DRAFT ARTICLES ON STATE RESPONSIBILITY
WITH COMMENTARIES THERETO
ADOPTED BY THE INTERNATIONAL LAW COMMISSION
ON FIRST READING

January 1997
INTRODUCTION

At its forty-eighth session, held from 6 May to 26 July 1996, the International Law Commission adopted provisionally, on first reading, draft articles on State responsibility. The State Responsibility draft consists of 60 articles which are divided into three parts and accompanied by two annexes. Part One. Origin of international responsibility contains articles 1 to 35 which were provisionally adopted from 1973 to 1980 and adopted with some revisions on first reading in 1980. Part Two. Content, forms and degrees of international responsibility contains articles 36 to 53 and Part Three. Settlement of Disputes contains articles 54 to 60 which, together with the two annexes relating to dispute settlement procedures, were provisionally adopted from 1983 to 1996 and adopted with some revisions on first reading in 1996.

The complete text of the State responsibility draft adopted on first reading is contained in the Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996 (Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10 and Corr.1, pp. 125-151)). The commentaries to the draft articles and annexes, as provisionally adopted from 1973 to 1996, are contained in the annual reports of the International Law Commission, most of which have been reproduced in the Commission's yearbooks issued to date, as indicated in the asterisk accompanying the commentary to each article. The references in the footnotes contained in the commentaries are to the Commission's annual reports, unless otherwise indicated.

As recorded in paragraph 64 of the above-mentioned report, the Commission decided, in accordance with articles 16 and 21 of its Statute, that these draft articles should be transmitted through the Secretary-General to Governments for comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1998. In paragraph 5 of its resolution 51/160 of 16 December 1996 entitled "Report of the International Law Commission on the work of its forty-eighth session", the General Assembly drew the attention of Governments to the importance, for the International Law Commission, to have their views on the draft articles on State responsibility, adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission.

The Secretariat has prepared the attached consolidated text of the draft articles and of the commentaries thereto for the convenience of Governments in responding to the above request.
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(vi)
STATE RESPONSIBILITY

Part One

Origin of international responsibility

CHAPTER I

GENERAL PRINCIPLES

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

Article 1

Responsibility of a State for its internationally wrongful acts

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

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

(2) The Permanent Court of International Justice applied this principle on 17 August 1923 in its judgment, No. 1, in the S.S. "Wimbledon" case,24 and in its judgments in the Case concerning the factory at Chorzów.35 In 1938, in its judgment in the Phosphates in Morocco case, the Permanent Court held that when a State was guilty of an internationally wrongful act against another State international responsibility was established "immediately as between the two States".36 The International Court of Justice, too, applied the principle in its judgment in the Corfu Channel case,37 in its Advisory Opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations38 and in its Advisory Opinion of 18 July 1950 on the Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase), in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".39 Arbitral awards have repeatedly affirmed the principle set forth in the present article. We need only recall the awards rendered in 1901 concerning Claims of Italian subjects resident in Peru (Reclamations des sujets italiens résidant au Pérou)40 in 1931 in the Dickson Car Wheel Company case41 by the Mexico-United States General Claims Commission set up under the Convention of 8 September 1923, and in the International Fisheries Company case42 in 1925 by Max Huber in the British

24 Case of the S.S. Wimbledon, P.C.I.J., Series A, No. 1, p. 15.
26 Phosphates in Morocco case (Preliminary Objections) 1938, P.C.I.J., Series A/B, No. 74, p. 28.
27 Corfu Channel case (Merits), Judgment of 9 April 1949, I.C.J. Reports, 1949, p. 23.
29 I.C.J. Reports 1950, p. 228.
30 Seven of these awards reiterate that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents ..." (United Nations, Reports of International Arbitral Awards, vol. XV (United Nations publication, Sales No. 65.V.3), pp. 399, 401, 404, 407, 408, 409 and 411). (Translation by the United Nations Secretariat.)
32 Ibid., p. 701.


**/ Ibid., pp. 173-176.
claims in the Spanish zone of Morocco case (Réalizations britanniques dans la zone espagnole du Maroc), and in 1953 in the Armstrong Cork Company case by the Italian-U.S. Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947.

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

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

(4) Despite the diversity of the arguments they put forward to justify this fundamental principle, all the writers recognize that any internationally wrongful act of a State entails the international responsibility of that State, in other words, that it gives rise, as far as that State is concerned, to new international legal relations characterized by subjective legal situations distinct from those which existed before the act took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics, and by authors of more recent works.

(5) The Commission is fully aware that, notwithstanding the unanimous recognition of the general principle which, under the name of international responsibility, links the emergence of new legal relations with the commission by a State of an internationally wrongful act, there are serious differences of opinion over the definition of the legal relationships created by an internationally wrongful act and the legal situations resulting from these relationships. One approach which may be regarded as traditional in international law writings —it is supported by Anzilotti, Ch. de Visscher, Eagleton, and Strupp, among others—describes the legal relations deriving from an internationally wrongful act in one single form: that of a binding bilateral relationship established between the offending State and the injured State, in which the obligation of the former State to make reparation—in the broad sense of the term, of course—is set against the subjective right of the latter State to require the reparation. This view does not admit of the possibility of a sanction in the proper sense of the term—i.e. having a punitive purpose—which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Another view, whose most illustrious supporters are Kelsen and Guggenheim, leads to a position almost diametrically opposed to that just described. It, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees the authorization accorded to the injured State to apply coercion to the offending State by way of sanction precisely as the sole legal consequence flowing directly from the wrongful act. According to this view, general international law would not regard the wrongful act as creating any binding relationship between the offending State and the injured State. The obligation to make reparation would be nothing more than a subsidiary duty which in municipal law the law itself, and in international law an agreement, interposes between the wrongful act and
the application of coercion. Lastly, there is a third view, upheld by, among others, Lauterpacht, Eustathides, Verdross, Ago, and the Soviet authors of the Kurs mezhdunarodnogo prava, according to which the consequences of an internationally wrongful act cannot be limited simply either to "reparation" or to a "sanction". In international law, as in any system of law, the wrongful act may, according to that view, give rise, not to just one type of legal relationship, but to two types of relationship, each characterized by a different legal situation of the subject involved. These legal consequences amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the right to claim reparation—again in the broad sense of the term—from the author of the act, or to giving that same subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.

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

(7) Lastly, the Commission did not fail to note that the unanimity found in State practice, in judicial decisions and in the international legal literature as regards the existence of the principle that any internationally wrongful act of a State involves, in international law, the responsibility of that State, relates only to the normal situation produced as the result of a wrongful act. For the accepted view expressed in many scientific works, as well as in a number of international decisions and statements of position by Governments, is that there are exceptional cases in which this responsibility devolves, not upon the State which committed the wrongful act, but on another State. These cases—in which the reference is usually to indirect responsibility or responsibility for the act of another—occur particularly when the State is placed in a position, in relation to another State, in which it controls the actions and limits the freedom of that State.

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

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

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

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

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

(12) Fourthly, the Commission felt unable to accept the idea of some writers that the rule that any internationally wrongful act of a State involves the international responsibility of that State should allow of an exception in the case where the wrongful act was committed in any of the following circumstances: force majeure or act of God, consent of the injured State, legitimate exercise of a sanction, self-defence or emergency. If any of those circumstances were present in a particular case, that would preclude the international responsibility of the State which had committed the wrongful act. As stated in the introduction to this chapter of the report, the Commission intends to take these circumstances, and their consequences in different situations, specifically into consideration in the chapter to follow that dealing with breach of obligation.

For the time being, in the Commission’s view, it is only necessary to say that the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the character—of the conduct of the State in one of those circumstances as wrongful. There is therefore no reason to provide for an exception to the rule laid down in this article.

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

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

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

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

Commentary*

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

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

(2) The concept referred to in article 2 corresponds in a way to that often termed in internal law "delictual capacity" or "capacity to commit wrongful acts". In many national legal systems, there are subjects which do not have this "capacity"—minors, for example. In other words, there are subjects which the legal order does not regard as having committed a "wrongful" act and which it therefore does not hold responsible, even when their conduct exhibits the features normally required for it to be characterized as wrongful, and thus even though the same conduct, if engaged in by another subject (an adult, for example), would have been regarded as an act entailing that subject's responsibility.

There is no provision, however, for similar situations in international law. In particular, there is no possible parallel between the status of a newly constituted State in international law and that of a minor or in general of any person not possessing delictual capacity in internal law. States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence. If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations. The principle that no State which by its conduct has committed a breach of an international obligation can escape the consequence, namely, to be regarded as having committed an internationally wrongful act which entails its responsibility, is the corollary of the principle of the sovereign equality of States.

(3) State practice and international judicial decisions leave no doubt about the existence of this principle, even though it has not generally been expressly stated in international awards or diplomatic correspondence. It can be said that writers on international law also are explicitly or implicitly in agreement on this point. 58

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


(5) The first special situation considered was that of States members of a federal union, where such States have retained, within limits, a measure of international personality. 59 It was with reference to such cases that the question was raised whether they should perhaps be recognized as constituting an exception to the principle formulated in article 2. It was argued that international practice seemed to indicate that even when it was the member State which, within the limits of its international personality, had assumed an obligation towards another State, it was still the federal State and not the member State which bore the responsibility for a breach of that obligation by the member State. Without wishing to take a position at the present stage on the validity of this argument, the Commission noted that, even if it proved to be well-founded, the breach of an international obligation committed by the member State possessing international personality would still constitute an internationally wrongful act by that member State. There would thus be no exception to the principle that every State is subject to the possibility of being held to have committed an internationally wrongful act.

(6) Another special situation considered was that where, on the territory of a given State, one or more other subjects of international law act in place of that State. The one or more other subjects of international law may sometimes, to a greater or lesser extent, entrust to elements of their own organization certain activities normally carried out by organs of the territorial State. The organs of the territorial State which normally fulfill certain international obligations of the State are no longer present or at all events are prevented from carrying out some of their duties. 60 In other words, the territorial State is shorn of a part of its organization, a part which had previously provided the physical means of fulfilling certain international obligations as well as of violating them. Here the Commission agreed that if in such circumstances the organs of the foreign State which had replaced those of the territorial State render themselves guilty of an act or omission in breach of an obligation of the territorial State, that act or omission could conceivably constitute an internationally wrongful act of the foreign State, but could not constitute a wrongful act of the territorial State. The Commission

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

60 This situation may occur when there is a legal relationship of dependence, such as a protectorate; but it may also occur in other cases, particularly a military occupation. The situation that arises when the organization of the "suzerain" State or the occupying State replaces the organization of the dependent or occupied State in certain sectors should not be confused with that which may occur when the organs of the dependent State remain in existence and retain their functions, but act only under the control of the suzerain State. In such a case, as has been pointed out, the result may be that one State is responsible for the internationally wrongful act of another State.
pointed out that, even in this case, there was no real limitation of the principle stated in article 2. If there was no internationally wrongful act of the territorial State, it was because, under the rules for determining what is an act of the State, the conduct in question could not be attributed to the territorial State.

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

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

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

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

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

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

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

Article 3

Elements of an internationally wrongful
act of a State

There is an internationally wrongful act of a State when:
(a) conduct consisting of
an action or omission is
attributable to the State under
international law; and
(b) that conduct
constitutes a breach of an
international obligation of the
State.

Commentary

(1) Article 1 states the basic general principle that
every internationally wrongful act of a State entails its
international responsibility, while article 2 states the
principle that every State is subject to the possibility of
being held to have committed an internationally wrong-
ful act entailing its responsibility. Article 3 supplements
these two principles by laying down the conditions
required to establish the existence of an internationally
wrongful act of the State, i.e. the constituent elements
of an internationally wrongful act. For that purpose,
the following two elements, both of which must be
present, are traditionally distinguished: (a) an element,
generally called a subjective element, consisting of con-
duct that must be capable of being attributed not to
the human being or group of human beings which
actually engaged in it, but to the State as a subject
of international law; and (b) an element, generally
called an objective element, which indicates that the
State to which the conduct in question is attributed
has failed, by that conduct, to fulfil an international
obligation of the State.

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

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

Footnotes:

8/ Yearbook... 1973, vol. II,
pp. 179-184.

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

81 United Nations, Reports of International Arbitral Awards,
vol. IV (op. cit.), p. 678. (Italics supplied by the Commission.)

82 League of Nations, Bases of Discussion... (op. cit.), p. 21.
(Italics supplied by the Commission.)
classic; among the more recent, those by Sereni, Levin, Amerasinghe, Jiménez de Aréchaga and that given in the "Restatement of the Law" by the American Law Institute are the clearest. Generally speaking, it may be said that most writers are substantially in agreement on this point, irrespective of their nationality or period. The reservations expressed by some writers concerning the necessity or utility of what has been called the subjective element of the internationally wrongful act are sometimes prompted by the idea, isolated and clearly invalidated by judicial decisions and practice, that the State would never answer for "its own" acts but only for the acts of individuals, whether having the status of organs or private persons. In other cases, for the sake of being logically consistent with the premises adopted, some writers have felt bound to deny the existence of a normative operation whereby an action which is in fact performed by an individual is attached to a collective entity. Thus, for example, there are writers who maintain that, since the only conceivable "legal imputation" is that which consists in attributing the legal effects of an act to a given entity, the attribution of the act as such to the said entity cannot be anything other than a factual or psychological imputation. There are still other writers who believe that the need to replace the idea of legal imputation by that of recognition of a link of factual causality must of necessity arise from the "real" character of collective entities, and of the State first and foremost. More often, however, the reservations expressed are simply the reflection of the uneasiness caused by the habitual use in this context of the terms "imputability" and "imputation", which only lead to confusion, and which the Commission, as mentioned below, decided to reject and replace by others less likely to give rise to misunderstanding.

(4) As regards the subjective element, and more particularly the determination of conduct susceptible of being considered as State conduct, what can be said generally is that it can be either active (action) or passive (omission). It can even be said that cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on an action by a State, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used in a case of active conduct. Similarly, those States which replied to point V of the request for information submitted to them by the Preparatory Committee for the '930 Conference for the Codification of International Law expressly or implicitly recognized the principle that the responsibility of the State can be entailed by the omissions as well as by the actions of officials, and this principle is confirmed in the articles adopted by the Conference on first reading. Finally, it can be said that the principle has been accepted without question by writers and explicitly or implicitly adopted in all the private codification drafts.

(5) Secondly, it is important to bring out the fact that in stipulating that for some particular conduct to be liable to be characterized as an internationally wrongful act, it must first and foremost be conduct attributable to the State the sole purpose is to indicate that it must be possible for the action or omission in question to have been deliberate, i.e., that the act was not performed by an individual who was not acting on behalf of the State.

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


87 International Responsibility ... (op. cit.), p. 534.


85 A. Soldati, La responsabilite des Etats dans le droit international (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 et seq.


89 See para. (15) below.

90 V. N. Elynychev, "Problema vmenenia v mezhdunarodnom prave", Pravoovedenie (Leningrad), 1970, No. 5, pp. 83 et seq.

91 The international responsibility of the State for an internationally wrongful omission was explicitly affirmed by the International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case (Merits) (I.C.J. Reports, 1949, pp. 22-23. See also the arbitral award of 10 July 1924 in the Affaire relative à l’acquisition de la nationalité polonaise (United Nations, Reports of International Awarded, no. 1 (United Nations publication, Sales No. 48.V.9) p. 625).

92 League of Nations, Bases for Discussion ... (op. cit.), pp. 70 et seq., and Supplement to Volume III (op. cit.), pp. 2-3, 12 et seq.


94 For studies concerning the specific character in international law of the offence of omission, see R. Ago, "Illecito commissivo e illecito omissionale del diritto internazionale", Diritto internazionale (Milan, Istituto per gli Studi di politica internazionale, 1938), pp. 9 et seq.; P. A. Zannas, La responsabilité internationale des États pour les actes de négligence (Montreux, Gauguin et Laubscher, 1952); G. Perrin, "L’agression contre la légation de Roumanie à Berlin et le fondement de la responsabilité internationale dans les délits d’omission, Revue générale de droit international public (Paris), 3rd série, vol. XXVIII, No.3 (1957), pp. 410 et seq.; D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international", ibid. t. XXIX, No. 4 (1961), pp. 744 et seq.
question to be considered in international law as an "act of the State". The State is a real organized entity, but to recognize this "reality" is not to deny the elementary truth that the State as such is not capable of physical action. In the last analysis, therefore, conduct regarded as an "act of the State" can only be some physical action or omission by a human being or group of human beings. Hence the necessity of establishing when and how an "act of the State" can be discerned in a given action or omission. In other words, it is a question of determining by whom and in what circumstances these actions or omissions must have been performed for them to be attributable to the State. This is what the articles in chapter II of the draft set out to do.

(6) It should first of all be made plain, however, that the attribution of conduct to the State cannot be based on simple recognition of a link of factual causality (causalité naturelle). It is sometimes—but not always—possible to speak of factual causality in reference to the relationship between particular conduct and the result of that conduct, but not in reference to the relationship between the person of the State and the action or omission attributed to it. There are no activities of the State that can be called "its own" from the point of view of factual causality (causalité naturelle), either in internal law or in international law. By the very nature of the State, the attribution of conduct to the State is of necessity a normative operation. It must also be emphasized that the State to which particular conduct is attributed is the State seen as a person, as a subject of law, and not the State seen as a legal order or system of norms. It should be added that in speaking of attribution to the State as a subject of law, what is of course meant is as a subject of international law, not as a subject of internal law. Lastly, it must be made clear that the attribution of conduct to a State for the purpose of establishing the possible existence of an internationally wrongful act by that State can take place only in accordance with international law. The operation of attaching an action or omission to a subject of international law in order to draw conclusions therefrom in the sphere of international legal relations cannot be performed in any other framework than that of international law itself. It is thus an entirely separate operation from attribution of the same conduct to the State as a subject of internal law, and on the basis of internal law, without prejudice to any possible consideration by international law, for its own purposes, of the situation in internal law. The concrete difficulties sometimes met with in this connexion are frequently due to an insufficiently clear grasp of these different aspects.

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

(8) It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is the breach of an international obligation of the State. In its judgement of 26 July 1927 on jurisdiction in the Case concerning the Factory at Chorzów, the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its judgement of 13 September 1928 on the merits of the case. The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations. In its advisory opinion of 18 July 1950 on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) the Court held that "refusal to fulfil a treaty obligation" involved international responsibility. In arbitration decisions, the classic definition is the one referred to above, given by the Mexico-United States General Claims Commission
in its decision in the *Dickson Car Wheel Company* case.\(^{88}\) In State practice, the terms "non-execution of international obligations", "acts incompatible with international obligations", "breach of an international obligation" and "breach of an engagement" are commonly used to denote the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference.\(^{89}\) Moreover, the article I unanimously adopted on first reading by the Third Committee of the Conference contains these words: "any failure . . . to carry out the international obligations of the State".\(^{90}\) The same consistency of terminology is to be found in the literature and private draft codifications of State responsibility.

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

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

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

\(^{89}\) *League of Nations, Bases of Discussion . . .* (op. cit.), vol. III, pp. 25 et seq., 30 et seq., and 33 et seq.; *Supplement to Volume III* (op. cit.), pp. 2, 6 et seq.


\(^{91}\) *P.C.I.J.* Series A/B, No. 74, p. 28.

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

(11) Having thus concluded that there was no exception to the principle that two conditions must be met for the existence of an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation incumbent upon the State—the Commission considered whether those two necessary conditions were also sufficient. The first problem considered in this connexion was whether there should not sometimes also be a third condition for the existence of an internationally wrongful act—the occurrence of a certain *external event* as a result of the State's conduct.\(^{89}\) In certain cases—for example, failure by the State's legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact, or refusal by a coastal State to permit innocent passage through its territorial waters in peacetime to ships of another State—the conduct as such is itself sufficient to constitute a breach of an international obligation incumbent upon the State. That is what may be called an internationally wrongful act of conduct alone. There are however, other cases in which the situation is different. For a State to be said to have failed in its duty to protect the premises of a foreign embassy against injurious acts of third parties, it is not sufficient to show that the State was negligent in not providing adequate police protection; some injurious event must also have taken place as a result of that negligence, such as damage by hostile demonstrators or an attack on the embassy premises by private individuals. In a case of that kind, and in general in cases where the purpose of the international obligation is precisely to prevent the occurrence of certain injurious events, negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an external event, one of those events which the State should specifically have endeavoured to prevent. The Commission

\(^{89}\) See on this question, R. Ago, "Le dilit international . . ." (loc. cit.), pp. 447 et seq., p. 500.
does not think, however, that this distinction directly affects the formulation of the rule stating the conditions for the existence of an internationally wrongful act. Even if, in some cases, it has to be concluded that there is no internationally wrongful act so long as a particular external event has not occurred, that does not imply that the two conditions for the existence of an internationally wrongful act—conduct attributable to the State, and breach by that conduct of an international obligation—are no longer sufficient by themselves. If there is no internationally wrongful act so long as the event has not occurred, the reason is that until then the State’s conduct has not resulted in the breach of an international obligation. It is really the objective element of the internationally wrongful act that is missing. In other words, the occurrence of an external event is a condition for the breach of an international obligation, and not a new element which has to be combined with the breach for there to be a wrongful act. The Commission will be able to consider the distinction made above between two different types of internationally wrongful acts when it takes up the various questions arising with regard to the breach of an international obligation.

(12) The second problem considered by the Commission in this connexion was whether before concluding that an internationally wrongful act existed, it was not also necessary to establish the presence, in the particular case under consideration, of a third constituent element, namely, damage, caused as a result of the State’s conduct, to the detriment of the subject whose subjective right has been impaired. Some writers are of this opinion, even if the way they commonly use the word “damage” does not necessarily indicate that they are referring to the same phenomenon or the same aspect. Even setting aside the opinions of those who by “damage” mean something else, or at all events something different from an injury caused by one State to another State at the international level, it should be noted that the word “damage” is sometimes used by international lawyers to refer specifically to damage to economic or patrimonial interests. Where such damage has occurred, it may indeed be a decisive factor in determining the consequences of a wrongful act. As such, it will be considered in the part of the draft devoted to the forms and extent of reparation. But it seems clear that, in this sense, “damage” is not an essential condition for the existence of an internationally wrongful act, nor an individual constituent element of that concept. More often it is maintained that “damage” should be understood to mean not just damage to economic interests but also to moral interests. It is in fact in this sense that the term is generally used when it is said that it constitutes an essential element of the internationally wrongful act. The expression “moral damage”, moreover, is not free from ambiguity, either.

As such, it will be considered in the part of the draft devoted to the forms and extent of reparation. But it seems clear that, in this sense, “damage” is not an essential condition for the existence of an internationally wrongful act, nor an individual constituent element of that concept. More often it is maintained that “damage” should be understood to mean not just damage to economic interests but also to moral interests. It is in fact in this sense that the term is generally used when it is said that it constitutes an essential element of the internationally wrongful act. The expression “moral damage”, moreover, is not free from ambiguity, either. It may refer specifically to the injury constituted by a slight to the honour or dignity of a State. But even the combination of “moral” damage as thus understood, and strictly “economic” damage is obviously not enough to introduce an element which must be present for there to be an internationally wrongful act, and what the Commission is trying to do in article 3 is precisely to determine the constituent elements without which there can in no case be an internationally wrongful act. International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For example, we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity. Yet it manifestly constitutes an internationally wrongful act, so that if we maintain at all costs that “damage” is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of “injury” to that other State. But this is tantamount to saying that the “damage” which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation.

Reference to the breach of an international obligation thus seemed to the Commission fully sufficient to cover that aspect as well, without the addition of anything further. The Commission was thus able to conclude that the two elements respectively described as the “subjective” element and the “objective” element are the only necessary components of any internationally
wrongful act. Other elements may be present in any particular case, or even in most cases, but are not indispensable.

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

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

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

Article 4
Charaterization of an act of a State as internationally wrongful

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

Commentary

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

See para. 37 above.
the responsibility of that State, with the rule laid down in article 4 involves the conclusion that the international responsibility of the State ensuing from a particular act arises irrespective of whether that act conforms or not to the provisions of the internal law of the State concerned.

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

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

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

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

(4) In practice, States which considered themselves wrongfully accused of international responsibility for what was in fact nothing more than failure to observe a provision of internal law have successfully resisted the charge by relying on the above principle. The request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference at the Hague drew a distinction between the international responsibility of the State flowing from the breach of an international obligation, and the purely internal responsibility flowing from the breach of an obligation established by the constitution or laws of that State. The Governments which replied to the request for information were in agreement on that point.101 At the Hague Conference, article 1 of the draft Convention on State responsibility, which was approved unanimously on first reading, implicitly confirmed the same conclusion.102

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

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

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

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

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

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99 This principle is also set out very clearly in Part IV of Restatement of the Law by the American Institute (para. 167) (Yearbook ... 1971, vol. II (Part One), pp. 193-194, document A/CN.4/217/Add.2).
98 P.C.I.J., Series A/B, No. 44, pp. 24-25. In this connexion, see also the opinion expressed by the Permanent Court in its judgement of 7 September 1927 in the Lotus Case (P.C.I.J., Series A, No. 10, p. 24).
100 League of Nations, Bases of Discussion (op. cit.), pp. 16 et seq. and Supplement to Volume III, pp. 2 et seq. The principle in question was clearly set out in the reply of the German Government: "International responsibility—the sole form of responsibility under consideration—can only become involved when a rule of international law has been broken... when a law is infringed to the detriment of a foreigner, there can never be any question of a request put forward under international law by a foreign State." (League of Nations, Bases of Discussion, op. cit., p. 16).
104 The Court rejected the argument of the German Government that the passage of the ship through the Kiel canal would have constituted a violation of the German neutrality orders, observing that:

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

... under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the Wimbledon through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article" (P.C.I.J., Series A, No. 1, pp. 29-30).
The same principle, viewed from a different angle, is also affirmed in the Advisory Opinions of 21 February 1925 on the Exchange of Greek and Turkish Populations\(^{109}\) and 3 March 1928 on the Jurisdiction of the Courts of Danzig.\(^{110}\)

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

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

> ... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject.\(^{115}\)

With regard to more recent years, mention must be made of the decisions of the Italian-United States Conciliation Commission, established under article 83 of the 1947 Treaty of Peace,\(^{116}\) and particularly the decision in the Wollemborg Case, rendered on 24 September 1956. The Commission stated:

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

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


\(^{110}\) P.C.I.J., Series B, No. 15, pp. 26-27: In the same connexion we may recall the observations by Lord Finlay on the Advisory Opinion of 15 September 1923 on the Question Concerning the Acquisition of Polish Nationality (P.C.I.J., Series B, No. 7, p. 26).


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

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

\(^{114}\) Award of 24 July 1930 rendered by the Tribunal established by the Agreement of 2 November 1929 (ibid., vol. II (op. cit.), p. 1098).


\(^{116}\) United Nations, Reports of International Arbitral Awards, vol. XIV (op. cit.), p. 289. See also in the same connexion the decision in the Flegenheimer Case of 20 September 1958, rendered by the same Commission (ibid., especially p. 360).

\(^{117}\) During the discussion in the Permanent Court of International Justice, Mr. Gidel, representing the Danzig Government, stated:

> “It is a universally accepted principle that the provisions or deficiencies of municipal law cannot be invoked by a State to avoid fulfilling international obligations or to evade the responsibilities flowing from the non-fulfilment of those obligations” [Translation from French] (P.C.I.J., Series C, No. 14-1, p. 44).

Mr. Limborg, representing the Polish Government, replied:

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

\(^{118}\) Award of 11th year, No. 11 (November 1934), pp. 1438, 1486 and 1494-1495. The other parties to the dispute did not question the soundness of the position taken by Switzerland in that connexion.

Case of Losinger et Cie, S.A., by Italy and France in the Phosphates in Morocco case and, lastly, by Liechtenstein in the Nottebohm Case.124

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

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

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

A State cannot avoid international responsibility by invoking the state of its municipal law.

(11) The International Law Commission of the United Nations, at its first session, in 1949, adopted a draft declaration on rights and duties of States. Article 12 of the draft, the contents of which were approved by all the members of the Commission, reads as follows:

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

(12) At the first session of the United Nations Conference on the Law of Treaties, held at Vienna in 1968, the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty might invoke the provisions of its internal law to justify the non-observance of a treaty should be inserted in the draft Convention. That proposal was adopted on first reading by 55 votes to none, with 30 abstentions, and referred to the Drafting Committee.127 On second reading, the Committee of the Whole approved without a formal vote the text submitted by the Drafting Committee.128 In 1969, at its second session, the Conference adopted by 72 votes to 2, with 24 abstentions, the text proposed by the Committee of the Whole, which became article 27 of the Vienna Convention on the Law of Treaties, and reads as follows:

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

(13) The principle thus sanctioned by international judicial decisions and State practice is, further, expressly confirmed by writers belonging to different legal systems.129 It is also included in most of the draft codifications of international law.
(14) There is no exception to the principle that it is only by reference to an international legal obligation binding a State that an act of that State can be characterized as internationally wrongful. The rule that the characterization given by international law cannot be affected by the characterization of the same act in internal law makes no exception for cases where rules of internal law require the State to conform to the provisions of internal law, for instance by applying to aliens the same treatment as to nationals. It is true that in such a case once the State has applied the provisions of internal law, there can be no internationally wrongful act; but even then, it is not the fact of keeping conduct in conformity with internal law that precludes its international wrongfulness, but the fact that conduct which thus conforms to internal law constitutes, by the very fact of its conformity, the performance of the international obligation. Conversely, if a State has, by its act or omission, contravened provisions of internal law, there will be an internationally wrongful act inasmuch as the violation of internal law constitutes at the same time a breach of the international legal obligation.

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

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

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

CHA. II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Commentary

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

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138 Cf. article 5 of the draft code prepared by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai; article I, second paragraph of the draft prepared by the Institute of International Law at Lausanne in 1927; article 2 of the draft prepared by the Harvard Law School in 1929 and article 2, paragraph 2 of the draft prepared in 1961; article 7 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930; article 4, third paragraph of the draft prepared by Strupp in 1927; and article 4 of the draft prepared by Roth in 1932. (See foot-note 14 above.)
considering the conduct as "an act of the State", has been advanced as the *subjective element* of the internationally wrongful act. The next step is to determine when, in what circumstances and in what conditions such an attribution can be made, in other words, to determine what "conduct" is regarded by international law as an "act of the State" for the purpose of establishing the possible existence of an internationally wrongful act.

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

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

(4) From this point of view, once the basic rule has been laid down which attributes to the State the acts of its organs, the question arises whether the activities of certain categories of organs should be excluded from the "acts of the State". Another point to be considered is whether or not, in addition to the conduct of organs which form part of the State machinery, it is appropriate to attribute to the State, at the international level, the conduct of organs of public institutions other than the State itself, or of persons who, though not "organs" in the proper sense of the term, engage in what are in fact public activities, or of organs of another subject of international law placed at the disposal of the State in question. Attention will then be given to the question whether or not it is appropriate to regard as "acts of the State" the conduct of organs or, more generally, of persons whose activities are in principle attributed to the State, when such conduct is adopted in circumstances which cast doubt on the legitimacy of that attribution. This question arises, for example, where an organ exceeds its competence or acts contrary to the requirements of internal law concerning its activities. We next have to consider the treatment to be accorded to the conduct of private individuals acting solely in that capacity, and the basis on which the conduct of State organs in connexion with acts by private individuals may be regarded as a source of responsibility. Lastly, consideration will be given to the case of the conduct of organs of other subjects of international law acting in the territory of the State and to problems relating to the retroactive attribution to a State of acts of a victorious insurrectionary movement.

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

(6) If the substance of the problem is to be understood and appropriate rules formulated, it is also desirable to avoid a double confusion which is at the root of the difficulties encountered by writers. In the first place, a clear distinction must be drawn between the operation of *attributing* to the State, for any particular purposes, the conduct adopted in certain circumstances by its "organs", i.e. by those which belong to its "organization", and the operation which consists of actually *establishing* that "organization", i.e. determining what are the individual and collective "organs" which, taken as a whole, make up the State machinery. In the second place, the necessary distinction must be drawn between the attribution of an act to the State as a subject of
international law and to the State as a subject of internal law. Failure to take this double distinction sufficiently into account explains why some of the best-known trends in legal literature have led to an impasse.138

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

(8) This statement is even more valid when a certain conduct is attributed to the State as a subject of international law and not as a subject of internal law. The formation and regulation of the organization of the State are not governed by the international order. The organization of the State is not created but presupposed by international law.139 In other words, the fact of forming part of the organization of the State is regarded in international law merely as a premise. That does not in any way mean that in international law it is not sometimes necessary to interpret or apply internal law; it is nevertheless true that international law merely presupposes the organization which the State has adopted within its internal legal order and regards it simply as a condition on which it bases some of its findings.140

(9) Three main conclusions emerge from what has been said above. The first concerns the meaning which should be given to the statement that, in international law, the conduct of the "organs" of the State subject of that law is attributed to the State in order to impose responsibility upon it, if appropriate. This proposition simply means that, in international law, the conduct of those who have the status of "organs" in the internal legal order, and solely in that order, is in principle considered as an "act of the State" and is attributed to the State.138 It does not in any way mean that their status becomes an "international" status by virtue of such attribution.

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

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

(12) The Commission has thus set itself the task of determining what conduct international law actually attributes to the State, basing itself primarily on the findings which result from an examination of State practice and the decisions of international tribunals. It is this method by which the Commission will mainly be guided in drawing up the provisions of chapter II of this draft. The solutions derived from practice and judicial decisions will be supplemented, where necessary, by elements of progressive development. As indicated in the introduction to this chapter,144 the Commission has only been able to consider and adopt the first two

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

139 See, for example, M. Marinoiu, La responsabilita degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale (Rome, Athenaeum, 1913), pp. 117-118; R. Aqio, "Le dilet inter-

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

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

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

140 See para. 35 above.
articles of chapter II, i.e. articles 5 and 6 of the draft, at the twenty-fifth session. It intends to complete the adoption of the articles in the chapter after considering the relevant proposals by the Special Rapporteur in his third and fourth reports.

**Article 5**

**Attribution to the State of the conduct of its organs**

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

**Commentary**

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

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

(3) The principle that the State is responsible for breaches of obligations committed by its own organs has long been unequivocally recognized in international judicial decisions. In most cases, the principle has simply been presupposed and taken for granted. In addition, however, to the very numerous cases in which the principle has been reaffirmed implicitly, there are others in which it has been expressed in clear and explicit terms. In the Moses case, for example, decided on 14 April 1871 by the Mexico-United States Mixed Claims Commission set up under the Convention of 4 July 1868, the umpire Lieber made the following statement: "An officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority." An even clearer assertion is to be found in seven arbitral awards made at Lima on 30 September 1901 in the *Affaire des réclamations des sujets italiens résidant au Pérou*, concerning the damage suffered by Italian subjects during the Peruvian civil war of 1894-1895. Each of these awards reiterates that: "... a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" [translation from French]. The principle of attributing to the State, for the purposes of international responsibility, the acts of its "organs", "leaders" and "agents" is also confirmed in several other arbitral awards.

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

(5) All the draft codes on international responsibility prepared by public institutions or learned societies formulate in similar terms the principle that the conduct of the organs of the State is attached to the State for the
purpose of determining international responsibility.\(^{144}\)

The draft codes prepared by individual jurists contain clauses couched in similar terms.\(^{147}\)

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

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

(8) This conclusion, together with the corollary which in principle precludes attribution to the State, as acts which...
Some of these drafts even make this exclusion the subject of a separate provision.\textsuperscript{158} In the case of theoretical works, almost all writers mention the need for such an exclusion, and some of them even lay particular stress on it.\textsuperscript{158}

The questions raised by actions or omissions on the part of persons acting in a private capacity who at the same time have the status of "organs" of the State will be considered in their various aspects in the more general context of the discussion of the conduct of private individuals which appears in a later part of this chapter of the draft articles. At that point, it will be necessary to see whether or not purely private conduct can, in certain circumstances, be attributed to the State for the purpose of the draft articles on the international responsibility of States. At this initial stage, our only concern need be to ensure that the demarcation line which we have drawn is indicated with the necessary clarity. It must be pointed out forthwith, however, that the case of purely private conduct should not be confused with the quite different case of an organ functioning as such but acting \textit{ultra vires}, or, more generally, in breach of the rules governing its operation. In this latter case, which will also be discussed in this chapter, the organ is nevertheless acting in the name of the State. This distinction has been clearly drawn in international arbitral decisions, for example, in the award in the \textit{Mallén} case, rendered on 27 April 1927 by the United States of America/Mexico General Claims Commission. In that decision, two separate events were successively taken into consideration: firstly, the action of an official acting in a private capacity, and secondly, another action committed by the same official acting in his official capacity, although in an abusive way.\textsuperscript{157} In other cases, the distinction was less easy to apply and the tribunals concerned had to make a close examination of the facts before they could rule on the nature of the act.\textsuperscript{158} It should be noted, however, that the principle of the distinction has never been questioned.

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

\textsuperscript{158} This is so in the case of the draft prepared by the \textit{Kokusaiho Gakkwai} (article 2, second paragraph) and of the draft prepared by the \textit{Deutsche Gesellschaft für Völkerrecht} (article 1, para. 4, second sentence). (See foot-note 14).

\textsuperscript{156} For the purposes of the present articles, conduct for any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

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

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

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

\textbf{Article 6}

\textbf{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.

\textit{Commentary/}

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

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

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

(3) With regard to the first question, it is an obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State can constitute an internationally wrongful act of the State. On that theory, the State would be called upon to answer only "indirectly" for the conduct of organs performing internal functions, such as administrative officials or judges, just as it is for the actions of private individuals; it would be responsible only if one of its organs responsible for external relations had endorsed the act or omission of the organ responsible for internal functions. This is obviously resulting from confusion between the consideration of certain conduct as an internationally wrongful act and the attribution to the State of a manifestation of will capable of constituting a valid international legal act or establishing participation in such an act. International judicial decisions and practice show that there is no justification for the theory. Indeed, for a long time now writers have mentioned it only in order to reject it.150

(4) The second question may seem at first sight rather more complex. The study of possible cases of internationally wrongful acts on the part of particular organs has often been taken up separately in connexion with one or other of the main traditional branches of government: the legislature (or constituent power),160 the executive and the judiciary.161 This procedure has made it possible to go thoroughly into certain questions, but has also certainly given rise to difficulties which have not real bearing on the topic considered here, for most such questions go far beyond the limits of the problems which arise in the context of chapter II of this draft. They often amount merely to asking whether the conduct of a given organ does or does not objectively constitute a breach of an international obligation, rather than whether it should or should not be attributed to the State as a subject of international law. Sometimes they go beyond the bounds of international wrong and responsibility. Moreover the Commission found that the division of powers was by no means so clear-cut in practice as it might seem in theory and, in particular, that it was understood very differently in the various legal and political systems.

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

... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.168

The Permanent Court of International Justice, in its Judgement No. 7 of 25 May 1926 in the Case concerning sabilité internationale des Etats et son application en matière d'actes législatifs (Istanbul, Tsitouris, 1950); E. Vitta, "Responsabilita ..." (loc. cit.). Similarly some general works contain a separate, detailed analysis of the acts or omissions of the organs of the different "powers", and, especially, of legislative organs.

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

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

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

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

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

Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized . . ., excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected by writers and by international judicial decisions. The possibility of attributing to the State acts committed by its legislative or judicial organs has been accepted in a great many international awards.

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

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

(7) With regard to the doctrine, apart from differences of approach to the question which sometimes lead to complications, the writers agree that the conduct of any State organ, whatever branch of the State “power” it may belong to, can be considered as an “act of the State” for the purposes of characterization as an internationally wrongful act. Codification drafts, both official and private, follow the same basic principles. They differ only in the wording of the formulations proposed.
(8) In the Commission's view, therefore, there is no need to appeal to ideas of progressive development of international law in order to reach the conclusion that acts or omissions of any State organ—whether of the constituent or legislative power, the executive or the judiciary—can be attributed to the State as internationally wrongful acts. No one now supports the old theories that legislative organs were an exception because of the "sovereignty" of Parliament, or judicial organs because of the principles of the independence of the judiciary or the authority of res judicata. Cases in which States resorted to arguments based on principles of that kind, and found arbitral tribunals willing to accept them, belong to the distant past. Today the opinion that the respective positions of the different branches of government are important only in constitutional law and of no consequence whatsoever in international law, which regards the State as a single entity, is firmly rooted in international judicial decisions, the practice of States and the literature of international law.

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

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

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

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

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176 The theory of the independence of the judiciary was advanced by Portugal to avoid recognizing its international responsibility in the Croft (1856) and Yulle, Shortridge and Co. (1861) cases (see A. de Lapradelle and N. Politiis, Recueil des arbitrages internationaux (Paris, Pedone, 1923), vol. II, pp. 22 et seq., 101 et seq., and 103).

178 The principal spokesman for this school of thought was E. M. Borchard, Diplomatic Protection . . . (op. cit.), pp. 189 et seq.


177 This opinion is reflected in article 7 (6) of the draft convention prepared by the Harvard Law School under Borchard's personal supervision in 1929 for the Hague Codification Conference (see Harvard Law School, Research in International Law (Cambridge, Mass., 1929), pp. 157 et seq. and 165 et seq.).
a party. 183 See for example the position taken by the United States
member of the United States/Mexico Mixed Commission established
under the Convention of 4 July 1968 in the Leichhardt case (J. B.
Moore, History and Digest . . . (op. cit.), vol. III, p. 3134).

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

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

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

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

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

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

189 See for example A. V. Freeman, "Responsibility of States . . .
(loc. cit.), pp. 284 et seq.; B. Cheng, op. cit., pp. 195-196; P. Reuter,
"La responsabilité internationale" (op. cit.), p. 92; T. Meron,
"Responsabilité . . ." (loc. cit.), pp. 97-98; H. Accioly "Principes
généraux de la responsabilité . . ." (loc. cit.), pp. 392-393; I. von
C. F. Amerasinghe, "Imputability . . ." (loc. cit.), p. 106; and Institute of the State and Law of the Academy of Sciences of
the Soviet Union, op. cit., p. 427.
responsibility. It would, moreover, be absurd to suppose that there was a category of organs specially designated for the commission of internationally wrongful acts. Any organ of the State, if it is materially able to engage in conduct that conflicts with an international obligation of the State, may be the source of an internationally wrongful act. Of course there are organs which, by the nature of their duties, will in practice have more opportunities than others in this respect, but the diversity of international obligations does not permit any a priori distinction between organs which can commit internationally wrongful acts and those which cannot.

(17) It might have been thought that the rule laid down in article 5 already made it sufficiently clear that the position of an organ in the organization of the State is irrelevant for the purpose of attributing conduct of the organ to the State. The Commission, however, feels it necessary to include an express provision on that point in the draft. It must be sure that certain views held in the past and mentioned in this commentary will not be put forward again in the future, whether supported by the same old arguments or by new ones. Article 6 provides a safeguard against such an eventuality and at the same time reflects purely and simply the present state of international law in the matter. With regard to the formulation of the rule to be laid down, the Commission considered that the substance of the rule would be most clearly expressed by a single consolidated formula. The text it adopted for article 6 is therefore based on this criterion. The Commission wishes to emphasize that the enumeration of the “powers” in the text of the article is not exhaustive; indeed, this should be clear from the words “or other” after the words “constituent, legislative, executive, judicial”.

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.

Commentary*

(1) In article 5 of the present draft articles, the Commission laid down the basic principle for determining what are “acts of the State” under international law: the first kind of conduct to be attributed to the State as a possible source of international responsibility is the conduct of those who, under the internal law of the State in question, are its own “organs”. In stating this principle, however, the Commission in no way wished to affirm that the conduct of such “organs” would be the only conduct that could be attributed to the State with a view to establishing the international responsibility, if any, of the State. The purpose of article 5 is merely to indicate the most important category of conduct which can be attributed to the State. Article 7 supplements article 5 by indicating that under international law the actions and omissions attributed to the State also include those of organs of entities which, while having under internal law a legal personality separate from that of the State itself, are nevertheless entities empowered by this same law to exercise some elements of the governmental authority. By analogy with what was pointed out in relation to the conduct of State organs, only the private conduct of the individuals composing the organs of the entities in question is excluded in principle from attribution to the State.

(2) The principle of attribution to the State of the conduct referred to is the corollary of the unity of the State from the international point of view. The actions of the State as a subject of international law is, indeed, performed first and foremost through the action of organs belonging to the machinery of the State proper; but to this action must be added that of organs of the machinery of all the other entities which have been empowered by internal law to exercise elements of the governmental authority. This is true both when the basis of their separate existence is the local or territorial setting which they act (as in the case of municipalities, provinces, regions, cantons, component States of a federal State and so on) and when this basis is, instead, the special nature of the functions performed (as may be the case of a bank of issue, a transport company entitled to exercise police powers, and so forth). In other words,

the principle stated in article 6 of the draft—namely, the irrelevance of the position of a State organ in the organization of the State for the purpose of attributing to the State, as a possible source of international responsibility, the actions or omissions of that organ—is not the only corollary of the fundamental idea of the unity of the State from the international point of view. The same principle should also lead us to disregard, for that purpose, the distinction between the various entities which, under internal law, perform specific services for the community and, in so doing, exercise functions which constitute elements of the governmental authority.

(3) Some members of the Commission, although fully in agreement on the fundamental idea mentioned above and on the consequences which quite naturally flow from it in the matter of determining what are “acts of the State” under international law, expressed doubts about the need to include in the draft articles a rule expressly stating the principle that conduct regarded as an act of the State includes that of organs of entities which, although legally separate from the State under internal law, are nevertheless empowered by that law to exercise elements of the governmental authority. The real point of those doubts was whether the entities in question and in particular territorial governmental entities, should in fact be regarded as entities separate from the State under its internal law. It is obvious that where such entities formed an integral part of the machinery of the State itself, the conduct of their organs would automatically be subject to the rule laid down in article 5, concerning the attribution to the State of the acts of its own organs. In reply to these doubts, however, it was pointed out that while there may be State legal systems under which territorial governmental entities are integrated into the structure of the State, so that the organs of these entities are regarded as organs of the State itself under its internal law, that is not the case under the majority of State legal systems. As a general rule such entities are endowed under internal law with a legal personality separate from that of the State, and consequently their organs are not regarded as organs of the State itself. The Commission therefore considered that the deletion of article 7, or even the deletion of paragraph 1 of the article, would leave a dangerous loophole in the codification of the topic—a loophole through which a State might evade international responsibility for the actions or omissions of organs of the entities in question.

(4) The principle that the State is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has long been unequivocally recognized in international judicial decisions and the practice of States. With regard to judicial decisions, a recent reaffirmation of the principle will be found in the award made on 15 September 1951 by the Franco-Italian Conciliation Com-

mission established under article 83 of the Treaty of Peace of 10 February 1947, in the case concerning the Heirs of the Duc de Guise. The Commission expressed the following opinion:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian. With regard to the practice of States, the most conclusive expression of the conviction held by States in this matter is found in the opinions given during the preparatory work for the Conference for the Codification of International Law held at The Hague in 1930. Point VI of the request for information addressed to Governments by the Preparatory Committee of the Conference expressly asked the question whether the State became responsible as a result of “acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.).” All Governments answered in the affirmative. This principle was also acknowledged in the codification drafts on State responsibility from official and private sources, and is accepted without discussion by all modern writers who have dealt with the question.884

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883 Ibid., vol. XIII (United Nations publication, Sales No. 64.V.3), p. 161 [translation by the United Nations Secretariat].
885 The principle referred to is expressly stated in Basis of Discussion No. 16 prepared by the Preparatory Committee for the Hague Codification Conference (Yearbook ... 1956, vol. II, p. 223, document A/CN.4/96, annex 2); in article II of the resolution adopted by the Institute of International Law in 1922 (ibid., p. 228, annex 8); in article III of the draft convention prepared by the Harvard Law School in 1929 (ibid., p. 229, annex 9) and in article 17, para. 1 (d) of the draft prepared by the same School in 1961 (Yearbook ... 1969, vol. II, p. 146, document A/CN.4/217 and Add. 1, annex VIII); in article 14, para. 1 of the revised preliminary draft prepared by Mr. F. V. Garcia Amador in 1961 (Yearbook ... 1961, vol. II, p. 48, document A/CN.4/134, addendum); in article VII of the “Principles of international law that govern the responsibility of the State in the opinion of the United States of America”, prepared by the Inter-American Juridical Committee in 1965 (Yearbook ... 1969, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV); and in section 170 of the Restatement of the law by the American Law Institute of 1965 (Yearbook ... 1971, vol. II (Part One), p. 94, document A/CN.4/217/Add.2).
(5) As to the question whether the component states of a federal State are to be included among the territorial governmental entities dealt with in the present article, it should be noted first of all that a consistent series of legal decisions has affirmed the principle of the international responsibility of the federal State for the conduct of organs of component states amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide the federal State with means of compelling the organs of component states to abide by the deferral State’s international obligations. The award in the *Case of the “Montijo”*, made on 26 July 1875 by the United States-Colombian arbitral tribunal established under the agreement of 17 August 1874, is the starting point for this consistent series of decisions. This principle has been reaffirmed in many decisions since that time. In this connexion, reference may be made to the awards rendered by the United States of America/Venezuela Claims Commission established by the Convention of 5 December 1885, the French-Venezuela Mixed Commission established under the protocol of 19 February 1902, the British-Venezuelan Mixed Commission established under the protocols of 13 February and 7 May 1903, the Mexico/United States of America General Claims Commission established by the Convention of 8 September 1923 and the France/Mexico Claims Commission established by the Convention of 12 March 1927. Thus, for example, in the award made on 7 June 1929 in the *Pellat Case*, the last-mentioned Commission reaffirmed “the principle of the international responsibility... of a federal State for all the acts of its separate States which give rise to claims by foreign States” and noted specially that such responsibility “...cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law”.

(6) With regard to the practice of States it may be noted in particular that, according to the Governments which replied to the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, the fact that the component states of a federal State have broad autonomy under internal law in no way rules out the possible international responsibility of the federal State for the conduct of organs of the component States. Attempts made in the past by some States with a federal structure to resist claims for compensation in respect of the conduct of organs of a component state have become increasingly rare in this century and have finally ceased.

(7) The substantial unanimity found in the international judicial decisions and in the practice of States in affirming the principle that a federal State is internationally responsible for the conduct of organs of its component states is not matched by a similar unanimity with regard to the grounds for that principle. The international responsibility of a federal State for the conduct of organs of its component states is sometimes presented as international responsibility for its own act, the conduct of an organ of the component state being regarded as attributable internationally to the federal State on the same grounds as the conduct of its own organs. In some judgements and statements of opinion, on the other hand, the international responsibility of a federal State in the cases considered here is conceived in terms of responsibility for the act of another—that is, of indirect responsibility of a subject of international law for the act of another subject—and the conduct of the organ of the component state is then attributed to that state alone.

(8) The two different ways of presenting and justifying the responsibility of a federal State for the conduct of organs of its component states are also to be found in some learned works. Most international jurists tend nowadays to see the structure of a federal State merely as an advanced form of decentralization of a State which, in outward appearance, remains basically unitary. Hence the holders of this view logically regard the principle of responsibility of a federal State, in the cases considered here, merely as the consequence of the attribution to that State, from the point of view of international law, of actions and omissions of organs of the component states. In the view of these authors, therefore, such attribution is made on the same basis as the attribution of the conduct of organs of a municipality, a region or the like. The

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*League of Nations, Bases of Discussion... (op. cit.), vol. III, pp. 121 et seq.; and Supplement to Volume III (op. cit.), p. 4.*

A typical example of this is to be found in the practice of the United States of America. After resisting, in the nineteenth century, the idea that the federation was responsible for the acts or omissions of organs of the component states, the United States Government adopted a much more flexible position and finally accepted such responsibility without reservation, as shown by the instructions sent to the United States agent before the Mexico/United States of America General Claims Commission in 1926 (G. H. Hackworth, *Digest of International Law*, vol. V (Washington, D.C., U.S. Government Printing Office, 1943), pp. 594-595) and by the reply given in 1929 to point X of the request for information addressed to the United States Government by the Preparatory Committee for the Hague Codification Conference (League of Nations, *Supplement to Volume III* (op. cit.), p. 21).

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influence of this view is to be seen in several codification drafts.\footnote{575} Other jurists, however—admittedly, mainly the older ones—regard the federal State much less as a composite State, that is, a State made up of states, than as a union of states in which the international personality of the federal State and the personality, however limited it may be, of the component states co-exist. Consequently, if an organ of a component State commits an act or omission relating to a sphere in which that State does not appear to have any international obligations directly incumbent upon it, the act or omission in question should be regarded under international law as an act or omission of the federal State, on the same footing as the conduct of organs of a municipality, and, as such, entails the federal State's responsibility. On the other hand, where an organ of a component state engages in conduct which amounts to a specific breach of an obligation incumbent upon the component state as a separate subject of international law, such conduct cannot be attributed to the federal State. The international responsibility of the federal State can all the same be invoked but as an indirect responsibility.\footnote{576} Some codification drafts also reflect this approach.\footnote{578}

(9) The differences of opinion thus revealed in judicial decisions, in the practice of States and in learned works with regard to the grounds on which a federal State bears international responsibility for the conduct of organs of its components states possess, perhaps, more theoretical interest than practical significance. At all events they seem to be due essentially to the fact that one and the same term—"federal State"—is used to denote entities having very different structures. It is an undeniable fact that no distinction is drawn in public international law between, on the one hand most of the federal States in existence today, and on the other a State with a unitary structure, and that the component states of such a federal State in no way figures as internationally separate entities. There are, however, federations whose component states retain to varying degrees an international personality of their own, and it is quite possible that fresh example of structures of this kind may emerge in the future. Indeed, many different situations exist in practice, for cases are also known in which some of the component states of one and the same federal State enjoy personality under internal law only, whereas other components of the same State are regarded as separate subjects of international law. This plurality of situations cannot but have repercussions on the theoretical basis of international responsibility.

(10) In the Commission's opinion, all that need be said on this point is that, if the component states of a particular federal State do not possess a separate international personality, even within narrow limits, and if, therefore, they do not at any time have international rights and obligations, there can be no doubt that they are no different, so far as the problem considered here is concerned, from the other territorial governmental entities dealt with in this article. The actions or omissions of organs of component states are then simply to be regarded under international law as acts of the federal State. In the cases—comparatively rare nowadays—in which component states retain an international personality of their own with a relatively restricted legal capacity, it seems evident that the conduct of their organs is likewise attributable to the federal State where such conduct amounts to a breach of an international obligation incumbent upon the component state, such conduct is to be attributed to the component state and not to the federal State. The international responsibility of the federal State can then be invoked only as the responsibility of one subject of international law for the act of another subject of international law.

(11) In connexion with the foregoing considerations the Commission discussed whether, after the statement of the principle of attribution to the State, as a possible source of international responsibility, of the conduct of organs of territorial governmental entities, an exception should be made to the principle in order to deal, in particular, with the case of component states of a federation which might have retained, in certain specific matters, an international legal personality and capacity of their own, separate from those of the federation. The Commission did not, however, find it necessary to make such a reservation. The purpose of the present article is simply to determine whether, under international law, the conduct of organs of territorial governmental entities of a State—be it federal or unitary—should be regarded as acts of the State: assuming, of course, that those organs have acted in a sphere in which their action may...
come up against the existence of international obligations of the State in question. Where an organ of a component state of a federal State acts in a sphere in which the component state has international obligations that are incumbent on it and not on the federal State, that component state clearly emerges at the international level, as a subject of international law separate from the federal State, and not merely as a territorial government entity subordinate to the federal State. It stands to reason that in this case the conduct of the organ in question is, in virtue of article 5 of the present draft, the act of the component state; the problem of attributing the conduct in question to the federal State does not even arise in this hypothetical case, which thus automatically falls outside the scope of those covered by this article. It will, of course, be another matter to determine in such a case, not to what subject of international law the act is to be attributed, but what subject is to be held internationally responsible for that act. This entirely different aspect of the matter will logically come up for consideration in another chapter and will form the subject of another article of the present draft.

(12) The question also arose whether the rule of attribution to the State of the acts or omissions of organs of territorial governmental entities was not open to an exception in the case where such acts or omissions amounted to a breach of a contractual obligation assumed by such an entity under internal law. In this context it has often been affirmed as a principle that the State cannot be held internationally responsible for the breach of contracts entered into by the organs of a territorial governmental entity in connexion, for instance, with loans. In the Commission’s view, however, the question whether the conduct under consideration can or cannot entail the international responsibility of the State is not a matter of whether or not such conduct should be regarded as attributable to the State. To find the right answer to such a question it is necessary to determine whether or not, in the specific case in point, the State is under an international obligation, for example in virtue of a treaty, requiring that State in its international relations to honour certain contractual obligations under internal law, whether those obligations have been incurred by organs of the State itself or by organs of a territorial governmental entity. Hence, even where the question whether the State has an international responsibility or not was answered in the negative, that answer would be dictated, not by the fact that such conduct of an organ of a territorial governmental entity, amounting to non-fulfilment of a contractual obligation of that entity, was not attributable under international law to the State, but by the fact that the second condition for the existence of an internationally wrongful act of the State—i.e. the breach of an international obligation of the State—would not be met in the case in question. Consequently no exception whatsoever need be made in this connexion to the principle laid down in paragraph 1 of the present article.

(13) The general rule laid down in article 7, paragraph 1, providing for the attribution to the State of the conduct of organs of territorial governmental entities obviously does not exclude the possibility that States may, by treaty, adopt a different, special rule designed to prevail over the general rule in specified matters. For instance, some treaties to which federal States are parties include a so-called “federal clause” exempting the federal State from responsibility in the event that non-performance of the treaty is due to the failure of the federal State’s constitution to provide it with means of compelling its component states to abide by the treaty. This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty in question and in the matters which the treaty covers.

(14) The rule laid down in article 7, paragraph 2, from, and is designed to cover, the need to take into account a typical phenomenon of our times: the proliferation of entities which, within a given community, are empowered to exercise some governmental authority. The manifold causes of this phenomenon need not be dwelt upon here. Suffice it to note that there is a tendency, within State communities, to set up more and more establishments, institutions—in a word, “entities”—which are required under internal law to perform certain tasks in the interest of the community but which possess, in the eyes of the law, an organization and a personality of their own, separate from those of the State. Among these various “entities”—whatever the régime by which they are governed—there are some whose particular characteristic is that the internal legal system confers upon them, to a greater or lesser extent, the exercise of certain elements of the governmental authority, usually of a regulatory or executive nature.

(15) Since this phenomenon is a relatively recent development, it is only to be expected that the practice of States has few precedents to offer. The request for information sent to Governments by the Preparatory Committee for the 1930 Codification Conference did not include any point dealing expressly with the case of entities other than territorial governmental entities exercising “public functions of a legislative or executive character” (point VI). However, in their replies to the questions raised in point VI, some Governments observed that the State was responsible also for acts or omissions of collective entities other than those of a local character, in so far as such entities were also required to exercise public functions of the same nature. The most interesting reply from this standpoint was that from the German Government, according to which:

... when, by delegation of powers, bodies act in a public capacity, e.g. police an area or exercise sovereign rights as in the case when they levy taxes for their own needs ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.

When, however, these bodies, acting outside their allotted sphere, are guilty of behaviour towards foreigners which is contrary to international law, the principles set out in No. VII (concerning the conditions under which the State becomes responsible for foreigners injured by private individuals in their rights recognized under international law) will also apply.

679 League of Nations, Basis of Discussion ... (op. cit.), pp. 90 et seq.
The remarks in this connexion apply in practice principally to legal entities, and particularly administrative bodies possessing the right of self-government; but they are also applicable when the State, as an exceptional measure, invests private organizations with public powers and duties or authorizes them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force.

The Preparatory Committee accordingly came to the conclusion that it should refer both to territorial government entities such as communes and provinces and more generally to "autonomous institutions" which exercise public functions of a legislative or administrative character. It therefore prepared the following basis of discussion:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State. Moreover the principle of such attribution is restated, in varied forms and at greater or lesser length, in certain codification drafts.

Unfortunately the Third Committee of the Conference did not have time to examine and adopt that basis of discussion.

(16) The few modern authors who have studied the problem have put forward the logical reasons which require that the conduct of organs of the entities here considered should be attributed, at the international level, to the State. Moreover the principle of such attribution is restated, in varied forms and at greater or lesser length, in certain codification drafts.

(17) In the Commission's view, the question whether the conduct of organs of its territorial governmental entities should be attributed to the State under international law, calls for the same affirmative answer when the organs involved are organs of entities whose separate existence meets a need for decentralization not ratione loci but ratione materiae, and for the same reasons. In both cases it is important that the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper. The Commission, for its part, feels able to conclude that there is already an established rule on the subject; but it is also convinced that, even if that were not the case, the requirements of clarity in international relations and the very logic of the principles governing them would make it necessary to affirm such a rule in the course of the progressive development of international law.

(18) The choice of criteria for designating the entities to be covered by paragraph 2 of the present article is not easy, for the entities in question vary widely in characteristics, in the matters falling within their field of activity and, sometimes, in the régimes which govern them. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent, and so on, do not emerge as decisive criteria for the purposes of attribution or non- attribution to the State of the conduct of its organs. Hence the Commission has come to the conclusion that the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State. The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. It is good to reason that, if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of the organ of an entity of this kind must relate to a sector of activity in which the entity in question is entrusted with the exercise of the elements of governmental authority concerned. Thus, for example, the conduct of an organ of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it falls within the exercise of those powers.

(19) With regard to the formulation of the rule, the Commission felt it preferable to cover in a single article all the cases of conduct of organs of entities which under the internal law of the State have a personality separate from the State but which are empowered by the same law to exercise certain elements of the governmental authority, whether through the application of a normal criterion of decentralization ratione loci of the exercise of the governmental authority, or in order to meet a more exceptional and more limited need for decentralization ratione materiae of certain elements of the governmental authority. For this purpose, the term "entity" has been used in the title of the article as being the most neutral term and the easiest to translate into the various languages, and also as a term wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public...
agencies of various kinds and even, in special cases, private companies.

(20) In paragraph 1 of the French text of the article, the expression "collectivité publique territoriale de cet Etat" has been used in preference to others because it is traditionally used in French to cover all the various categories of entities, from communes to the component states of a federal State, that satisfy a criterion of decentralization ratione loci of the governmental authority. It makes clear what entities are referred to and dispenses with the need to list the entities in question, which is always a risky process. Moreover, a corresponding expression is used in Spanish and the Romance languages in general. In English the expression "territorial governmental entity within a State" has been adopted as having the same meaning as that French expression. In paragraph 2 the expression "entity...empowered...to exercise elements of the governmental authority" seemed the best calculated to meet the need to indicate in the various languages the nature of the functions which the entity in question must be called upon to exercise in order to come within the scope of this article.

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.

Commentary

(1) Article 5 and 7 of this draft dealt with the attribution to the State qua subject of international law, as a possible source of its responsibility, of the conduct of organs which are part of the formal structure of the State and the conduct of organs of territorial governmental entities of the State and the conduct of organs of territorial governmental entities of the State or other entities similarly empowered by internal law to exercise certain elements of the governmental authority. We have thus covered the whole broad category of persons formally appointed in one way or another, under the internal law of a State, to act on behalf of the community. Article 8 is intended to supplement these two articles by providing for the possible attribution to the State, as a subject of international law, of the conduct of persons (individuals or private entities) or groups of persons who have in particular circumstances acted in fact on behalf of the State without, however, having been formally appointed as organs for that purpose under the State's legal system. Sub-paragraph (a), on the one hand, refers to persons or groups of persons who have committed certain acts when in fact prompted to do so by organs of the State or of one of the other entities mentioned in article 7 or who have been instructed by such organs to perform certain functions or certain activities, though not by way of formal appointment as an organ. Sub-paragraph (b), on the other hand, covers the case of persons or groups of persons who, although unconnected by any formal or de facto link with the machinery of the State or the machinery of any of the other entities mentioned in article 7, have acted in exceptional circumstances by assuming on their own initiative the exercise of certain elements of the governmental authority.

(2) The hypothesis contemplated in sub-paragraph (a) was intended by the Commission mainly to cover cases in which the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. In the same context the Commission wished to deal with the familiar cases in which the organs of the State or of one of the other entities empowered by internal law to exercise elements of the governmental authority prefer, for varied and in any case self-evident reasons, not to undertake certain duties directly or not to carry out certain tasks themselves. They then make use of persons who are not formally part of the State machinery or of the machinery of any of the other entities mentioned; they call upon private individuals or groups of private individuals to take on the duties and tasks in question, although here again these individuals or groups are not thereby formally attached to the structures in question and do not, in other words, thereby become de jure organs of the State or of the other entities mentioned. The Commission, also bearing in mind the important role played by the principle of effectiveness in the international legal order, considered that that order must of necessity take into account, in the cases contemplated, the existence of a real link between the person performing the act and the State machinery rather than the lack of a formal legal nexus between them. The conduct in which the persons or groups in question thus engage in fact on behalf of the State should therefore be regarded under international law as acts of the State: that is to say, as acts which may, in the event, become the source of an international responsibility incumbent on the State.

(3) The validity of this conclusion is confirmed by international judicial decisions and international practice, even though the former have only occasionally had to deal with the acts of the persons referred to in sub-paragraph (a). The cases which have actually arisen in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The main forms of conduct which have been taken into consideration for attribution to the State are acts generating international responsibility are, first, the conduct of private individuals or groups of private individuals who, while remaining such, are employed as auxiliaries in the police or armed forces or sent as "volunteers" to neighbouring countries, and secondly, the acts of persons employed to carry out certain missions in foreign territory.

(4) As an example of the first set of situations, mention may be made of the award given on 30 November 1925 by a Great Britain/United States arbitral tribunal in the *D. Earnshaw and Others (Zafiro)* Case. The tribunal found that the conduct of the crew of a United States merchant vessel was attributable to the United States of America and engaged the international responsibility of that State, because it had been established that the vessel, although private, was in fact acting as a supply ship for United States naval operations. Its captain and crew were for this purpose under the command of a United States naval officer. A further example is to be found in the decision in the *Stephens Case*, given by the Mexico/United States of America General Claims Commission on 15 July 1927. Referring to a group of guards who were not part of the Mexican army but whom it had employed as auxiliaries, the Claims Commission observed:

It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico.

On this basis the Claims Commission concluded that the act of a person who was part of these groups of guards employed as auxiliaries engaged Mexico's responsibility on the same basis as the act of members of the regular armed forces.

(5) With regard to the second set of situations, reference may be made to the *Black Tom* and *Kingsland cases*, concerning acts of sabotage committed in the United States of America during the First World War by persons acting on behalf of Germany. In its decision of 16 October 1930 the United States and Germany Mixed Claims Commission established under the agreement of 10 August 1922 declared that, if it were proved that the damage complained of was due to the acts of the persons in question, Germany must be held responsible. In the same context, reference may also be made to the positions taken by States on the occasion of incidents concerning notorious cases in which persons have been abducted from the territory of another State: the *Rossi*, *Jacob*, *Eichmann* and *Argoud* cases.

(6) In addition to the two sets of situations just mentioned, reference may be made to certain positions taken on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country considering itself injured has claimed the existence of international responsibility for such conduct on the grounds that, in the country where the conduct occurred, the press and other mass information media were really controlled by the Government.

(7) It does not seem necessary to dwell on further specific examples of the application of the principle stated in sub-paragraph (a) of the present article, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf, though without thereby acquiring the status of organs either of the State itself or of some other entity empowered to exercise elements of the governmental authority, is unanimously upheld by the writers on international law who have dealt with this question.

(8) The Commission wishes nevertheless to make it quite clear that, in each specific case in which international responsibility is claimed for acts committed by persons acting on behalf of one State, to the extent that these persons manifestly employed for this work by the German Gestapo, and taken to France in 1963 by persons suspected of acting on behalf of the French police. See on this subject the information given in *Zehnder*, p. 689 et seq.

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886 Lehigh Valley Railroad Company and Other Cases (Black Tom and Kingsland cases), United Nations, *Reports of International Arbitral Awards*, vol. VIII (United Nations publication, Sales No. 38.V.2), pp. 84 et seq. In this decision the Commission held that the burden of proof had not been sustained and it consequently decided the case in Germany's favour. It was later proved, on the basis of new information, that the damage had in fact been caused by German saboteurs; the Commission therefore set aside its previous decision and held Germany responsible for the damage caused (decision of 15 June 1939, *ibid.*, pp. 450-459). On this case, see L. H. Woolsey, "The arbitration of the sabotage claims against Germany", *American Journal of International Law* (Washington, D.C.), vol. 33, No. 4, October 1939, pp. 737 et seq.
887 This was an abduction carried out in Switzerland in 1928 by persons probably acting by agreement with the Italian police. On this case, see Scheuner, "Der Noteinwechsel zwischen der Schweiz und Italien in der Angelegenheit Cesare Rossi", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, first part (1929), pp. 280 et seq.
888 Berthold Jacob was abducted from Swiss territory in 1935 by persons manifestly employed for this work by the Gestapo, and taken to Germany. On this incident, see Quénéudec, *op. cit.*, p. 49; and *Die deutsch-schweizerische Schiedsordnung im Falle Jacob*, *Friedens-Warte* (Geneva), vol. 35, No. 4 (1935), pp. 157-158.
890 Colonel Argoud was abducted from German territory and taken to France in 1963 by persons suspected of acting on behalf of the French police. See on this subject the information given in *Zehnder*, p. 689 et seq.
891 For examples drawn from practice see also E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staats für die Presse* (Zürich, Polygraphischer Verlag, 1949), pp. 40 et seq.
national responsibility of the State has to be established, it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs. Where such proof is lacking, the conduct of the persons concerned can only fall under the provisions of a subsequent draft article which is to deal with the conduct engaged in by individuals or groups of individuals as private persons. For these reasons the text adopted by the Commission for article 8, sub-paragraph (a), begins with the words "it is established".

(9) With regard to the hypothesis contemplated in sub-paragraph (b), the Commission focused its attention mainly on circumstances in which, for one reason or another, the regular administrative authorities have disappeared. During the Second World War, for example, in belligerent countries and any other country invaded, local administrations fled before the invader, or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over, in the interests of the community, the management of certain public concerns or that committees of private persons provisionally took charge of the administration, issued ordinances, performed legal acts, administered property, pronounced judgements, etc., in other words, exercised elements of the governmental authority. In such circumstance it may also happen that private persons acting on their own initiative assume functions of a military nature; for example, when the civilian population of a threatened city takes up arms and organizes its defence. There are other situations in which the organs of administration are lacking as a result of natural events such as an earthquake, a flood or some other major disaster. Here again, private persons who do not hold any public office under internal law may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided precisely because of the exceptional situation.

(10) What sets the cases now envisaged apart from those dealt with in sub-paragraph (a) is that the persons or group of persons referred to here have assumed the exercise of the functions in question on their own initiative instead of being appointed to or entrusted with them by organs of the State or of one of the entities referred to in article 7. Moreover, in many cases, they act without the knowledge of the official organs. There is thus no formal or real link with the machinery of the State or of one of the entities entrusted by the internal law of the State with the exercise of elements of the governmental authority.

(11) The question then arises whether such conduct should also be regarded under international law as acts of the State that are capable of entailing its international responsibility if they constitute a breach of an international obligation of the State. International practice in this matter is very limited, and this is hardly surprising in view of the rather exceptional nature of the situations envisaged and, in particular, of the hypothesis that the conduct in question may constitute internationally wrongful acts. The Commission has found, however, that national laws often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts. In the Commission's view the State, as a subject of international law, should a fortiori bear the responsibility for such conduct when it has led to a breach of an international obligation of that State. The criterion which, it would seem, should guide international law in this matter is that the nature of the activity performed should be given more weight than the existence of a formal link between the agent and the organization of the State or of one of the entities referred to in article 7. This view is shared by the few writers that have dealt with the case of private individuals who, in exceptional circumstances, assume on their own initiative the exercise of certain elements of the governmental authority. However, the Commission wishes to stress that, since the persons under consideration have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in genuinely exceptional cases. The Commission is unanimous in indicating that, for this purpose, the following conditions must be met: in the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities (that is, organs of the State or one of the entities dealt with in article 7) and, furthermore, in circumstances which justified the exercise of these elements of authority by private persons: that is to say, in the last resort, in one of the circumstances mentioned in the commentary to the present article.

(12) The Commission wishes to point out that the case of persons acting in fact on behalf of the State in the circumstances covered by the present article should not be confused with the case of what are called "de facto..."
The specific problem of attributing to a State the conduct of the 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.

Commentary:

(1) Where a State places one of its organs at the disposal of another State in order that that organ may temporarily act for the benefit and under the authority of that other State, there is a possibility that, notwithstanding the provisions of the previous articles, the conduct of that organ may be regarded under international law as an act of the State at whose disposal it has been placed, and not of the State whose organ it is. An analogous situation may arise where an organ is “lent” to a particular State, not by another State, but by an international organization. These exceptional situations form the subject-matter of the provisions of the present article, which is intended chiefly to specify the conditions that have to be met for the exceptional change of attribution to take place. There are three essential conditions for this: (a) the organ placed at the disposal of a State by another State or by an international organization must possess the legal status of an “organ” of that other State or of that organization at the time when it acts under the authority of the State to which it has been “lent”; (b) the beneficiary State must actually have the “lent” organ at its disposal at the time when the organ engages in the conduct likely to give rise to international responsibility; and (c) the conduct in question must have been engaged in by the “lent” organ in the exercise of elements of the governmental authority of the beneficiary State.

(2) The first of these conditions is easily defined: the present article refers solely to the case where a State or an international organization has placed one of its organs at the disposal of another State and that organ has not lost its original status merely by temporarily performing functions under the authority of a State other than its own. Consequently article 9 does not apply to the
conduct of persons or groups of persons who, according to the legal order of the sending State or international organization, are mere private individuals at the time of such conduct, either because they have never had the legal status of an organ of that State or organization or because they have lost that status on being placed at the disposal of another State. For example, "experts" placed at the disposal of a State under technical assistance programmes are more often than not to be regarded under the legal system of the sending State or organization as private individuals, not as "organs"; and in many cases, even if they had the status of an "organ" previously, they have lost it on being seconded to another State. The State at whose disposal an expert is placed may if it wishes confer on him, under its own internal legal order, the status of an organ of the State or of one of the other entities contemplated in article 7 of the present draft. It is even conceivable that the State in question may in fact entrust him with the performance of certain functions or duties on its behalf in accordance with article 8. The conduct of the expert can then be attributed under international law to the beneficiary State as a possible source of international responsibility for that State, but by virtue of articles 5 to 8, not article 9, of the present draft. If, on the other hand, the beneficiary State confines itself to using the services of the expert "lent" to it by another State, or by an international organization, in the same way as the services of any other national or foreign expert—i.e. if the "lent" expert remains a private individual—his conduct is not subject to the possibility of being considered as an act of the beneficiary State. In such circumstances, international responsibility cannot conceivably attach to that State except upon the usual conditions on which a State may generally incur responsibility in connexion with the activities of mere private individuals.

(3) It is not, however, essential that the organ placed at the disposal of a State by another State should be an organ forming part of the State machinery proper under the internal legal order of the latter State. It may equally well be an organ of a territorial governmental entity or, more generally, of any entity empowered by the internal law of the sending State to exercise elements of the governmental authority. For example, a town may suffer a disaster and the municipality of a foreign town may place its fire brigade temporarily at the former town's disposal. Again, a city may come to the assistance of a foreign city suffering for example, from over-rapid growth and make its town-planning services temporarily available to the foreign city. In both cases it is possible that the organs thus "lent" may, in the exercise of their functions, encroach upon foreign rights or interests. The provision in article 9 should therefore be understood to cover also the case in which a State places at the disposal of another State an organ belonging, not to its own machinery, but to that of another entity empowered by the internal legal order to exercise elements of the governmental authority.

(4) The second of the conditions stated above which must be met in order for a specific situation to be among those covered by article 9 is that the conduct in question should be engaged in by an organ of a State or of an international organization which has genuinely been placed at the disposal of another State. This logically excludes from the scope of article 9 the most common cases of activities carried on by organs of a State or of an international organization in the territory of another State: namely, those in which these organs merely perform in foreign territory functions which are and remain functions of the State or international organization to which they belong. In such cases no functional link is established between the organ acting and the machinery of the State in whose territory it is called upon to act. This applies both to actions performed by the organ in question without the consent, or even against the will, of the territorial State (such as military operations against that State) and to functions performed with the consent of that State (diplomatic or consular functions, for instance, or representational functions for an international organization). In both these cases it is obviously out of the question to attribute to the territorial State the conduct of the organs concerned. By virtue of article 5 of the draft, such actions on the part of the State organs can only be regarded as acts of the State to whose machinery the organs belong. In any case, this point will be considered in detail in a later article of this draft, in which particular attention will be paid to the conduct, in the territory of a State, of organs of another subject of international law.

(5) The condition that the organ in question shall have been "placed at the disposal" of a State does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State.

(6) The second condition therefore excludes from the scope of the rule stated in article 9 situations in which certain functions of the allegedly "beneficiary" State are performed without its freely given consent, as happens when a State placed in a position of dependence, protectorate, unequal union, territorial occupation or the like is compelled to allow the acts of its own machinery to be set aside and replaced to a greater or lesser extent by those of the machinery of another State. In situations of this kind, whatever language may sometimes be used to save appearances, the dominant, protecting, etc. State is in no sense placing its own organs "at the disposal" of the dependent, protected or similar State; it is merely replacing, in specific sectors, the activities of the latter State's organs by those of its own organs, which obviously go on acting under its own direction and control. In such situations, therefore, no genuine "placing at the disposal" of one State of organs belonging to another State has taken place. It is a case of "transfer" of functions rather than transfer of "organs"; and this is in reverse, inasmuch as the exercise of certain functions normally discharged by the organs of the territorial State is transferred to the organs of another State, which discharge them under the latter State's authority and control. From the standpoint of international law, therefore, there is no doubt that the actions and omissions...
of the organs concerned are actions and omissions of the State to which the organs belong, and that such cases fall solely within the scope of article 5 of the present draft.

(7) Furthermore, the second of the conditions under consideration excludes from the scope of the rule stated in article 9 those situations in which the organs of a State or of an international organization perform functions appertaining to another State in the territory of that other State and with its consent, but nevertheless act under the authority, direction and control of the sending State or organization. Such a situation can arise, for example, where a State sends a contingent of its own personnel to the territory of another State that is faced with a specific emergency, but without placing them at the latter State's disposal, i.e. where the former State continues to direct and control the operations of the personnel sent to the foreign territory. It is true that the organ then acts in the interests of a State other than the State to which it belongs and that it performs duties which normally fall to the organs of the beneficiary State; but what is important is that in doing so the organ in question continues to act as part of the machinery of the sending State and under its aegis, and that no real functional link is established with the machinery of the beneficiary State. There is consequently no need for a proviso excepting such cases from the general rule laid down in article 5 of the draft; from the standpoint of international law, the conduct of the organs in question still constitutes an act of the State to which those organs belong.

(8) To conclude, it cannot be held that an organ of a State or of an international organization has been "placed at the disposal" of another State, and hence that the present article is applicable, unless the organ in question acts in the exercise of functions appertaining to the State at whose disposal it has been placed, and under that State's authority, direction and control, and is required to obey any instructions it may receive from that State and not instructions from the State to which it belongs.

(9) The third condition that has to be met for a given situation to be one of those contemplated in article 9 is that the organ placed at the disposal of a State by another State or by an international organization should be acting in the exercise of elements of the governmental authority of the beneficiary State. In other words, the rule in article 9 cannot be held to apply where an organ of a State or of an international organization, placed as such at the disposal of a given State, is acting within the internal legal order of the beneficiary State, but as a mere private individual. It frequently happens that a State places one of its organs at the disposal of another State and that the beneficiary State confines itself to using that organ as a mere expert or adviser, or in some such capacity, and does not entrust it with the exercise of official duties normally performed by its own organs. Unless this last essential condition is met, the conduct of the organ placed at the disposal of the beneficiary State obviously cannot be considered to be an act of that State in international law. There will be an act of the State only where the organ lent by a foreign State is actually instructed to act as though it were an organ of the beneficiary State: i.e. where the conduct in question takes place in a sphere in which the organ has been entrusted with the exercise of functions embodying genuine elements of the governmental authority and not simply with tasks which, however important they may be, are to be performed in an exclusively personal capacity.

(10) As examples of situations in which application of the rule stated in article 9 might be entertained, reference was made in the Commission to the case in which certain conduct is engaged in by a detachment of police placed at the disposal of another State to deal with internal disturbances; by a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or the consequences of a natural disaster; by officials of a State or of an international organization appointed by another State to administer in its territory a public service which its own officials are unable, in certain circumstances, to administer; by judicial organs appointed in particular cases to act as judicial organs of another State; and so on. Specific instances were cited: for example, that of the United Kingdom Privy Council acting as the highest court of appeals for New Zealand and that of judicial organs of Nigeria appointed to serve also as Chief Justices of Botswana and Uganda and as President of the Court of Appeal of the Gambia. It was pointed out that Nigeria has also placed some of its civil servants at the disposal of other African States to take temporary charge of organizing the civil service of the beneficiary State.

(11) As to the cases in which the rule in article 9 might apply, the Commission also considered whether those cases might include the dispatch of armed contingents by a State to the territory of another State to be stationed there or employed in military operations. It was made clear, however, that situations of that kind generally lie outside the operation of the latter part of the proviso stated in the present article. Armed forces sent by a State to foreign territory for defensive or offensive military purposes are not forces "placed at the disposal" of the State to whose territory they are sent, at least not in the sense in which the expression "placed at the disposal" is to be understood in article 9. We should not be misled by the use of that or similar expressions in a different sense. Sending troops to the territory of another State to engage in concerted operations, based on that territory, against a third State, or to assist in withstanding an attack from such a State; stationing contingents of a State's own forces in the territory of another State in peace-time in order to defend the country, in the common interest, against external threats; using a State's own military forces to help the territorial State in a civil war in progress there: all those are situations which can be called military "aid" to another State—lawful or unlawful according to the circumstances—but not a "placing at the disposal" of that State of forces sent to its territory. The forces in question usually remain at the disposal of the State to which they belong; they act under its orders, control and instructions; and, what is more important, they exercise through their actions a characteristic element of the governmental authority of that State, not of the territorial State. By any token, the activities of such forces or of their members are acts of the State to which they
belong. It could happen that the territorial State incurs joint responsibility, but for quite different reasons: for example, by tolerating certain actions on the part of the foreign troops or even, in some cases, by merely permitting their presence in its territory; however, that responsibility would flow from the application of the provisions of other rules and not of the rule stated in the present article.

(12) This does not, of course, mean that it is necessary to rule out altogether the possibility of exceptional cases in which a State genuinely places at the disposal of another State a contingent of its own armed forces, so that the other State may employ that contingent under its authority and control and assign it to tasks which may involve the exercise of elements of the beneficiary State's governmental authority. But in such cases, the contingent in question will probably be assigned to special tasks different from those on which armed forces are usually employed. In this connection it was recalled that, at the time of the earthquake which devastated Peru in 1970, contingents of the Soviet army and the United States navy and a Swedish engineer regiment were placed, through the United Nations, at the Peruvian Government's disposal for relief operations, which were carried out under that Government's control and instructions and which certainly involved the exercise of elements of the governmental authority. Other similar examples were also mentioned. Hence the Commission unanimously recognized that in cases of this kind it is perfectly possible for situations to arise in which the provisions of article 9 should be applied.

(13) The problem of determining to what State conduct should be attributed as a possible source of international responsibility where the conduct is that of an organ of a State placed at the disposal of another State, and therefore acting under the latter State's authority and in the exercise of elements of its governmental authority, was considered in the arbitral award made on 9 June 1931 in the Chevreau Case by Judge Beichmann, who was appointed arbitrator under the compromis of 4 March 1930 between France and the United Kingdom. The arbitrator had before him a French claim concerning damage suffered by Julien Chevreau, a French national resident in Persia who had been arrested by British forces operating near the Caspian Sea, and who had subsequently been detained on suspicion of intelligence with the enemy and deported. The question at issue was whether the United Kingdom was required to compensate Chevreau for the loss of certain property, books and documents which, according to Chevreau, had been in his rooms at the time of his arrest and had subsequently been stolen or lost owing to the negligence of the British consular authorities. In fact, at the request of the French Consul at Resht, who was away from Persia at the time, Chevreau's books and documents had been sent to the British Consul who, in the absence of the French consular authority, was running the French Consulate. In his award the arbitrator rejected the French claim, stating that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power." 601 The situation in question thus corresponded precisely to one of the cases envisaged above: that in which the organ of one State is required to run a public service of another State, under the authority of the latter State and in place of one of the latter State's organs that is unable to perform its functions itself. The conclusion reached by the arbitrator, ruling out the possibility of attributing to the United Kingdom negligence committed by an organ of the British State at a time when it was performing a typical public function of the French State, was obviously based on recognition of the principle which, in the Commission's opinion, should govern the matter: namely, that an act or omission on the part of an organ of one State acting in exceptional circumstances under the authority of another State and in the exercise of elements of that other State's governmental authority should be considered under international law to be an act of that other State and not of the State to which the organ belongs.

(14) Those authors of learned works on international law who have studied the problem of the international responsibility of a State for the conduct of organs placed at its disposal by another State or by an international organization also express themselves in favour of attributing such conduct to the State receiving the "loan" in question, providing that the organs concerned have genuinely been placed at the disposal of the beneficiary State: that is to say, that they are subject in their actions to the authority and control of that State, not to those of the sending State or international organization. 602

(15) In the Commission's view there can be no doubt about the validity of the rule stated in article 9. The principle of the attribution to a particular State of the conduct of an organ of another State or of an international organization that has been effectively placed at the disposal of the former State is a logical inference from the criteria governing the rules stated in the previous articles. An organ which is "lent" by one State to another State, and which consequently performs its activities under the authority and control of the latter State, is not acting as an organ of the State to which it belongs. Its acts are no more attributable to the last-mentioned State than acts committed by that organ as a private individual would be. On the other hand, the conduct in which that organ engages in the exercise of elements of the governmental authority of the State at

601 Ibid., p. 1141, [translation by the United Nations Secretariat].
602 On this subject, see J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", Annuaire français de droit international, 1962 (Paris) vol. VIII (1963), p. 444, I. Brownlie, Principles of Public International Law (Oxford, Clarendon Press, 1966), p. 376; F. Durante, Responsabilità internazionale e attività cosmiche (Padua, Cedam, 1969), pp. 40 et seq.; P. Kurit, op. cit., pp. 178 et seq.; P. A. Steiniger, "Die allgemeine Voraussetzungen..., Wissenschaftliche Zeitschrift... (loc. cit.), pp. 448-449. The last-named writer (who also refers to article 4 of the draft agreement prepared by himself and B. Graefhath in 1973) for reference, see above, foot-note 376) states that in certain cases an international responsibility might be laid upon the sending State; the possible cases he considers are, however, those examined below in paragraph 16 of this commentary, which in reality fall outside the provisions of article 9.
whose disposal it has been placed is of necessity an act of that State, even if that State has not granted it the status of an organ in its own legal system. Even in this case, the conduct of the “lent” organ is an act of the State receiving the loan", just as the conduct of an individual in fact exercising elements of the governmental authority of that State would be. That State would have to bear the responsibility if the act should be characterized as internationally wrongful.

(16) In formulating the rule stated in article 9, the Commission discussed whether or not express provision should be made in its text for the case in which the very act of placing some of a State's organs at the disposal of another State would in itself constitute a breach of an international obligation incumbent on one or the other of the two States concerned or on both of them. A State may be internationally bound not to furnish aid of any kind—and therefore not to "lend" any of its organs—to another State against which, for example, the Security Council may have ordered the adoption of sanctions. Again, the act of placing specific organs at the disposal of another State with a view to their use in the commission of an internationally wrongful act may certainly amount to a breach of an international obligation. Conversely, it is possible that the action of a State in admitting to its territory organs placed at its disposal by another State may, in specific cases, constitute a breach of an international obligation incumbent on it. The Commission did not, however, consider that such possibilities made it necessary to formulate an exception to the rule in article 9. A loan of one of its organs by a State to another State is one act: the subsequent conduct of the lent organ acting under the authority and control of the beneficiary State is another. Even in the case where the first act was in itself an internationally wrongful act of the lending State entailing, as such, its international responsibility, the conduct of the wrongfully lent organ acting henceforth under the authority of the beneficiary State and in the exercise of that State's governmental authority would nevertheless have to be regarded as an act of the latter State.

(17) The Commission likewise saw no need to make a special reservation for the case where criteria for attribution different from those prescribed in article 9 might be specified in the agreement by which a subject of international law undertakes to place some of its organs at the disposal of another subject of international law. The Commission held that such a reservation would be unnecessary in the relations between the State to which organs were lent and the lending State because such relations would in any case be governed by the international agreement concluded between them. In relations with third States—the most important aspect of the question—a reservation of this kind might lead to misunderstandings and provide the State bearing responsibility under the rule laid down in the present article with an inadmissible pretext for evading that responsibility. The agreement concluded between the two parties to the "loan" of organs must in no case be allowed to prejudice the situation of third States or to affect claims by which such third States might invoke, under general international law, the international responsibility of one or other of the two parties in question.

(18) With regard to the formulation of the rule, it has already been noted that, in using in article 9 the words "organ ... placed at the disposal of a State by another State", the intention was to include in the scope of this expression also an organ of one of the entities separate from the State proper which are taken into consideration in article 7. The words "placed at the disposal" were preferred to others, such as "lent" or "transferred" because they seemed to convey more clearly the essential condition for the attribution of an act to the State to which the foreign organ has been sent: namely, that that organ should be subject in its actions to the authority, direction and control of that State. Lastly, the phrase "if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed" was selected as that best calculated to make it clear (a) that the conduct of the organ placed at the disposal of a State by another State or by an international organization cannot be attributed as a possible source of international responsibility to the State receiving the "loan" in the case where such conduct has been engaged in as part of activities carried on by the "lent" organ in an exclusively personal capacity, and (b) that such attribution is likewise excluded in cases where the conduct complained of has been engaged in as part of activities which are carried on officially but which involve the exercise of elements of the governmental authority of the State to which the organ belongs and not of the State at whose disposal the organ 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.

Commentary 2/
(1) In articles 5 and 7 of the draft articles, provision has been made for the attribution to the State qua subject of international law, as a possible source of international responsibility on its part, of the conduct of organs which form part of the State machinery proper, and of the conduct of organs of territorial governmental entities or other entities also empowered by internal law to exercise elements of the governmental authority; these provisions apply, of course, only to conduct which the persons constituting the organs have adopted in performing their functions as members of those organs and not as private individuals. The purpose of the present article is to specify that such conduct is attributed to the State, qua subject of international law, even if the perpetrators have contravened the provisions of internal law concerning their activity, as in the case where they have exceeded their competence under internal law or if they have contravened instructions received. There is no exception to this rule even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ.

(2) It follows that, under the system adopted by the Commission, no conduct of State organs or of the other entities mentioned in article 7 is excluded from attribution to the State qua subject of international law. Only the actions of the human beings constituting the organs in question, performed in their capacity as private individuals, are not regarded as acts of the State capable, as such, of incurring its international responsibility. On the contrary, such actions are never attributable to the State even if their perpetrators have used, in the case in question, the means— including weapons—placed at their disposal by the State for the exercise of their functions. Acts of commission and omission performed in a purely private capacity by persons who happen to possess the status of organs of the State, organs of a territorial governmental entity, or organs of another entity empowered to exercise elements of the governmental authority, are on exactly the same footing as the acts of commission and omission of the private individuals dealt with in article 11.

(3) The attribution or non-attribution to the State of the conduct of organs which acted in their official capacity but outside their competence under internal law, or contrary to instructions received or, more generally, in breach of the provisions of internal law which they were required to obey in their activity, had been one of the questions most keenly debated among international lawyers. However, the Commission wished to avoid involvement in theoretical discussion and, more particularly, to avoid being influenced by certain theses based on a mistaken assimilation of the situation under international law to the situation existing under internal law. It is true that international law presupposes the internal organization of the State to be as the State establishes it; it presupposes, in particular, the existence of rules of internal law which determine the position of the various organs in the State machinery proper or in the machinery of the other entities which share with the State the exercise of elements of the governmental authority. But that is all. On the basis of this presupposition, it is international law alone that established the conditions under which the conduct of those organs is attributed to the State qua subject of international law and can give rise to an international responsibility of the State. The characterization of certain conduct of organs as acts of the State for the purpose of determining its international responsibility is completely independent of the characterization of the same conduct as acts of the State liable to incur administrative responsibility under internal law. Once again, therefore, it is on the basis of the data provided by State practice and international judicial decisions, and also bearing in mind the requirements of modern international life, that the Commission has formulated the rule laid down in the present article.

... it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority. 42

Shortly afterwards, on 14 August 1900, Secretary of State Adee used the same formula in his letter to the Ambassador of Italy at Washington, but linked it to the case of subordinate organs. 43 In the following paragraphs, frequent reference will be made to these two statements of position.

(7) In European practice during the second half of the nineteenth century, the case which appears to be the most significant, since a number of Governments were called upon to express their opinion on it, is the Italian-Peruvian dispute concerning reparation for damage sustained by Italian nationals in Peru at the hands of the Peruvian civil and military authorities during the civil war of 1894–1895. In a note of 26 October 1897 addressed to the representatives of several foreign Governments, including the Italian Government, Mr. de la Riva-Agüero, the Peruvian Minister for Foreign Affairs, had denied the existence of international responsibility of the State

... for damage caused by agents of the authority by virtue of acts unrelated to their legal functions, if the Government disapproves of and censures their conduct and subjects the offending official to appropriate proceedings to give effect, in accordance with the law, to the civil and criminal responsibility he has incurred ... All the principles which I regard as established serve to show that the State incurs responsibility and a diplomatic claim is justified only in cases

For example, the letter sent on 11 October 1893 by Mr. Tripp, the United States Minister to Austria, to a Mr. Mix, a United States national who, it seems, complained that he had been the victim of an "outrage" committed by Austrian officials, would appear at first sight to contain a clear rejection of attribution to the State, as a source of responsibility, of the acts of organs which violate internal law (United States of America, Department of State, Foreign Relations of the United States (Washington, D.C., U.S. Government Printing Office, 1894), p. 25). On reflection, however, it becomes clear that this case constitutes a precedent for affirming that international responsibility of the State cannot be claimed until it has been determined that fulfilment of the international obligation cannot be secured by recourse to available local remedies. This being so, however, it is far less certain that this case proves that the State would by no means be responsible for actions or omissions on the part of its officials acting outside their competence or contrary to instructions concerning their activity.

J.B. Moore, A Digest ... (op. cit.), vol. VI, p. 743. See also the position taken by the same Secretary of State in connexion with the Tunstall case in 1885 (ibid., p. 664). In this case the attribution of responsibility to the United States of America was rejected, the injurious act having in practice been performed by an organ acting in a purely private capacity.

For instance, the attitude of the Italian Government at that time, as revealed in the Bartolozzi case and the case of the damage inflicted on certain Italian nationals in Chile, shows some vacillation. On these cases, see S.I.O.I. (Società Italiana per l’Organizzazione Internazionale)—C.N.R. (Consiglio Nazionale delle Ricerche), La pratica italiana di diritto internazionale (Dobbs Ferry, N.Y., Oceania, 1970), 1st series (1861–1887), vol. II, pp. 862–864.

The case of the Star and Herald (United States v. Colombia) may be cited in support of these considerations. On this case, see J.B. Moore, A Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, pp. 775 et seq.
where damage and injuries are inflicted on aliens by acts contrary to
the provisions of treaties or, in the absence of these, to the law of
countries, which are committed by the Government or its civil and
military agents in the performance of their functions, on the orders or
with the approval of the Government and, as I have said elsewhere,
by an absolute denial of justice.44

The Italian Government expressed reservations regarding the
principles set forth by Mr. de la Riva Agüero, and
asked the British and Spanish Governments for their
opinions. The British Government agreed with the Italian
Government in considering

... the theory that officials of the State are not responsible for acts
which are not the consequence of orders directly given them by their
Government to be inadmissible ... hence all Governments should
always be held responsible for all acts committed by their agents by
virtue of their official capacity.45

The Spanish Government expressed the same opinion:

His Majesty's Government is of the opinion that the agents of a
government, whenever they are acting in the performance of their
functions, commit the government as a whole, since there is no way to
resist the action of these officials, because this action is based on the
authority they exercise. Consequently, His Majesty's Government
believes that compensation should be paid for unjustifiable damage
caused by agents of a government in the performance of their func-
tions, whether or not they were acting on orders of that government.
If this were not the case, one would end by authorizing abuse, for in
most cases there would be no practical way of proving that the agent
had or had not acted on orders received.46

The Italian Minister for Foreign Affairs endorsed the
opinions of the Governments consulted,47 and conse-
sequently instructed the Italian representative at Lima
to support the claims of the injured Italian nationals.48

(8) The further we advance into the twentieth century,
the more manifest is the recognition of the basic principle
that the State must acknowledge as its own, at the interna-
tional level, the acts of organs which have exceeded
their competence or contravened instructions concerning their
activity. In this respect, the attitude taken by the
Government of the United States of America, on the one
hand, and by the Guatemalan Government in the
Shine and Milligen case in 1907,49 and the Cuban Government
in the Miller case in 1910,50 on the other, are significant.

(9) It was more especially at the time of the 1930 Codifi-
cation Conference, held at The Hague, that Governments
found an opportunity to express their views on the subject
with which we are concerned. Mr. Guerrero, the Chairman
of the Committee of Experts for the Progressive Codifica-
tion of International Law appointed by the League of
Nations, in the report of the Sub-Committee on the
Responsibility of States he prepared in 1926, still sup-
ported the theory that the State is not responsible for the
"acts contrary to international law" of organs acting
outside their competence as defined by municipal law.
Such acts could not, in his view, be attributed to the State.
However, these conclusions were to be rejected by most
Governments. This is apparent, in the first place, from the
replies of Governments to the request for information
addressed to them by the Preparatory Committee of the
Conference in 1928. In point V, No. 2 (b), they were asked
whether the State became responsible in the case of "Acts of
officials in the national territory in their public capacity
(acts de fonction) but exceeding their authority". Of the
19 States which submitted written replies on this point,
only three took a negative view, five failed to take a clear
position, while 11 were clearly in favour of State responsi-
bility.51 Similar replies were given to point V, No. 2 (e),
which dealt with "Acts of officials in a foreign country,
such as diplomatic agents or consuls acting within the
apparent scope of, but in fact exceeding, their authority".52

The bases of discussion prepared by the Committee
reflected these views. Basis No. 13 stated that:

A State is responsible for damage suffered by a foreigner as the
result of acts of its officials, even if they were not authorized to
perform them, if the officials purported to act within the scope of
their authority...

and basis No. 14 stated that:

Acts performed in a foreign country by officials of a State...
acting within the apparent scope of their authority are to be deemed
to be acts of the State and, as such, may involve the responsibility of
the State.

In the discussion which took place in the Third Com-
mitee of the Hague Conference, some delegates proposed
the deletion of basis No. 14.53 Others spoke in support
of it. At the end of the discussion, a proposal to delete
basis No. 13 was rejected by 19 votes to 13; Mr. Guerrero
withdrew his proposal, which reverted to the idea of non-
responsibility; and the proposal to adopt basis No. 13,
with a few amendments submitted by the Swiss delegation,
was adopted by 20 votes to 6, with a few abstentions.54

Basis No. 13, having thus been adopted, was sent to the
Drafting Committee; the latter prepared the following
text, which became article 8, paragraph 2, first sub-par-
agraph, of the articles adopted in first reading by the Third
Committee of the Conference:

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45 Mr. Ferrero, Italian Ambassador in London, to Mr. Visconti
Venosta, Italian Minister for Foreign Affairs, 1 March 1898 (ibid.)
(translated from Italian).
46 Note verbale by Duke Almodóvar del Rio, 4 July 1898 (ibid.)
(translated from Italian).
47 See the opinion rendered on 19 February 1899 by the Diplo-
matic Disputes Board of the Italian Ministry of Foreign Affairs (ibid.).
48 Mr. Canevaro to Mr. Pirrone, 11 April 1899 (ibid.).
49 G. H. Hackworth, Digest of International Law (Washington,
50 Ibid., pp. 570-571.
51 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 (document C.75-M.69.1929.V), pp. 75 et seq.; and Sup-
plement to vol. III (document C.75(a).M.69(a).1929.V), pp. 3 and
16-17.
52 Bases of Discussion ... (op. cit.), vol. III, p. 78 et seq.; and
Supplement to vol. III (op. cit.), pp. 3 and 17.
53 The Conference was unable to consider basis No. 14, owing to
lack of time.
54 For the discussions at the Conference, see League of Nations,
Acts of the Conference for the Codification of International Law,
held at The Hague from 13 March to 12 April 1930, vol. IV, Minutes
of the Third Committee (document C.351(c).M.145(c).1930.V),
pp. 85 et seq.
International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State. 55

(10) The criteria which prevailed at the Hague Codification Conference of 1930 have not undergone any subsequent changes. One of the clearest and most frequently quoted statements of position is to be found in the opinion delivered in 1931 by the United States Court of Claims in the Royal Holland Lloyd v. the United States case. 56 The principle of the attribution to the State of the conduct of its organs which have acted contrary to the provisions of internal law has in fact been constantly invoked by claimant States (for example by the United States of America in 1933 in the Colom y Piris case 57 and by Belgium in 1936 in the Baron de Borchgrave case 58 ) and has been accepted even by respondent States (cf. the position of Bulgaria in the aerial incident of 27 July 1955 case 59 and of Italy in 1965 in connexion with the Mantovani case. 60

(11) To an even greater extent than diplomatic practice, the decisions of international tribunals, viewed as a whole and, above all, in the perspective of their historical development, unquestionably confirm, in the opinion of the Commission, the basic principle that the acts of State organs which have acted outside their competence or contravened the instructions received should be attributed to the State, as a source of international responsibility. Indeed, there are many decisions confirming this principle. It is true that neither the Permanent Court of International Justice nor the International Court of Justice has had occasion to pronounce on this question, but arbitral tribunals and commissions have had many opportunities to do so and arbitral awards are not lacking. The same observation applies in this connexion as was made with regard to State practice: as we pass from earlier eras to times nearer the present day, we can detect an unmistakable progression in the clarity of ideas and the definition of principles.

(12) In the period covering the entire second half of the nineteenth century, we find that a number of arbitral awards, though handed down in cases in which organs had probably acted in breach of the provisions of internal law concerning their activity, fail to refer to the question with which we are concerned; in these decisions, international responsibility is attributed to the State for the conduct of the officials in question without making it clear whether or not those officials had exceeded their competence or contravened provisions they should have obeyed, and without inquiring what attitude higher authority might have adopted towards the case. 61 In cases in which the question was expressly raised and examined, the criteria adopted vary from case to case 62 and the reasons given for the decisions sometimes reveal a confusion of thought which does not make for easy interpretation. 63

(13) The awards rendered by the various mixed commissions in the “Venezuelan arbitrations” of 1903 form a link, as it were, between the arbitral decisions of the nineteenth century, which were characterized by a great deal of uncertainty, and those of the twentieth century, where there is a uniform trend towards attributing to the State the conduct of its organs acting in that capacity but in contravention of the rules of internal law. None of the latter decisions any longer contain the idea that the action of an official, even if subordinate, who has acted as an organ but has exceeded his competence or contravened the instructions received is to be identified with the action of a private individual. It is true that, in order to establish the responsibility of the State, the arbitrator may at times fall back in a particular case on the argument that the Government implicitly approved, if it did not expressly authorize the conduct of the organ under its authority. That is what occurred in the award handed down in the Compagnie générale des asphaltes de France case. 64 In other awards,

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55 Ibid., p. 238.
56 "... the United States bears what has been described as a 'wide, unlimited, unrestricted and vicarious responsibility' for the acts of its administrative officials and its military and naval forces ... Governments are responsible, in their international intercourse, for the acts of their authorized agents, and if such acts were mistaken, or wrongful, liability arises against the government itself for the consequences of the error or the wrong." (American Journal of International Law (Washington, D.C.), vol. 26, No. 2 (April 1932), p. 410).
57 G. H. Hackworth, op. cit., p. 570.
60 Revue générale de droit international public (Paris), vol. XXXVI, No. 3 (July-September 1965), p. 835.
61 See, for example, the decisions handed down in the Only Son case (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. IV, pp. 3404-3405), the William Lee case (ibid., pp. 3405 et seq.) and the Donoughho case (ibid., vol. III, pp. 3012 et seq.).
62 For example, in the decision relating to the case of the Matilda A. Lewis, handed down by the American-British Claims Commission set up by the Treaty of 8 May 1871, the principle applied is that the State must bear responsibility for the decisions of subordinate officials even if they contravened or erroneously interpreted the rules of municipal law (J. B. Moore, History and Digest ... (op. cit.), vol. III., p. 3019 et seq.). On the other hand, in the award delivered in the Gadino case on 30 September 1901 by the Italian-Peruvian Arbitration Tribunal established under the Convention of 25 November 1899, the arbitrator completely assimilated actions illegally committed by subordinate officials to the actions of private individuals and affirmed that the responsibility of the State could be involved only if the State had not used the means within its power to prevent the illegal action or had not punished the offenders (United Nations, Reports of International Arbitral Awards), vol. XXV (United Nations publication, Sales No. 66.V.3), p. 415.
63 See for example the decision handed down on 19 March 1864 by the Arbitral Commission set up in 1863 by France and Argentina to adjudicate the Lacaze case (A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Pédone, 1923), vol. II, pp. 297-298), and the decision of the United States-Venezuelan Mixed Commission set up under the Convention of 5 December 1885 concerning the William Yeaton case (Moore, History and Digest ... (op. cit.), vol. III, pp. 2946-2947).
however, a different position is taken. This is so in the decision in the *Maal case*. In ordering Venezuela to pay compensation for the maltreatment inflicted on Maal, a Netherlands national, by the police, Umpire Plumley stated that he had no difficulty in acknowledging that such treatment had occurred without the knowledge of the high authorities of the Government, but that:

... the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for.\(^65\)

Lastly, there are some awards, such as that rendered in the *Metzger case*,\(^66\) where the State was required to pay a pecuniary indemnity although it had already punished the offending organ. A few years later, the award relating to the *La Masica case*, delivered on 7 December 1916 by Alfonso XIII, King of Spain, explicitly stated the principle that the State must bear responsibility for the acts of its organs even if they had acted in violation of the provisions of municipal law.\(^67\)

(14) The truly important and significant decisions, however, which represent, as it were, the culminating point of the evolution and progressive refinement of legal thinking on the problem we are considering, occur in the 1920s. Two awards especially, one rendered on 23 November 1926 by the United States-Mexican General Claims Commission constituted under the Convention of 8 September 1923 relating to the *Youmans case*, and the other on 7 June 1929 by the French-Mexican Claims Commission set up under the Convention of 25 September 1924 relating to the *Caire case*, provide a precise, detailed and virtually definitive formulation of the principles applicable.

In the first of these two cases, the Commission had to establish whether the Mexican Government should assume international responsibility for the action of a detachment of 10 soldiers and their commanding officer, who were sent to Angangueo with instructions to protect some United States nationals threatened by disturbances, but who, instead of carrying out the orders given them, shot one of the aliens dead and then took part, with the rioting mob, in the massacre of two others. The Commission, presided over by van Vollenhoven, ordered the respondent Government to make good the injury and gave the following reasons for its decision:

... we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.\(^68\)

The *Caire case* concerned the murder of a French national by two Mexican officers. After the victim had refused to give them a sum of money which they demanded, the officers took Mr. Caire to the local barracks and shot him. The Commission found:

... that the two officers, even if they are deemed to have acted outside their competence... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.

This decision was preceded by a long statement of reasons by the Presiding Commissioner, Verzijl, in the course of which he declared:

I consider ... to be perfectly correct ... [those theories which] tend to impose on the State, in matters of international concern, responsibility for all acts committed by its officials or organs and constituting delinquencies from the standpoint of the law of nations, irrespective of whether the official or organ in question has acted within or beyond the limits of his or its competence...

... whenever an official has availed himself of his official status, the fact that he acted outside his competence does not exempt the State from international responsibility, and that non-responsibility of the State is restricted to cases where the act had no connexion with the official function and was, in fact, merely the act of a private individual.\(^69\)

(15) The views of writers on international law have followed a course parallel to that observed in the case of State practice and the decisions of international arbitration bodies. Owing mainly to the theoretical difficulties they found in attributing to the State, under international law, conduct which was not attributable to it under internal law, the earliest writers placed the conduct of organs acting in their official capacity but outside their competence on the same footing as the conduct of private individuals. According to those writers no responsibility of the State for such conduct was conceivable except in cases where higher authorities had as it were been “accomplices” in the injurious acts or at least had not done all they could to prevent them, had not disavowed them and had not punished those who committed them.\(^70\)

Subsequent clarification regarding the need to draw a clear distinction according to whether the actions and omissions of organs are attributed to the State under

\(^65\) Ibid., vol. IV (United Nations publication, Sales No. 1951.V.1), p. 116. The Commission was subsequently to apply on many occasions the principles defined in the *Youmans case*. See, in particular, the awards relating to the *Mallén case* (ibid., pp. 176 et seq.), the *Stephens case* (ibid., pp. 267–268), and the *Way case* (ibid., pp. 400–401).

\(^66\) Ibid., vol. V (United Nations publication, Sales No. 1952.V.3), pp. 529 et seq. (Translation from French.)

\(^67\) Ibid., vol. X (United Nations publication, Sales No. 60.V.5), pp. 732-733.

\(^68\) Ibid., pp. 417–418.

\(^69\) Ibid., vol. VI (United Nations publication, Sales No. 61.V.4), p. 560.
municipal law or under international law eliminated the opposition to the idea of considering the actions or omissions in question as "acts of the State". At the same time, as practice and international decisions become clearer and more consistent, modern international jurists have almost unanimously consider it to establish that actions or omissions of organs of the State, irrespective of whether they conform or are contrary to the legal provisions governing their conduct, must be considered as acts of the State from the standpoint of jurisdictional relations between States. 72


(16) With regard to codification drafts, only the conclusions of the 1926 Guerrero report exclude the possibility of making the State responsible for acts of its organs which have exceeded the limits of their competence according to municipal law. We have seen that bases of discussion Nos. 13 and 14, prepared in 1929 by the Preparatory Committee of the Hague Conference for the Codification of International Law, and article 8, paragraph 2, first sub-paragraph, of the draft articles adopted in 1930 in first reading by the Third Committee of the Conference, clearly stated the opposite principle. Article 12 of the 1961 revised draft by F.V. García-Amador provided that:

an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.

As to the drafts prepared by private institutions, the one prepared by the International Law Association of Japan in 1926 and the one prepared by the Harvard Law School in 1929, contain provisions that are not entirely clear. All the other drafts expressly accept as a basic principle the possibility of attributing the conduct of its organs to the State as a source of international responsibility when they have acted in their official capacity, even if in the case in question they were not competent according to municipal law, had disobeyed their instructions, and so on; see the second and third paragraphs of article I of the draft prepared by the Institute of International Law; 73 article 2 of the draft prepared by K. Strupp in 1927; 74 article 1, paragraph 4, of the draft prepared by the German International Law Association in 1930; 75 article 1 of the draft prepared by A. Roth in 1932; 76 article 15 of the draft prepared by the Harvard Law School in 1961, 77 para-
reduce the number of cases in which international re-

that a means of avoiding such situations might be to

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sponsibility might be attributed to them. In the view of the

Commission, however, these reasons are no longer valid. It had then occurred to those States

treated on an equal footing by other States and were con-

posed the principle because they thought they were not

had in the past opposed the application of the principle

for the claimant State to prove that the organ of the

would not acting on superior orders or that, although officially

exceeded the formal limits of their competence according to

municipal law or contravene the provisions of that law

of administrative ordinances or internal instructions

issued by their superiors, they are nevertheless acting, even though improperly, within the scope of the discharge

di their functions. The State cannot take refuge behind

the notion that, according to the provisions of its legal

system, those actions or omissions ought not to have

occurred or ought to have taken a different form. They

have nevertheless occurred and the State is therefore

obliged to assume responsibility for them and to bear the

consequences provided for in international law.

(17) In the opinion of the Commission there is no need to

reopen the discussion on the basic criterion which has

been affirmed in diplomatic practice and in the decisions

of international tribunals in this century, i.e. the criterion

of the attribution to the State, as a subject of international

law, of the acts and omissions of its organs which have

acted in that capacity, even when they have contravened

the provisions of municipal law concerning their activity.

This criterion is based on the need for clarity and security

in international relations which seems to be the dominant

theme in modern international life. In international law,

the State must recognize that it acts whenever persons or

groups of persons whom it has instructed to act in its name

in a given area of activity appear to be acting effectively

in its name. Even when in so doing those persons or groups

exceed the formal limits of their competence according to

municipal law or contravene the provisions of that law

or of administrative ordinances or internal instructions

issued by their superiors, they are nevertheless acting, even though improperly, within the scope of the discharge

of their functions. The State cannot take refuge behind

the notion that, according to the provisions of its legal

system, those actions or omissions ought not to have

occurred or ought to have taken a different form. They

have nevertheless occurred and the State is therefore

obliged to assume responsibility for them and to bear the

consequences provided for in international law.

(18) In the opinion of the Commission, there is another

important reason why the principle in question must be

accepted. If the opposite principle were accepted, the

principle that only conduct of its organs which is in con-

formity with the provisions of its municipal law is to be

attributed to the State, that would make it all too easy for

the State to evade its international responsibility.

It would often be very difficult, if not almost impossible, for

the claimant State to prove that the organ of the defendent

State had not contravened the municipal law of that State, and particularly to prove that the organ was

not acting on superior orders or that, although officially

disavowed, the conduct was in fact encouraged by the

other organs of the State.

(19) The Commission considered the reasons why States

had in the past opposed the application of the principle

enunciated in the present article. It noted that certain

States, particularly the Latin American States, had op-

posed the principle because they thought they were not

treated on an equal footing by other States and were con-

tinually subjected to interference in their domestic affairs

by foreign powers. It had then occurred to those States

that a means of avoiding such situations might be to

reduce the number of cases in which international re-

sponsibility might be attributed to them. In the view of the

Commission, however, these reasons are no longer valid.

First, the situation as regards relations between States

has changed considerably, while secondly, and especially,

States realized that the way to achieve greater true equality

among States was not to try to reduce the number of cases in which a claim of State responsibility could be success-

fully prosecuted because that would only reduce the num-

ber of cases in which the responsibility of powerful

States could be invoked, at the same time as the number of cases in which the responsibility of weaker States could

be invoked. The better course was to try to change the

"primary" rules which establish the obligations of States,

the breach of which entails international responsibility.

(20) Another reason why, in the past, certain States

opposed the principle enunciated was the fear of being

held responsible under international law whenever an organ

(particularly a subordinate organ) caused injury to an alien in breach only of the municipal law of the State. In the view of the Commission, this fear also is

unfounded. It in no way follows from the principle

enunciated by the Commission that conduct of that kind

constitutes an internationally wrongful act of the State, which

is a source of international responsibility. For

international responsibility to be incurred, it is necessary

for the conduct attributable to the State to constitute a

breach of an international obligation of the State. If only

municipal law is affected, the conduct in question will be

an act of the State, but not an "internationally wrongful"

act of the State. The situation takes on a different aspect

if the injured alien tries to obtain reparation for the

damage he has suffered by having recourse to the means

available to him under the domestic law of the State and

is then faced with, say, a "denial of justice". But it is then

the breach by its judicial organs of the international

obligation to allow aliens access to its courts, rather than

the original injurious conduct of another organ in breach

only of its municipal law, that constitutes the interna-

tionally wrongful act of the State.

(21) Having thus established that there is no longer any

valid reason for not adopting the basic principle in the

matter, the Commission considered the question whether or not any limitations should be placed on that principle.

It noted that, although some writers and draft codifica-

tions supported the principle, they suggested different

ways of restricting the scope of the principle in border-

line cases. Suggestions of this kind are also, but more rarely, to be found in diplomatic correspondence and

international arbitral awards.

(22) Certain authors of learned works or draft codifica-

tions have suggested using for this purpose the notion of

general competence;52 they consider that the conduct of

52 Article 2 of the draft prepared by Karl Strupp in 1927 stated that responsibility of the State was not relieved or avoided by the fact that the organ had "exceeded ... its authority", provided it had "general jurisdiction to undertake the act or action in question". According to article 1 of the draft prepared by A. Roth in 1935, the State was considered responsible for the acts "of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the general scope of their jurisdiction". According to the commentary on article 7, paragraph (a) of the draft prepared by the Harvard Law School in 1929, the formulation used in this clause should be understood as meaning that the State is responsible for an injury to an alien caused
an organ is internationally attributable to the State only if the organ acted within the "general scope of its competence" or within the "general scope of its functions". In the opinion of the Commission such a notion is not only vague, but inaccurate. Either the organ is competent under the legal system to which it belongs, or it is not: there is no such thing as "general" or "genetic" competence, as opposed to "special" or "specific" competence. And it would be even more erroneous to envisage a "general competence" attributed by international law in cases where municipal law denied its existence. A limitation thus formulated should therefore not be accepted.

(23) Other international jurists and other draft codifications have applied the criterion of the use of means derived from function. This criterion has sometimes been mentioned even in positions taken by the Governments and in international arbitral awards. If we applied this criterion, the conduct of the organ which had acted in that capacity, but contrary to the provisions of the municipal law concerning its activity, would be internationally attributable to the State only if the organ had used the means placed at its disposal by the State for the performance of its functions. Application of this criterion could, however, lead to unacceptable conclusions. For instance, the State which would have to assume responsibility for the act of a police officer who, disobeying his instructions, killed an alien placed in his custody by using a weapon provided by the State, would escape responsibility if the same act was committed by the same police officer using a weapon provided by a private individual, or even if the same officer allowed the murder to be committed by a private individual.

(24) Among other endeavours to limit the scope of the principle, several internationalists and draft codifications have adopted the notion of manifest lack of competence or, conversely, to that of apparent competence. It has been seen that these notions have been used both in the

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Note 82 continued.
by one of its higher authorities in so far as that authority acted "within the general scope" of its office or function (see Harvard Law School, Research in International Law (Cambridge, Mass. 1929), pp. 162-163). With regard to the authors of learned works, it may be recalled that Starke (loc. cit., p. 110) speaks of "general competence"; and C. Fenwick (International Law, 3rd ed., rev. and enl., (New York, Appleton-Century-Crofts, 1948), p. 291), of "general scope of authority". Dahm (op. cit., p. 182) mentions the acts of State organs which are contrary to municipal law but which nevertheless fall within the "general sphere of the competence attributed to the organ" or which are objectively related to the functional activities of the organ.

83 The formulation under cover of their status as organs of the State and making use of means placed at their disposal as such organs" was used in the third paragraph of rule I of the resolution adopted by the Institute of International Law in 1927. Article 1, paragraph 4, of the draft prepared by the German International Law Association used the wording: "[the organ] acted beyond its competence". Dahm (op. cit., in p. 253) is somewhat different. According to the Belgian international jurist, State responsibility "is generally acknowledged, at least ... when the injurious act was committed by means of the authority or the physical force that the guilty agent possessed by virtue of his functions" (translation from French). Other international jurists, such as P. Reuter, (loc. cit., p. 68) use the same formulation.

84 The replies of Belgium and Finland to the question put in point V, No. 2 (b) of the request for information prepared by the Preparatory Committee of the 1930 Conference were clearly based on this model. The Belgian reply read as follows: "The State is responsible if an official has used the means at his disposal in his capacity as an organ of the State." (League of Nations, Bases of Discussion ... (op. cit.), pp. 75-76.)

85 In the decision relating to the Caire case, referred to above in paragraph 4, it was indicated that the action of two officers who were incompetent according to the municipal law had involved the responsibility of the State because they had "acted under cover of their status as officers and used means placed at their disposal on account of that status". It was added that "... in order for this responsibility of the State for acts of its officials or organs committed outside the limits of their competence to be acknowledged, the officials or organs concerned must have acted, apparently at least, as competent officials or organs or else, when acting, have used authority or means pertaining to their official status".

86 It should be noted that, in some of the positions of Governments referred to in the foot-notes above, it is not clear whether the use of means derived from function is intended to establish a distinction between conducts of organs of the State in their capacity as organs or whether it is intended to distinguish the conduct of organs in the performance of their functions as organs from their conduct in a purely private capacity, quite unconnected with their association with the machinery of the State. In the opinion of the Commission, any case, the notion of the use of means derived from function cannot be used even for this second purpose. On the one hand, the use of means derived from function is certainly an indication, but it is not a sufficient indication, because the organ acted in its official capacity. Take the case of a police officer who, while off duty and after a personal altercation with an alien, kills the alien with the weapon supplied to him. The act is still a private act of the police officer. On the other hand, the fact that the organ did not use means derived from function does not constitute sufficient proof that the organ acted in the capacity of a mere private individual. If an organ fails to perform an action which it was required to perform (say, for example, it omits to protect the life of a foreign Head of State on an official visit to the country), it is obviously not using means derived from function, but its passive conduct is nevertheless related to its official activity.

87 As has been pointed out, the first paragraph of article VIII, approved at first reading by the Third Committee of the Hague Conference, laid down the principle of the responsibility of the State for acts performed by officials acting outside their competence, but "under cover of their official character". The second paragraph went: "International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage" (Yearbook ... 1956, vol. II, p. 225, document A/CN.4/96, annex 3). A text based on similar criteria was inserted by Garcia Amador in article 12, paragraph 4, of his revised draft of 1961, and by Gräfth and Steigner in article 3 of their draft. Formulations which are in part similar are to be found in the works of several writers. See, among others, Guggenheim (op. cit., p. 6), Jiménez de Arechaga (loc. cit., p. 350), Ténédikides (loc. cit., p. 877).

88 Strisower (loc. cit., p. 461) insists that the organ must have acted "in a manner at least apparently related to its functions"; Freeman says that the State is responsible when the organ has acted "under the apparent authority of his position" (loc. cit., p. 290); according to Greig(op. cit., p. 435), the State is not responsible unless the acts of organs are "within the apparent scope of their authority"; Furgler (op. cit., p. 26) is of the view that the State is responsible for acts committed by organs when their law had involved the responsibility of the State because they had acted under cover of their status as officers and used means placed at their disposal on account of that status. It was added that "... in order for this responsibility of the State for acts of its officials or organs committed outside the limits of their competence to be acknowledged, the officials or organs concerned must have acted, apparently at least, as competent officials or organs or else, when acting, have used authority or means pertaining to their official status".
practice of States and in international jurisprudence. The logical conclusion of the application of these notions is that the conduct of an organ acting within the scope of its function, but in breach of the provisions of municipal law, is not attributable to the State where the breach is "manifest" or, conversely, that the conduct is attributable to the State provided it is not manifest that the organ has contravened those provisions.

(25) In justification of this conclusion it has been argued that if the lack of competence of the organ was manifest at the time when the organ acted, the injured party could and should have been aware of it and, in consequence, been able to prevent the illicit act from taking place. The situation is very similar to the one provided for in article 46 of the Vienna Convention on the Law of Treaties, which lays down that the manifestation of the will of an organ of the State expressing the State's consent to be bound by a treaty may not be attributed to the State if it is manifest that this consent was expressed in violation of the provisions of its internal law concerning the competence of the organ. However, in the view of the Commission, the exception cannot be transferred just as it stands from attribution to the State of a declaration of will to attribution to the State of action liable to be the source of international responsibility. At the time of the conclusion of a treaty, if one party realizes that the organ of the other party is not competent to express the State's consent, it can always protect itself by refusing to agree to the conclusion of the treaty in such conditions. On the other hand, in the majority of cases at least, the fact of knowing that the organ engaging in unlawful conduct is either exceeding its competence, or contravening its instructions, will not enable the victim of such conduct to escape its harmful consequences.

We are, then, faced with a dilemma. Either we simply include the limitation ruling out attribution to the State of the conduct of organs acting in situations "manifestly" outside their competence, in which case we run the unpardonable risk of presenting the State with an easy loophole in particularly serious cases where its international responsibility ought to be affirmed; or we formulate the limitation in question in the way proposed by several writers, who maintain that conduct of an organ acting outside its competence should not be attributable to the State if the organ's lack of competence was so manifest that the injured party ought to have been aware of it and could, ipso facto, have avoided the injury. But then we finish up by reducing the applicability of the limitation to such a small number of cases that, in the end, it would only weaken unnecessarily the force of the basic rule which it is essential to confirm in the most positive fashion. In conclusion, the Commission is of the opinion that, however worded, the limitation to exclude from qualification as acts of the State the actions of organs in situations of "manifest" lack of competence has no place in the rule defined in the present article.

(26) On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connexion whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. The Commission first considered this question when it was preparing article 5 of the draft. As is mentioned in paragraphs 8 and 9 of the commentary to that article, State practice, international jurisprudence and theory are unanimous on that point. The cases which have just been considered confirm this rule. It is no doubt true that it is not always easy to establish in a specific case whether the person acted as an organ or as an individual. But the fact that difficulties are sometimes encountered in the application of the rule does not mean that it is not well-founded. That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for "all acts committed by persons forming part of its armed forces" in violation of the Regulations annexed to the Convention, whether they acted as organs or as individuals. But in the absence of treaty provisions of this nature, States cannot be held responsible for such conduct. Some members of the Commission questioned whether it might not be desirable none the less to provide for the attribution to the State of the conduct of individuals having the status of organs, acting in a private capacity, in cases where they use means supplied to them by the State for the performance of their official duties, including certain means of coercion. The Commission, however, considered that even in these cases the conduct in question is not attributable to the State. If a policeman off duty uses the weapon supplied to him by the State for the purpose of killing an alien of whom he is jealous, that is not sufficient, in the eyes of the Commission, to justify

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90 The notes from Secretaries of State Bayard and Adee dated, respectively, 17 August 1885 and 14 August 1900 (see para. 6 above) referred to the notion of appearance which constituted the basis of the question put in point V, No. 2 (c), of the request for information addressed to Governments by the Preparatory Committee of the Hague Conference, and for the replies of some Governments (League of Nations, Bases of Discussion . . . (op. cit.), p. 78 et seq.). As regards international jurisprudence, it may be recalled that in the award in the Cairo case (see para. 14 above), it is stated that in order for the responsibility of the State for acts of its organs committed outside the limits of their competence to be acknowledged, "they must have acted, apparently at least, as competent . . . organs".


92 To give one example only, it would have been of no help to Mr. Youmans and the other American nationals killed at Angangueo by Mexican soldiers (see para. 14 above) to have known that the latter were acting in violation of their orders.

93 Say, for example, a head of State started a war of aggression, and in so doing "manifestly" violated provisions of the municipal law concerning his functions, it would be absurd not to consider such an action as an act of the State and, as such, a source of international responsibility.

94 See, in particular, article VIII, para. 2, of the draft adopted at first reading by the Third Committee of the 1930 Hague Conference; article 12, para. 4, of F.V. García Amador's revised draft; the studies of T. Meron (op. cit., p. 113) and of J.F. Quéneudec (op. cit., p. 120).

95 See in this connexion point (10) of the commentary on article 5 of the draft.

attributing such action to the State under international law. That does not mean, of course, that the State cannot, in certain circumstances, incur international responsibility in situations of this kind; but then the responsibility must be incurred through the act of organs other than the organ which committed the wrongful act. In other words, the conduct of organs acting in a purely personal capacity is entirely assimilable to the conduct of private persons, which is dealt with in article 11 of the draft.

(27) With regard to the drafting of the rule, the Commission considered that the conduct of State organs (referred to in article 5 of the draft) and the conduct of organs of territorial governmental entities or other entities empowered to exercise elements of the governmental authority (referred to in article 7) should be dealt with together. These latter organs may also act in a manner inconsistent with the instructions concerning their activities or engage in activities which do not fall within their competence. In many federal States, for instance, the police are organs of the member States; if, contrary to their instructions, they do not protect the offices of a foreign consulate effectively, all that can be done is to apply the same rule as would be applied if the guilty organ were an organ of the federal State. And the same rule can only be applied if the police were organs not of a territorial governmental entity but of another entity empowered to exercise elements of the governmental authority, for example, a railway company to which certain police powers have been entrusted. If one of these company officials, in carrying out his duties, searches the luggage of a foreign diplomat, this act will be attributable to the State even though the official, in so doing, was acting contrary to his instructions.

(28) The expression "even if, in the particular case, the organ exceeded its competence under internal law or contravened instructions concerning its activity" was preferred to other more general expressions (for instance "even if ... the organ acted inconsistently with the provisions of internal law concerning its activity"), because it covers the most frequent and typical cases of violation of the provisions of internal law concerning the organ’s activity. In speaking of an organ which has exceeded its competence, the intention is to refer particularly to the case of an organ which acts in the performance of duties other than those which were entrusted to it. In speaking of an organ which has contravened instructions concerning its activity, the intention is to refer to the case of an organ which, while acting in the performance of the functions which it was empowered to carry out, acts in a manner inconsistent with the instructions, whether general or specific, which had been given to it. It is true that there may be other less frequent cases of violation of the provisions of internal law concerning the activity of the organ: when, for instance, the organ contravenes general rules relating to public administration, which cannot be described strictly speaking as instructions. But no inference can be drawn from this fact. Article 10, in fact, only confirms, even with regard to the cases which have been most discussed, the principle of the attribution to the State of all the conduct of organs acting in that capacity. No exception to this principle can therefore be admitted.

(29) Lastly, the expression "such organ having acted in that capacity" has been introduced to indicate that the conduct referred to comprises only the actions and omissions of organs in carrying out their official functions and not the actions and omissions of individuals having the status of organs in their private life. Some members of the Commission wondered whether it might not be desirable to state explicitly that the last type of conduct was not attributable to the State under international law. The majority of the members of the Commission were, however, of the opinion that such a clarification was unnecessary. The non-attribution of such conduct to the State follows clearly from the fact that articles 5, 7 and 10 only attribute to the State the conduct of organs acting in that capacity. The proposed clarification would therefore only be an unnecessary repetition.

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.

Commentary

(1) In the preceding articles of this chapter (articles 5 to 10), a positive presentation has been given of the conduct which is to be considered as acts of the State under international law. The present article confirms the rules laid down in the preceding articles by making the negative statement that certain kinds of conduct which have not been mentioned in the articles in question are not to be considered as acts of the State under international law.

(2) The conduct referred to in the present article, which excludes the attribution of that conduct to the State, consists primarily of the actions of private natural or legal persons in so far as—and this is most often the case—such persons are not acting on the State’s behalf either de jure or de facto. It was indicated in article 7, paragraph 2, that the State could by law entrust the exercise of elements of the governmental authority to legal persons even where these were private persons. Where a private legal person has been empowered to exercise such authority and is acting in the exercise of that authority, his conduct will therefore be attributable to the State. It was further indicated in article 8 that the organs of the State (or of one of the entities referred to in article 7) could as an exceptional measure instruct private natural or legal persons to perform certain activities on behalf of the State, without formally conferring on such persons the status of organs of the State or organs of one of the entities referred to in article 7. Private natural or legal persons may also, in exceptional circumstances, be in the position of having to assume the exercise of certain elements of the governmental authority of their own accord. In those cases also, therefore, the conduct of private persons will be attributable to the State. In all other cases, however—in short,
in all cases not expressly provided for in articles 7 and 8—the acts of private natural and legal persons come under the present article, which provides that they cannot be considered as acts of the State. The acts of legal persons which cannot be classified as private legal persons under the State's internal law (for example “parastatal” or quasi-public legal persons and also other entities which are public but which have not been empowered to exercise elements of the governmental authority, or which have been so empowered only in a sector of activity other than that in which they have acted) also fall within the category of acts covered by the present article. Lastly, the acts covered by the present article must also be taken to include the acts of natural persons who have the status of organs of the State or organs of one of the entities referred to in article 7 (or organs of a foreign State, an international organization or an insurrectional movement) but who, in the case in point, act in their capacity as private individuals, i.e. perform acts which relate to their private life and have no connexion with the machinery of the State.

(3) The acts of private persons or of persons acting, in the case under consideration, in a private capacity are in no circumstances attributable to the State. It is irrelevant for this purpose whether there is, between the person acting and the State, a link other than those referred to in articles 7 and 8: for example, if the person has the nationality of the State in question or has acted on the territory of that State. It is also irrelevant whether the person acts alone or in a group, in a normal situation or on the occasion of popular unrest, demonstrations, riots or disturbances in general, in time of peace or of war, etc. It is also irrelevant whether his acts cause damage to a foreign State or to its organs or nationals.

(4) The strictly negative conclusion reached regarding the attribution to the State of the acts of private natural and legal persons and of the other persons mentioned above in paragraph 2 of the present commentary does not imply, however, that the State cannot incur international responsibility for such acts on other grounds. Hence, the purpose of article 11, paragraph 2, is to make it clear that all the items of conduct which are covered by the provisions of articles 5 to 10 of the draft and which have been adopted in relation to the acts of private persons are to be considered as acts of the State under international law. That applies, of course, where the very fact that these acts could take place makes it clear that in the circumstances there has been a breach of an international obligation on the part of organs of the State or organs of another entity exercising elements of the governmental authority. It is not, of course, within the ambit of the present draft to determine the content and scope of the international obligations of States which may be breached by acts or, more often, omissions on the part of organs of the State in relation to the acts of individuals. It is enough to point out that such obligations exist. For example there is no doubt that, to an extent which varies from case to case, the State must afford protection to foreign States, their official representatives and their ordinary nationals against any attack by individuals. If, in a particular situation, the State or the entities mentioned in article 7 failed to take adequate protective measures and an attack by individuals took place, there would be an act of the State related to the acts of individuals—an act of the State constituting a breach of an international obligation of that State. The same would be true if an individual made an attack and the organs of the State failed, for example, to discharge an international obligation to punish or extradite that individual. Again, the possibility cannot be ruled out that, in a given situation, organs of the State may be found to have taken a complaisant attitude to the individual’s action and shown a kind of complicity with it; the very fact of that complaisance or complicity might then represent the breach of an international obligation of the State.

In conclusion, the purpose of paragraph 2 of the present article is to make it clear that the State can sometimes incur an international responsibility on the occasion of acts of a private person or of persons referred to in paragraph 1 of the present article, but to specify at the same time that this responsibility derives, not from some kind of endorsement by the State of the acts of individuals, but from separate conduct attributable to the State under articles 5 to 10 of the draft—conduct which is merely related to the acts in question. The acts of private persons or of persons acting in a private capacity then constitute—and it is important to emphasize this—an external event which serves as a catalyst for the wrongfulness of the State’s conduct.

(5) The rule whose content has just been explored was established by the Commission on the basis of data furnished by State practice and international judicial decisions. The point of departure for its analysis was the discovery that a State has often been held internationally responsible on the occasion of acts or omissions whose material perpetrator was a private natural or legal person who, on that occasion, was not acting on the State’s behalf. The Commission therefore investigated whether the explanation for that responsibility lay in the fact that, for the purposes of international law, the acts of private persons not acting on the State’s behalf (for example, any person on its territory or possessing its nationality) would also be attributed to the State as an element constituting an internationally wrongful act of the State, or whether that responsibility had some other basis.

(6) In the opinion of the Commission it would not really be impossible, from a strictly theoretical point of view, to hold that even the conduct of private persons not acting on the State’s behalf constituted “acts of the State” under international law. Such a conclusion, however, would only be acceptable on one specific condition. The study of what happens in the practice of international relations would have to establish beyond doubt: (a) that, in the cases under consideration, the State as a subject of international law was held responsible for the act of a private person acting as such and, consequently, (b) that any international responsibility incurred by the State was the result of a breach of an international obligation caused by that same act.96 If that were the case, it would

96 Let us imagine, for example, that an individual has managed to enter the premises of a foreign embassy and has destroyed objects or purloined documents. In order to be able to conclude that the individual’s act should be attributed to the State as a source of responsibility, it would have to be established that, in the case in question, the State had been specifically accused of having breached, by its own action, the obligation to respect the inviolability of the embassy premises and archives.
only be necessary to take note of that finding and to draw the inferences, however surprising they might appear.97

(7) However, the study of international practice might show that the acts of private persons acting as such were never taken into account in determining the international responsibility of the State unless they were accompanied by certain actions or omissions on the part of organs of the State. This should not automatically rule out the idea that the person's action could be attributed to the State. It might be thought that it could be so attributed, but only in cases where it was specifically characterized by a measure of participation or complicity on the part of State organs.98 It is important to keep in mind, however, that this conclusion would always include the idea that the State endorsed the act of the private person as such, in cases where certain State organs had in some way connived at that act. The action of the private person would be at the heart of the internationally wrongful conduct of the State, and the State would breach an international obligation through the action of that person, in which certain organs would merely be accomplices. The condition laid down in the preceding paragraph for attributing the individual's action to the State would thus remain unchanged: the examination of specific cases would always have to lead to the same conclusion, namely that the internationally wrongful act with which the State was charged was the breach of an international obligation perpetrated through the action of the private person concerned and not, for example, some other delinquency committed by someone else.

(8) On the other hand, if the situations examined indicated that, in fact, the State had been accused of a breach of international obligations, other than that which could have been breached by the action of the private person, a different conclusion would have to be drawn. The condition required for acknowledging attribution of the act of the private person to the State would be manifestly lacking. It would no longer be a question of maintaining that the State had committed the breach of an international obligation complained of through the action of that person, which the State has endorsed. Nor could there be any question of describing the organs which had committed actions or omissions on that occasion as "accomplices" in the breach of an international obligation brought about by the action of the person concerned, even if the person and his conduct had been treated with leniency. On the contrary, it would have to be concluded that, if there was a breach of an international obligation, it was committed directly and solely by those same organs of the State, and that the "act of the State" which might incur international responsibility could only have been the action or omission of those organs.99 The act of the private person would merely be an external event distinct from the act of the State, this latter act having simply been committed in relation to that event.100

(9) Hence the determining criterion, in establishing whether the conduct attributed to the State as a source of international responsibility is the conduct of the private person or that of an organ, is the nature of the delinquency of which the State is held to be guilty under international law. On the other hand, the amount of reparation which, in a given situation, is requested by the claimant State or fixed by an international tribunal will not, in the opinion of the Commission, provide any clarification of the problem before us. In the Commission's view, writers have erred in allowing themselves to be influenced by the fact that, in certain cases, the amount of the reparation that the State has had to pay has been calculated on the basis of the damage actually caused by the action of the private person, and in concluding from this that the State, in the situation envisaged, would be answerable, not for the act of its organs, but for the act of the private person. The findings of these writers in no way support such an inference. If, in the consideration of a particular case, it was concluded, on the basis of the elements indicated in the previous paragraphs, that the act attributed to the State as the source of international responsibility was not the action committed by the private person but the conduct of the organ, there would be no reason to call this conclusion

97 It would be useless to object, as writers have often done, that only States are subjects of international law and that therefore only States can breach the obligations imposed by that law. That would be merely begging the question; furthermore the cases referred to here are not cases of alleged international responsibility of individuals, but cases of international responsibility of the State. Since the action of the private individual would be attributed to the State, it would be the State, acting through the individual, which breached an international obligation.

98 The participation or complicity would of course have to be genuine. It would be otherwise if the term "complicity" was used wholly incorrectly, as is sometimes the case, and was no more than a euphemism for something else. For example, it is obvious that a court machinery of the State. This is therefore a totally different field from that of actions committed by certain individuals at the instigation and on behalf of the State, which are dealt with in article 8, subparagraph (c), of the draft.

99 Let us return to the example of the individual who succeeds in entering the premises of a foreign embassy and causing damage or committing burglary. There is no doubt that if the offender was, for example, a police officer acting in his official capacity, the act would have been specifically accused of having breached its obligations to respect the inviolability of the embassy premises and archives. If it was established that, where the offender was a private individual, the State was not accused of having violated the inviolability of the embassy but of having breached a totally different obligation—namely to ensure, with due diligence, that such crimes do not occur—the inferences from that finding would have to be coherently drawn. The State would be held responsible, not for the action of the individual, but for the omission committed in connexion with that action by the organs responsible for surveillance.

100 This does not mean that such an event would not affect the determination of the State's responsibility. On the contrary, as has been noted above, it could be a condition for the existence of such responsibility by acting from outside as a catalyst for the wrongfulness of the conduct of the State organs in the case under consideration. For example, if the international obligation of the State consists of seeing to it that foreign States or their nationals are not attacked by private persons, a breach of that obligation occurs only if an attack is actually committed. But it would not, in any case, constitute a condition for attributing to the State the conduct of its organs; there would be no doubt about such attribution even without the external event. What would depend on the external event in question would be the possibility of considering the act of the State, in the case in point, as constituting a completed breach of an international obligation, and hence as being a source of international responsibility.
sion into question at a later stage. There is no reason why a State which, through its organs, has failed, for example, in its obligation to provide the representative of a foreign State with effective protection should not be called upon to discharge its responsibility by paying an indemnity commensurate with the damage caused to that representative by the private person. It has already been pointed out that the action of the private person, even if it were regarded merely as an external event in relation to the act for which the State assumed responsibility, could constitute a necessary condition for proving, in a specific case, the wrongfulness of the conduct of the State organs and for incurring the State’s responsibility. It would therefore be normal for the injurious consequences resulting from that action to constitute, at the very least in certain cases, a criterion for determining the amount of the reparation owed by the State for the delinquency committed on that occasion by its organs.

(10) The idea that the answer to the question of attribution or non-attribution of the conduct of private persons to the State depends on the criteria which would be used to determine the amount of reparation owed by the State is linked to the idea, which the Commission rejected on examining article 3 of the draft, that one of the conditions for the existence of an internationally wrongful act of the State is the existence of “damage” caused by the breach of the obligation. It is understandable that those who hold that damage to be one of the constituent elements of an internationally wrongful act should identify the responsibility deriving from such an act with the obligation to make reparation for such damage. It is also understandable that they should find it difficult to agree that the amount of the reparation claimed from a State which is only held responsible for having failed to prevent or, more particularly, to punish the action of the individual should be calculated on the basis of the “...image” caused by the action of the private person rather than that resulting from the failure on the part of the State. In the Commission’s opinion, however, the damage, and especially the financial damage, should be seen not as an element of the internationally wrongful act but as a material effect of that act, and one which is not automatic, especially in so far as it is an effect measurable in terms of financial loss. When the responsibility resulting from an internationally wrongful act entails an obligation to make reparation, the State incurring the responsibility must make reparation for the breach of its own international obligations, that is, for the disturbance which it has caused in international legal relations. However, the amount of reparation is not necessarily determined solely by the economic consequences of the breach itself. It is perfectly understandable that in certain cases, when the breach has in fact caused damage, the extent of the damage may be taken into account on fixing the amount of the reparation. But this does not mean that the amount of the reparation must necessarily be tied to the assessment of the financial damage resulting from the delinquency. In some cases it may indeed be pointless to seek to determine how much financial “damage” the State has caused through the breach committed by its organs, for example in a case where a State has not punished, or has punished inadequately, the person who caused damage to an alien. In many cases this will not provide a firm basis for determining the amount of reparation due for a delinquency committed by the State. Even if the financial harm actually caused is to be used as a yardstick and taken into account in determining the amount of reparation for the breach in question, such harm will not necessarily be that caused by the conduct adopted by the State organs on that occasion. As already indicated, it is not unusual for a State, if it has failed in its duty to protect the nationals of another State against the acts of private persons, to be required to make good its breach by paying an indemnity calculated on the basis of the financial loss actually incurred by those foreign nationals as a result of the action committed in its territory by a private individual. In many cases this would be more logical than taking as a yardstick the damage caused by the State organs themselves, which is difficult to assess. But, in conclusion, let us repeat that the adoption of this solution in no way compels us to infer that, in this particular case, the State has endorsed the action of the individual.

(11) Two additional points: firstly, the responsibility of the State on the occasion of acts committed by private persons can in no case be described as an “indirect” or “vicarious” responsibility. In any legal system, the responsibility defined as “indirect” or “vicarious” is the responsibility which a subject of that juridical order incurs for the wrongful act of another subject of the same juridical order. This anomalous form of responsibility entails separating the subject that commits an internationally wrongful act from the subject that bears the responsibility for that act. However, in cases where the State is held internationally responsible on the occasion of actions of private persons, those persons cannot be regarded as separate subjects of international law. The conditions for indirect responsibility are therefore entirely lacking.

(12) The second point is that, if it were to be established in certain situations, particularly in the event of public disturbances, the State was answerable in all cases for acts detrimental to foreign States or their nationals, irrespective of whether such acts, committed either by private persons or by organs, were attributable to the State or not, something entirely foreign to the sphere of responsibility for internationally wrongful acts would be involved, something which would no longer bear any relationship to the determination of the conditions for the existence of an act of the State at the international level. What would be involved would be a guarantee given by the State at the international level against the danger of actions committed in its territory, under certain conditions, by private persons.

(13) Bearing in mind the foregoing considerations of principle, the Commission proceeded to study some specific cases which have actually occurred in international relations, and began by examining the decisions of arbitration bodies. In this connexion the Commission noted that, in the last century, the principle was already being advanced that the conduct of a private person could never, by itself, justify holding the State responsible in international law. For such responsibility to be incurred, that conduct must in every case be accompanied by
wrongful conduct on the part of organs of the State.\textsuperscript{101} That having been said, it should be recognized that some of these decisions seem to support the argument for attributing the State, as a source of responsibility, the act of the individual himself, characterized by the approval or sanction of the State.\textsuperscript{102}

(14) On the other hand, the principle that the act of an individual cannot be attributed to the State as a source of the State’s responsibility is clearly proclaimed in the awards rendered at the beginning of the twentieth century (on 30 September 1901, to be precise) by the arbitrator Ramiro Gil de Urribarri who, under the Italian-Peruvian Convention of 25 November 1899, was entrusted with the task of ruling on the claims of Italian nationals residing in Peru.\textsuperscript{103} In the complex Poggioli case, which was decided by Umpire Ralston of the Italian-Venezuelan Commission established under the Protocols of 13 February and 7 May 1901, one of the claims considered was concerned with actions of four individuals who, among other things, had attempted to murder one of the Poggioli brothers. In the decision, reference was again made to acts of individuals which had become the acts of the Government because the authorities of the country had not punished those individuals; but at the same time it was affirmed that “some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the Government of Venezuela must be held responsible”.\textsuperscript{104} The wording used in the decision was not very specific, but the award as a whole shows quite clearly that the umpire in no way intended to accept the idea that the actions of individuals could as such be attributed to the State.\textsuperscript{105}

\textsuperscript{101} See for example the award rendered in the Ruden case by the United States-Peru Mixed Commission established under the Convention of 4 December 1868 (Moore, History and Digest ..., op. cit., vol. II, pp. 1654–1655); the awards relating to Glenn’s case rendered by an umpire appointed under the Convention of 4 July 1868 between the United States and Mexico (ibid., vol. III, p. 3138); the award relating to the Cotesworth and Powell case, rendered on 5 November 1872 by the British-Colombian Mixed Commission established under the Convention of 14 December 1872 (ibid., vol. II, p. 2082); and the award relating to the De Brissot and others case, rendered in 1890 by the United States-Venezuelan Claims Commission established by the Convention of 5 December 1885 (ibid., vol. III, p. 2968).

\textsuperscript{102} Thus, in the award relating to the Cotesworth and Powell case, referred to in the preceding foot-note, the Commission indicated that it based the responsibility of Colombia solely on the consequences of the amnesty granted by that country to the guilty parties, thus adhering “to the well-established principle in international policy, that, by pardoning a criminal, a nation assumes responsibility for his past acts”. This statement of position shows the influence of ideas that were still widely held at the time the award was made.

\textsuperscript{103} See, for example, the awards relating to the Capelleti case (United Nations, Reports of International Arbitral Awards, vol. XV (United Nations publication, Sales No. 66.V.3), p. 439) and the Serra case (ibid., p. 410).

\textsuperscript{104} Ibid., vol. X (United Nations publication, Sales No. 60.V.4), p. 689.

\textsuperscript{105} Some apparent uncertainties were probably due quite as much to the complexity of the de facto situation considered as to the persistent influence of certain theories which were still current at the time. It was probably the umpire’s intention to bring out two different aspects of the actions of the local Government. Firstly, he denounced the complicity of the local Government in the acts of the individuals who had committed the crimes. However, in the case in question, it was not a legal fiction to speak of “complicity”; the term was not used merely to stigmatize an attitude adopted ex post facto in failing to mete out appropriate punishment to the perpetrators of a crime. It would even have been justifiable to ask whether, in such circumstances, the local authorities had not gone beyond “complicity” and mere participation in the acts of individuals, and whether those individuals were not in fact government agents, persons acting at the instigation of the Government. The umpire went on to emphasize that one fact at any rate was certain: the local government authorities were guilty of failing either to punish or to attempt to punish the perpetrators of the crimes. The umpires saw in that omission a denial of justice, a delinquency undoubtedly committed by the Government, the indisputable source of the international responsibility of the State.

hesitate to state its opinion: (a) that the act of the individual is attributed to him alone and that the only acts which can be attributed to the State are those of its organs; (b) that the two kinds of acts should be considered at two quite different levels—the first at the level of municipal law and the second alone at the level of international law; and (c) that the notion of complicity inherent in the failure to take punitive action was purely fictitious and in any event could not be used as a basis for reversing the conclusions and attributing to the State responsibility for the acts of the individual. For the purpose of determining the damages payable by Mexico in respect of the omissions attributed to it, the Commission also deemed it necessary to take into account the distinction which it had drawn between the delinquency committed by the individual and the delinquency charged to the State. It emphasized that the two delinquencies were different "in their origin, character and effect". Therefore it believed that the State was bound to remedy its internationally wrongful omission by compensating the foreign nationals injured by that omission. The damage caused by the omission could not, in the Commission's view, be assessed on the basis of the damage caused by the murderer, which was different and inflicted on different individuals. The Commission thus wished to emphasize that, even as far as the amount of reparation was concerned, it was taking into account only the omission of the State organs and not the act of the individual. In other cases and, in particular, the Kennedy case, decided on 6 May 1927, the Venable case, decided on 8 July 1927 and the Canahí case, decided on 15 October 1928, the Mexico-United States General Claims Commission again applied the principles set forth in the Janes case.

(17) After the beginning of the 1930s, there are no further international arbitral decisions of an interest comparable to that of the Janes case. However, it is evident that, after that date, the principle of the non-attribution to the State of the acts of individuals was finally accepted, and it was also accepted that the negative conclusion embodied in that principle was not susceptible of modification by the attitude of the public authorities with regard to such acts. Subsequent arbitral commissions have therefore confined themselves to establishing whether, in a particular situation, the State could be held guilty of a breach of its international obligations to ensure prevention and punishment and to deciding, on the basis of that finding, whether an internationally wrongful act constituted solely by such breach has been committed by the State. Thus, in the decision relating to the case of the Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels during the War, rendered on 9 May 1934 on the basis of the Great Britain-Finland Agreement of 30 September 1932, the arbitrator, referring to the application of the rule of prior exhaustion of local remedies, indicated that the two parties agreed in recognizing that there might be cases where it could be said that a breach of international law resulted from the very acts committed and had consequently existed before any recourse was had to the municipal tribunal. He went on to state that these acts must have been committed by the respondent Government or its officials, since there was no direct responsibility under international law for the acts of private individuals.113

(18) Among arbitral awards relevant to the question under consideration, decisions relating to injuries inflicted upon aliens by individuals in the course of riots, revolts and disturbances in general which the public authorities were unable to prevent or control have often been regarded as a separate category. The principle of the non-attribution to the State, as a source of responsibility of the acts of the individual perpetrators of such injuries is once again brought out clearly in these decisions. The Great Britain-United States Mixed Commission established under the Agreement of 18 August 1910 observed, for example, in its decisions of 18 December 1920 relating to the case of the Home Frontier and Foreign Missionary Society of the United Brethren in Christ, that no Government could be held responsible for the act of rebels committed in violation of its authority “where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection”.114 The fundamental principle of the non-responsibility of the State for damage caused in its territory in connexion with events such as riots, revolts, civil wars or international wars was also reaffirmed by the arbitrator Max Huber in his decision of 1 May 1925 in the British Property in Spanish Morocco case, already mentioned. This decision states that “responsibility for the action or inaction of the public authorities

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107 Ibid., vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 86 et seq.
108 Ibid., p. 89.
109 The United States member of the Commission, Nielsen, dissented from the majority opinion with respect to the criteria to be applied in determining the damages to be paid. He maintained that a State whose authorities had failed to take prompt and effective measures to apprehend and punish the guilty individuals was in fact obliged to make reparation for the damage caused by the acts of such individuals (ibid., pp. 90 et seq.).
110 Ibid., pp. 194 et seq.
111 Ibid., pp. 219 et seq.
112 Ibid., pp. 389 et seq.
113 Ibid., vol. III (United Nations publication, Sales No. 1949.V.2), p. 1051. See, in the same connexion, the Kidd case, decided on 23 April 1931 by the British-Mexican Commission established under the Special Agreement of 19 November 1926 (ibid., vol. V (United Nations publication, Sales No. 1952.V.3), pp. 142 et seq.); the Noyes case, decided on 22 May 1933 by the United States-Panama General Claims Commission established under the Convention of 28 July 1926 (ibid., vol. VI (United Nations publication, Sales No. 1955.V.3), p. 311); and the Denham and Adams cases, decided by the same Commission on 22 May 1933 (ibid., pp. 312 and 313) and 21 June 1933 (ibid., pp. 322 and 323), respectively. Authoritative confirmation of the principle that the State is not necessarily answerable for all wrongful acts perpetrated in its territory may be found in the Judgment rendered by the International Court of Justice on 9 April 1949 in the Corfu Channel case (Merit) (I.C.J. Reports 1949, p. 18).
114 United Nations, Reports of International Arbitral Awards, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 44. See also the award rendered by the United States-Chile Claims Commission established under the Convention of 7 August 1892 in the Loewet case Moore, History and Digest ... (op. cit.), vol. III, pp. 2990 et seq. and the decision relating to the Uphill case rendered by the United States-Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903 (United Nations, Reports of International Arbitral Awards, vol. IX (United Nations publication, Sales No. 1959.V.5), p. 159).
is quite different from responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities".\textsuperscript{115}

(19) With regard to State practice, the positions taken by Governments during the preparatory work for the 1930 Codification Conference and at the Conference itself are particularly significant. All the States which participated in this work recognized that acts of private individuals could never be attributed to the State as a source of international responsibility. They agreed that the State incurred responsibility, in certain circumstances, only for the conduct of its own organs in relation to acts of private individuals which constitute as such a violation of its international obligations, even where the said acts take place in special circumstances such as riots, internal disturbances, etc. or cause injury to aliens enjoying special protection, such as diplomatic agents accredited to the State. This is abundantly clear from the replies of Governments to various points of the request for information addressed to them by the Preparatory Committee for the Conference.\textsuperscript{116} On the basis of the replies received, the Preparatory Committee worked out bases of discussion Nos. 10, 17, 18, 19 and 22 (d), which were unfortunately all concerned with the definition of obligations regarding the treatment of foreigners rather than with the determination of acts attributable to the State as a source of international responsibility. The Conference was unable to consider basis of discussion No. 22 (d), while basis No. 19 was deleted as an unnecessary amplification of basis No. 18. The other three bases were merged into a single text reading as follows:

A state is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.\textsuperscript{117}

(20) The text gave rise to a long debate during which a clear division appeared between two groups of States: some, which in principle were in favour of the proposed text, believed that in certain circumstances States were required to provide foreigners with greater protection than that which they afforded their own nationals; the others, which were opposed to the text under discussion, were not ready to accept anything more than the possibility of requiring that foreigners be given the same treatment as nationals. The traditional quarrel between those who, in the question of the treatment of foreigners, supported the so-called minimum standard thesis and those who supported the principle of equal treatment with nationals thus entered into the discussion; and it became impossible to reach a solution which would command a substantial majority. After certain proposals were rejected, the discussion was resumed on the basis of a new text drafted by the delegations of Greece, Italy, Great Britain, France and the United States of America, which read as follows:

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, make reparation or inflict punishment for the acts causing the damage.\textsuperscript{118}

Even so, this text, which was based on the one adopted by the Institute of International Law at its Lausanne meeting, could not satisfy the proponents of the more restrictive approach to the law relating to foreigners. When it was put to the vote after having been endorsed by the Sub-Committee, there were 21 votes in favour, 17 against and 2 abstentions.\textsuperscript{119} It then became article 10 of the draft adopted by the Conference in first reading, but in view of the result of the vote there was little hope of its being adopted definitively.

(21) In the light of the foregoing, it may be said of the work of the 1930 Codification Conference that, if it had not run into difficulties completely unconnected with the question of responsibility proper, and if the discussion had centred on a text which remained neutral concerning the definition of the scope of the obligations of States with regard to the protection of foreigners, a very positive result on the question of responsibility could easily have been achieved. This is clear from the fact that all the States which finally voted against the Sub-Committee's proposal had previously voted in favour of a proposal by China which differed from the majority proposal only in that it accepted the principle of equal treatment for foreigners and nationals.\textsuperscript{120}

(22) One final point which warrants a brief mention in our consideration of the positions taken by States during the 1930 Conference and the preparatory work concerns the criteria to be applied in determining the amount of reparation due from a State for a breach of its international obligations with regard to the protection of aliens against the acts of individuals. The belief that these criteria should not have any bearing on the solution to the problem of identifying the act which in these circumstances is attributed to the State as a source of international responsibility is confirmed by the position adopted by the majority of States with regard to the question raised by the Preparatory Committee for the Conference in point XIV (d) of its request for information.\textsuperscript{121} It is interesting to note, furthermore, that Governments finally agreed at

\textsuperscript{115} Ibid., vol. II (United Nations publication, Sales No. 1949.V.1), pp. 642 et seq. [translation from French]. The arbitrator Huber was to apply these principles in a special manner in the Ziat, Ben Kiran case (ibid., p. 730).

\textsuperscript{116} These are the replies to point VII (a), concerning failure of a State to fulfil its obligation to protect foreigners from injury by private individuals; point VII (b), regarding failure of a State to fulfil its obligation to punish individuals causing injury to foreigners; point VII (c), concerning acts of individuals directed against foreigners as such; point IX (d), relating to damage caused by persons engaged in insurrections or riots, or through mob violence where the movement is directed against foreigners as such or against persons of a particular nationality; and point V, 1 (c) relating to damage caused by individuals to foreigners invested with "a public character recognized by the State" (League of Nations, Bases of discussion ... (op. cit.), pp. 62 et seq., 93 et seq., 119 et seq.) and Supplement to Volume III (op. cit.), pp. 2, 3, 13, 14, 18, 19 and 21.

\textsuperscript{117} League of Nations, Acts of the Conference ... (op. cit.), p. 143.

\textsuperscript{118} Ibid., p. 175.

\textsuperscript{119} Ibid., p. 190.

\textsuperscript{120} Ibid., p. 185.

\textsuperscript{121} League of Nations, Bases of discussion ... (op. cit.), pp. 146 et seq. and League of Nations, Supplement to Volume III (op. cit.), p. 26.
the Conference to adopt a formula for reparation, which, while not the more precise one which the Preparatory Committee had proposed in basis of discussion No. 29, still does not seem to lend itself to an interpretation that would make it possible to take into account, in assessing the amount of reparation, damage other than that incurred in the circumstances under consideration by internationally wrongful omission on the part of State organs.

(23) The positions taken by Governments in specific situations are also significant. First we shall consider some situations in which injury has been caused by private individuals to private individual aliens. Then we shall consider some special situations, such as injurious acts committed against individual aliens in the course of popular uprisings, demonstrations, riots and disturbances in general. Finally, we shall review the situation in which the victims of attacks are not just private individuals but persons entitled to special protection, such as representatives of foreign States, or even foreign States themselves, in the case of attacks by individuals on their security.

(24) With regard to the first category of situations, the practice of the United States is one of the best known. On various occasions, the United States Government has expressed the opinion that a State can only incur international responsibility in connexion with the acts of individuals if it has failed to fulfil its international obligations to provide protection. An example of this practice is the position taken by the American-Mexican Claims Commission, established by the Mexican Claims Act of 1942, in relation to the Texas Cattle claims and the Dexter claims, and the opinions given by Assistant Legal Advisers of the State Department on 28 May 1952 and 17 July 1957 respectively. In instructions sent by the State Department to the United States Embassies in San Salvador in 1959, refusing to support a claim of a United States national against El Salvador, it was stated that the policy of the United States Government had long been "based upon the generally accepted principle of international law that a State cannot be held liable to another State without an injury being caused by the respondent State to the claimant State."

The same principles have been upheld by other Governments—see, for instance, a note by the German Government communicated to the Secretary-General of the League of Nations concerning the acts of German nationals who had abducted three Saar nationals in Saar territory and taken them to Germany to have them arrested; and the reply given on 11 July 1962 by the United Kingdom Minister of State to a question in Parliament about the Diboku case, concerning a citizen of the British Protectorate of Bechuanaland who had been maltreated by his employer in South Africa.

(25) With regard to acts causing injury to aliens committed during riots, popular demonstrations or other disturbances, international practice contains many examples of Government statements of position. Not to go too far back, we may start with the positions taken by the Governments of the United States and Italy in the CUTTER CASE. During a popular demonstration at Florence in October 1925, a crowd attacked the building where the office of a United States national named Cutter was located and destroyed the office furniture. From their statements of position it is clear that the two Governments agreed in substance to acknowledge that only actions or omissions on the part of the official authorities of the State could be attributed to the latter as internationally wrongful acts involving its international responsibility. Neither Government endeavoured to attribute the individual's act to the State. The difference between the two Governments concerned the criteria to be applied in determining the amount of reparation to be paid in the event of an internationally wrongful omission on the part of the authorities being established.

(26) During the 1930s and the 1950s, the impossibility of attributing to the State acts committed by individuals during public disturbances or mob demonstrations is twice recognized in the instructions given by the State Department to its embassies on the subject of injuries sustained by United States nationals in Cuba in 1933 and in Libya in 1956. In both cases, the State Department refused to support the claims of the United States nationals, on the principle that in such cases State responsibility can arise only as a result of negligence by the government authorities in failing to prevent or punish the injurious acts. Again, the reply by the French Secretary of State for Foreign Affairs to a parliamentary question concerning the assassination of certain French nationals in

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122 Paragraph 3 of basis of discussion No. 29 was worded as follows:

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures. (League of Nations, Bases of discussion ... (op. cit.), p. 152.)

123 The text which the Sub-Committee that considered basis No. 29 submitted to the Third Committee and which, after having been adopted by the latter by 32 votes in favour and undergoing some stylistic changes, became article 3 of the draft approved in first reading by the Conference, mentioned reparation for damage sustained only in so far as it results from failure to comply with an international obligation (League of Nations, Acts of the Conference ... (op. cit.), p. 130).

124 A domestic United States agency established to consider the claims of United States nationals in respect of which Mexico had paid a lump sum.

125 Whitman, op. cit., pp. 752-753.

126 Ibid., pp. 755-756.

127 Ibid., p. 757.

128 Ibid., p. 738.

129 Ibid., p. 816.

130 League of Nations, Official Journal, 14th year, No. 8 (August 1933), p. 1050.


132 Ibid., p. 658.

133 Whitman, op. cit., pp. 831-832. The fact that three years later the State Department submitted to the Iraqi Government a request for compensation for the families of three United States nationals who were killed at Baghdad in 1958, in a mob attack, should not be interpreted as a negation of the principles stated above. It would seem that the request was made on grounds of equity and humanity rather than of law. In any case, that was how it was interpreted by the Iraqi Government (ibid., pp. 832-833).
Morocco contains one of the most categorical expressions of the opinion of a Government on this question. It states:

On each occasion, we have emphasized the responsibility of the Government, not so much because of any direct complicity on its part as because of the elementary duty of any independent Government to maintain order in its territory.\(^{138}\)

Lastly, during a debate in the British Parliament on the subject of the injury caused to British subjects following disturbances in Indonesia, the Foreign Secretary was asked whether the Government was bearing in mind its negotiations with Indonesia the fact that the Indonesian authorities had appeared passively to condone the actions of the mob. Replying in the affirmative, the Foreign Secretary explained that it was precisely because of that fact that the British Government was negotiating in order to make the Indonesian Government admit its responsibility.\(^{136}\)

(27) Special consideration must be given to cases in which acts of individuals were directed against aliens invested by their State with representative status, for whom that State was therefore entitled to demand special protection.\(^{137}\) It is a question whether such cases should not constitute an exception to the general rule which clearly emerges from State practice as well as from arbitration cases, so that the State on whose territory the injurious acts of individuals have been committed shall be held responsible, for those acts, irrespective of the conduct of its organs as regards the fulfilment of the obligation to provide extra protection which lies on the organs of the State with regard to official representatives of foreign States.

(28) Let us consider first an international incident which is of interest because of the positions and the discussions to which it gave rise in the Council of the League of Nations and other international bodies—the Janina or murder of the Italian members of the Tellini mission incident. On 27 August 1923, General Tellini, the Chairman of the international commission entrusted by the Conference of Ambassadors with the task of delimiting the Greek-Albanian frontier, and the members of the Italian delegation in the commission, were assassinated by unknown persons near Janina, in Greek territory. On 29 August, the Italian Government sent the Greek Government a note which presented a series of demands, ranging from punishment of the culprits to various forms of reparation for the moral and material injury caused to Italy.\(^{138}\) The Greek Government replied the next day, denying its responsibility for what had happened and stating that it was prepared to accept only some of the demands of the Rome Government, including the demand concerning the payment of compensation to the families of the victims.\(^{139}\) Italy then proceeded to occupy Corfu, as a pledge for Greece’s performance of its obligations, whereupon Greece referred the dispute to the Council of the League of Nations on 1 September.\(^{140}\) At that stage, the attitude of the Italian Government seemed to indicate that, in view of the nature of the crime and the identity of the victims, it considered that the responsibility of the Greek State arose simply from the fact that the crime had been committed in Greek territory and not from any attitude on the part of the organs of the territorial State in relation to what had occurred. The Italian Government did not refer to any failure by the Greek authorities to perform their duties of vigilance and protection. On the other hand, the Greek Government, though stating that it realized that reparations were due to the Italian Government for the disgraceful crime, protested against the suggestion that it was morally and materially responsible for the crime, since no proof had been forthcoming that it had failed in its own duties.\(^{141}\) The Conference of Ambassadors, which had also intervened, adopted a resolution, on 5 September, which it transmitted to the Council of the League of Nations.\(^{142}\) This resolution was in some respects contradictory and reservations were expressed during the discussion which ensued in the Council of the League of Nations on the reply to be sent to the communication received from the Conference of Ambassadors.\(^{143}\) On the one hand, the resolution accepted the Greek proposal for the establishment of a commission of inquiry, to investigate and try to shed some light on the circumstances surrounding the event and thus on the question of the existence or otherwise of responsibility on the part of Greece. But, on the other hand, it affirmed as a principle of international law the automatic responsibility of States for political crimes and outrages committed within their territory, thus echoing the position adopted at that time by the Italian Government. The incident was settled by the Conference of Ambassadors, which, on 13 September, adopted a resolution taking note of the undertaking of the Greek Government to present apologies and offer other solemn forms of satisfaction and of the payment made by that Government to the Swiss National Bank of a sum as security for any indemnity that might be fixed should the guilty parties not be traced. The resolution also took note of the undertaking of the Italian Government to evacuate the island of Corfu.\(^{144}\)

(29) The Council of the League of Nations took note of the settlement of the case at its meeting on 17 September.\(^{142}\) On 28 September, however, it decided to refer to a special Committee of Jurists five questions concerning the problems of international law raised by the incident between Italy and Greece.\(^{146}\) In reply to question 5 asked by the Council, the Committee of Jurists stated that:


\(^{136}\) E. Lauterpacht, British Practice in International Law (London, The British Institute of International and Comparative Law, 1963), p. 120.

\(^{137}\) From this viewpoint, acts committed by individuals against the property of a foreign State, such as an embassy building or consulate premises, may be considered as acts directed against foreign government representatives.


\(^{139}\) Ibid., pp. 1413–1414.

\(^{140}\) Ibid., pp. 1412–1413.

\(^{141}\) Ibid., pp. 1288–1289.

\(^{142}\) Ibid., p. 1294.

\(^{143}\) Ibid., pp. 1294 et seq.

\(^{144}\) Ibid., pp. 1305–1306.

\(^{146}\) Ibid., pp. 1306 et seq.
The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.\(^{147}\)

The opinion of the Committee of Jurists thus clearly departed from that of the Conference of Ambassadors in 1923. The responsibility of the State arises, according to the Committee, only if the organs of the State fail in their duty to give special protection to the persons injured by an attack committed by individuals. The Council of the League of Nations considered the reply of the Committee of Jurists, and its members, including Italy, approved it unanimously on 13 March 1924.\(^{148}\) In displaying agreement with the conclusions of the jurists the injured State, once the emotion aroused by the event had subsided, joined the other countries in general recognition of the principle that, even in the special cases envisaged, the State is finally responsible only for the actions or omissions of its organs.

(30) The incident in question had given rise to discussions in the most important international organization of the time. A number of more recent incidents have also provoked interesting discussions at the bilateral diplomatic level. Generally speaking, these discussions confirm the principle that acts of individuals directed against aliens or the property of aliens that States are obliged to provide with special protection do not give rise to an exception to the general rule regarding the determination of the State's international responsibility for the acts of private individuals. In those cases too, the principle that the State is responsible only for the conduct of its organs with respect to acts committed by private individuals seems to be well established in the practice of international relations. The fact that in such cases the international responsibility of the territorial State is more frequently alleged by claimant Governments and even more frequently acknowledged by the respondent Governments, arises simply from the much more compelling obligation of the State to protect the persons or property in question.

(31) For example, in the case of Worowski, the Soviet Government envoy to the Lausanne Peace Conference who was killed on 10 May 1923 by a certain Conradi, which led to the breaking off of all trade and other relations between the Soviet Union and Switzerland, the dispute between the two countries, when reduced to essentials, related not to the principles but to the facts.\(^{149}\)

The real question at issue was whether or not, in the particular case, the organs of the Swiss State had failed to fulfill its obligation to provide protection, for the two parties were clearly of the opinion that, in the case of injurious actions committed by individuals in law, only the conduct of the organs of the State with regard to such actions may be invoked as a source of State responsibility. This principle seems also to be confirmed in official statements of position in connexion with other cases such as, for example, the murder of the Belgian diplomat, Baron de Borchgrave,\(^{150}\) and the attack on the Italian consul at Chambéry,\(^{151}\) as well as the protests addressed by the Secretary-General of the United Nations to Israel in connexion with the Bernadotte case,\(^{152}\) to Jordan in the case of the staff member Bakke,\(^{153}\) and to Egypt in the case of Lieutenant-Colonel Queru and Captain Jeannel.\(^{154}\)

The international world has seen many cases recently involving attacks on diplomatic or consular missions or foreign official establishments. It may be noted that in those cases where the problems of concern to us specifically arose, the parties either affirmed or denied international responsibility of the receiving State on the basis of the conduct of the organs of that State.\(^{155}\)

(32) It might also be asked whether acts committed in the territory of a State by persons, especially by groups or bands, having prepared their activity in the territory of a neighbouring State, should not be viewed as constituting a special category of acts of individuals which may give rise to questions of international responsibility. History is replete with examples of incidents provoked by such activities and we need not cite specific cases.\(^{156}\)


\(^{150}\) See the Memorandum of the Belgian Government of 13 May 1937, in P.C.I.J., Sez. C, No. 83, pp. 73 et seq., and particularly pp. 28-32; the Memorandum introducing preliminary observations submitted by the Spanish Government on 29 June 1937 (ibid., pp. 55 et seq.). See also the notes annexed to the two memoranda.

\(^{151}\) Kiss, op. cit., p. 615.

\(^{152}\) Whiteman, op. cit., pp. 742 et seq.

\(^{153}\) Ibid., pp. 744 et seq.

\(^{154}\) Ibid., pp. 746-747.


\(^{156}\) See the Memorandum of the Belgian Government of 13 May 1937, in P.C.I.J., Sez. C, No. 83, pp. 73 et seq., and particularly pp. 28-32; the Memorandum introducing preliminary observations submitted by the Spanish Government on 29 June 1937 (ibid., pp. 55 et seq.). See also the notes annexed to the two memoranda.

\(^{147}\) Ibid., 5th Year, No. 4 (April 1924), p. 524.

\(^{148}\) Ibid., pp. 523 et seq. The following year, the Council transmitted that reply to the Members of the League and requested their comments. Between November 1925 and February 1926, it received 21 replies: all the Governments which gave their opinion on this point unanimously expressed the view that the State incurs responsibility only when the constituted authority was negligent in the performance of its duties (ibid., 7th Year, No. 4 (April 1926), pp. 597 et seq.).

\(^{149}\) For the text of the statements, telegrams and notes of the parties relating to this case see: K. Furgler, op. cit., pp. 58 et seq.; League of Nations, Official Journal, 7th Year, No. 5 (May 1926), p. 661; Institute of the State and of Law of the Academy of Sciences of the
There are doubtless situations involving actions by groups which are and remain private entities, or which at least are entirely outside the machinery of the State in whose territory they reside. If that is the case, the actions which such groups may carry out in the territory of another State do not constitute a separate category distinct from other acts of individuals. That State may incur international responsibility with respect to such actions, but always for one of the reasons already noted which entail responsibility in similar circumstances. The Government of that State will be accused of having failed to fulfill its international obligations with respect to vigilance, protection and control, or of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security, and so on. In other words, it will always be a question of the same internationally wrongful acts of omission—of which we have seen numerous examples—which are habitually attributed to States with respect to the acts of individuals. In order for the State to incur responsibility arising from other causes—responsibility arising directly from actions by the bands or groups in question—the situation must be different. These groups must maintain different and closer relations with the Government of the country in which they are based. Where that Government is known to encourage and even promote the organization of such groups, to provide them with financial assistance, training and weapons, and to co-ordinate their activities with those of its own forces for the purpose of possible operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become formations which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. They then fall into the category of persons or groups which are linked, in fact if not formally, with the State machinery and are frequently called "de facto organs", and which were dealt with in article 8 (a) of this draft. When they carry out their planned activities, those activities are attributed to the State and constitute internationally wrongful acts of the State: wrongful acts of commission rather than omission, which by virtue of that fact render the State concerned internationally responsible. It is thus clear that such situations are far from being simple cases involving State responsibility for the acts of individuals.

(33) The opinions expressed by the writers who have dealt with the subject can broadly be grouped into three basic schools of thought according to which solution to the problems in question they favour in principle among those that are theoretically possible. First we may mention the view that, on the basis of the concepts of "solidarity of the social group" or "guarantee", the acts of individuals are attributable to the State as a source of international responsibility quite regardless of the attitude which organs of the State may take towards those acts. The first concept has tempted some modern writers but it has no true adherents at present. The second has rarely received any great support as a generally applicable criterion. It has, however, had adherents, particularly in the past, who have defended it as being applicable to special situations, ranging from the case of acts committed during riots, civil wars or xenophobic demonstrations to the case of acts directed against persons or property entitled to special protection. The second school of


159 G. Arangio-Ruiz at one point appears to take up this idea in a new form in "Stati e altri enti (Soggettività Internazionale)", Nooissimo Digesto Italiano (Turin), vol. XVIII (1971), p. 154, note 9.

160 A. Soldati, La Responsabilité des Etats dans le droit international (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 83-84, is the only writer to maintain that the State, in order to guarantee that it will fulfil its obligations, must generally assume responsibility for the conduct of any person whomsoever.

161 See E. Brusa, "Responsabilité des Etats à raison des dommages subis par des étrangers en cas d'éméeute ou de guerre civile", Annaire de l'Institut de droit international, 1898 (Paris), vol. 17, pp. 96 et seq.; Fauchille, ibid., 1900, vol. 18, pp. 234-235. A new report prepared jointly by E. Brusa and L. von Bar ("Nouvelles thèses", ibid., pp. 47 et seq.) and taking the same view was approved by the majority of the Institute (ibid., pp. 254 et seq.). Nevertheless, these ideas were not well received by writers. Only J. Goebel, ("The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars", American Journal of International Law (Washington, D.C.), vol. 8, No. 4 (October 1914), pp. 802 et seq.), sought to defend Brusa's ideas a few years later. More recently, other writers have advocated the adoption of a rule making the State responsible for all damage to aliens resulting from the movements of xenophobic mobs, although they do not claim that this rule was previously applied in international relations. See, for example, J. W. Garner, "Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots and insurrection", Proceedings of the American Society of International Law (at its twenty-first annual meeting), Washington, D.C., April 28-30, 1927 (Washington, D.C., 1927), pp. 57-58 and 62.

162 The responsibility of the State for all acts perpetrated by individuals in such circumstances has been advocated by A. Decenciere-Ferrandiere, (La responsabilité internationale des Etats à raison des dommages subis par des étrangers (Paris, Rousseau, 1925), p. 128; C. Eagleton, op. cit., pp. 80-81 and 93); J. Dumas ("La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice des étrangers", Recueil des Cours ..., 1931-II (Paris, Sirey, 1932), vol. 36, p. 254; L. Cavaret (Le droit international public positif, 2nd ed. (Paris, Pédone, 1962), vol. II, pp. 490-497); D. W. Greig (op. cit., p. 444). In the same connexion it might be noted that M. R. Garcia-Mora (International Responsibility for Hostile Acts of Private Persons against Foreign States (The Hague, Nijhoff, 1962), pp. 28-29 and 35), favours the adoption of a
thought is represented by those who, while differing on many other aspects, are more or less in agreement on one basic point. In their view, an act committed by a private person is attributable to the State as a source of international responsibility provided that other factors were involved in its commission, particularly failure to prevent the act or to react a posteriori, and that provided such omissions were omissions of the State directly, i.e. of its organs. This theory, known as the “theory of complicity”, prevailed in the writings of nineteenth-century international jurists; its influence was also discernible in certain arbitral decisions of the same period. Generally abandoned after the first decade of the twentieth century, it nevertheless received further support from some writers at a later date. In certain aspects, theories maintained by more recent writers, who base their views on specific concepts of the organization and nature of the State as a subject of international law, also resemble the argument just described. Their common feature is that they place less emphasis on, or indeed abolish, the distinction between acts of private persons and acts of organs for the purpose of establishing individual conduct acts as an act of the State. The third school of thought is the one to which the very large majority of modern writers belong. The empirical finding advanced in various forms by these different writers is the following: acts and omissions by private individuals who are and remain private individuals are not attributable to the State under international law and do not become “acts of the State” which, as such, may involve its responsibility towards other States. The acts of private individuals or private companies which cause injury to foreign States, their representatives or their subjects are often the occasion of an internationally wrongful act of the State, but this is a wrongful act which is the conduct of State organs. They frequently constitute an external event which acts as a catalyst in setting in motion the wrongful conduct of those organs with respect to the actual situation. But the State is internationally responsible only for the action, and more often the omission, of its organs where they are guilty of not having done everything within their power to prevent the injurious act of the private individual or to punish it suitably if it has occurred despite everything. The State is responsible for having breached not the international obligation with which the individual’s act might be in conflict, but the general or special obligation imposing on its organs a duty to provide protection. Lastly, it should be noted that the large majority of international jurists who have devoted their attention to the specific problems of acts committed by individuals in special situations, such as riots, mob demonstrations and xenophobic disturbances, or acts constituting attacks on persons or property enjoying special protection, have reaffirmed in this context as well the validity of the general rule that these acts are not attributable to the State as a source of international responsibility.

(Footnote 162 continued.)

rule which would replace the one at present in force and would make the State automatically responsible for all acts committed by individuals in its territory where such acts constituted a threat to international peace and security.

163 This theory, which derives from H. Grotius, De Jure Belli ac Pacis Libri Tres (Amsterdam MDCXLVI), lib. II, pp. 366 et seq., was developed by E. de Vattel, Le droit des gens, ou Principes de la loi naturelle (Lyons, Robert et Gauthier, 1802), vol. II, p. 72.

164 See, for instance, Borchard, op. cit., p. 217; C. C. Hyde, “Concerning damages arising from neglect to prosecute”, American Journal of International Law (Washington, D.C.), vol. 22, No. 1 (January 1928), pp. 140 et seq.; and J. L. Brierly, “The Theory of implied State Complicity in International Claims”, The British Year Book of International Law, 1928 (London), vol. 5, pp. 42 et seq. The last two writers substituted the term “condonation” for the term “complicity”, which they considered too strong. Their primary intention, which is in keeping with Nielson’s position in the Jones case, was to facilitate the calculation of compensation in cases of “non-punishment” on the basis of the injury caused by the individual’s action.

(34) The codification drafts—whether the work of academic associations or private authors or prepared under the auspices and on behalf of official bodies—all provide that, in the case of acts of private persons which cause injury to aliens, the responsibility of the State can exist only if organs of the State have been guilty of internationally wrongful omissions in the prevention or punishment of such acts or if they have denied to the injured person the appropriate means to establish his claim. Yet these drafts are often unclear on essential points or go into matters other than the one in question here. They seek at the same time to define the international obligations of the State with regard to the protection of aliens against injury by private persons. For that reason they cannot be used as a basis for the drafting of this article.

(35) As a result of the Commission's consideration of international jurisprudence, State practice and the opinions of the authors of academic works, it is able to reach the following conclusions: (a) in accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve the responsibility of the State. This conclusion is valid irrespective of the circumstances in which the private person acts and of the interests affected by his conduct; (b) although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned. In the view of the Commission, the rule which emerges from the application of the criteria outlined above fully meets the needs of contemporary international life and does not require to be altered. The Commission considers in particular that it would certainly be inadvisable to introduce an exception to this rule as regards acts affecting certain specific interests, for example the security of foreign States, or conduct in special circumstances, such as a riot or other form of internal public disturbance. The Commission also considers that there would be no point in endorsing the suggestion by certain authors that a proper guarantee against the consequences of the acts of private persons where those consequences are detrimental to foreign States, their representatives or their nationals should be imposed on the State; such a guarantee would be deemed to operate even where the State could not be accused of any breach of its international obligations in connexion with the acts in question. A guarantee of this kind might find a place in a special convention intended to prevent or punish the acts of certain specific categories of persons. It could not, however, be made a general rule without upsetting the balance of international legal relations. The Commission therefore considers that the rule which it proposes to establish should not depart in substance from the one now in force in customary international law.

(36) As regards the wording adopted by the Commission to express the rule in question, a few brief comments are called for on the expression "a person or a group of persons not acting on behalf of the State" in paragraph 1 of the article. The term "person" was preferred to other terms because it comprises both natural persons and legal persons. Reference is made to a "group of persons" as well as to individual persons because the acts envisaged in this article are in most cases committed by groups. It was considered unnecessary to qualify these terms by the adjective "private", although obviously in the very great majority of cases the present article will apply to acts of private persons, for two reasons. Firstly, as regards artificial persons, the rule must also apply to those persons who are not regarded as "private" according to internal law, for example "parastatal" or quasi-public legal persons. The non-attribution to the State of the acts and omissions of such persons is just as certain as in the case of the acts and omissions of a private company, provided of course that the persons in question are not empowered by the internal law of the State to exercise elements of the governmental authority, or at least that the acts and omissions in question do not come within their exercise of it. The second reason is that, particularly in the case of natural persons, the rule must also apply to persons who possess the status of organs of the State or of another of the entities referred to in article 7 of the draft, provided that these persons act in their capacity as private persons independently of the official functions which they perform on other occasions. Finally, the words "not acting on behalf of the State" were inserted to exclude from the scope of the rule acts committed in any of the circumstances which, under articles 7 and 8, justify as an exception the attribution to the State of the conduct of natural or legal persons who do not form part of the State machinery proper.

(37) Paragraph 2 of the article constitutes a saving clause. It is intended, in the case of acts which are injurious to foreign States or to their representatives or nationals but are not attributable to the State because they were committed by the persons envisaged in paragraph 1, to prevent attempts by the State also to evade the international responsibility which might be incurred as a result of conduct adopted by organs of the State in relation to the said acts. As regards the wording of this provision, the Commission considered that it was necessary to take account of two requirements. First, it wished to avoid touching, even indirectly, on the determination of the content of the obligations which bind a State to foreign States in respect of the protection of the latter, and of their representatives and nationals, against injurious acts by persons not acting on behalf of the State. Secondly, it wished to emphasize that there must be a relationship or link between the acts of the State envisaged in this paragraph and the injurious acts of persons referred to in paragraph 1. With regard to the first requirement, the Commission considered that it was necessary to be particularly strict in the application of the criterion selected, and that it should not be forgotten that the first attempt at codification of the question of State responsibility, undertaken by the League of Nations in 1930, had failed precisely in the attempt to establish both the content of the rules of responsibility and the

Foot-note 167 continued.

content of the “primary” obligations of States with regard to the rights of aliens. The Commission therefore preferred not to adopt a formulation to the effect that the rule enunciated in paragraph 1 would be without prejudice to the attribution to the State of the failure to use all reasonable means at its disposal to prevent or punish the injurious conduct of the persons in question. It also rejected another formulation to the effect that the rule would be without prejudice to the attribution to the State of the possible omission by its organs in a case in which the latter should have taken action to prevent or punish such acts (by private persons) and did not do so. With regard to the second requirement, the expression “conduct which is related to that of the persons or groups of persons” referred to in paragraph 1 appeared to be the most appropriate means of expressing the link, which must exist in the cases considered here, between conduct attributable to the State and acts of the persons envisaged in paragraph 1 of the article. The term “conduct was chosen in preference to the term “omission”, because the breach by a State of its international obligations in regard to the acts of the persons in question may also take the form of an action, although this rarely occurs. Finally, the expression “any … conduct … which is to be considered as an act of the State by virtue of articles 5 to 10” was preferred to the expression “any conduct of an organ of the State”, since the breach of the obligation may be effected by any conduct which is attributable to the State by virtue of the articles mentioned, and not only by conduct of organs of the State in accordance with the provisions of articles 5 and 6.

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.

Commentary*

(1) International life provides abundant examples of activities carried on in the territory of a State by organs of another State acting on the latter’s behalf, i.e. in the exercise of elements of the governmental authority of the State to which the organs belong—and not, therefore, in the exercise of elements of the governmental authority of the territorial State, as in the case provided for in article 9. There is nothing abnormal in this. Some organs of the State, such as diplomatic or consular officials, are specially appointed to carry on activities in foreign territory. In other cases, organs which normally carry on their activities in the State to which they belong are called upon as an exceptional measure to engage in activities in the territory of another State with its consent, as in the case of official visits by dignitaries of a foreign State, the operation of foreign military bases established by agreement, and so on. On some occasions, activities of organs of a State are performed in the territory of a foreign State without the consent of the territorial State or even against its wishes: for instance, military operations against the territorial State, the operations of intelligence services in foreign territory, and so forth. In these various cases, the conduct of such organs of a foreign State can in no way be attributed to the territorial State, possibly entailing its responsibility, solely because it has taken place in the latter State’s territory. Such conduct is and remains an act of the State to which the organ belongs, by virtue of draft articles 5 et seq., which set no territorial limitation on the attribution to the State of the acts of its organs. Therefore no exception should be seen in the present article to the principles laid down in the preceding articles in chapter II of the draft, which govern the attribution of an act to the State.

(2) In the light of these considerations, a doubt may be raised—and some members of the Commission have raised it—whether it is really essential to specify in the present article that there can be no question of attributing to the territorial State the conduct, as envisaged in this article, of organs of foreign States. In the Commission’s opinion, however, there are several reasons for including such a statement in the draft. The old idea is still rooted in some minds, and at times reappears in practice, that the State is somehow responsible for everything that happens in the territory under its jurisdiction. Furthermore some of the “primary” rules whose breach may entail international responsibility are delimited in scope and content by the notions of territory and territorial jurisdiction: first and foremost, the rules concerning treatment of aliens. Thus it is customary to speak in this connexion of the responsibility of the State for damage caused in its territory to foreign persons or property, an expression which would seem to include damage caused to foreigners by organs, acting in the territory of the State, which are themselves foreign. Therefore the draft articles should explicitly rule out any idea that the territorial State is in some way responsible solely because the specified conduct of organs of a foreign State took place in its territory.

(3) Secondly, such a statement clarifies the rule laid down in draft article 9 to the effect that acts committed by organs of a State which have been “placed at the disposal” of another State are attributable as a possible source of responsibility to the latter State as a subject of international law. As was pointed out in the commentary to article 9, the essential condition that the organ in question shall have been “placed at the disposal” of a State does not mean only that the “lent” organ must act in the exercise of elements of the governmental authority of the beneficiary State. It requires above all that, in performing the functions entrusted to it by the beneficiary State, the “lent” organ shall act under the exclusive direction and control of that State. In the cases contemplated in the present article, on the other hand, the organ in question remains under the orders and exclusive authority of the State to which it belongs. It is clear that, in a case of this kind, the acts or omissions of the organ are not conduct of an organ “placed at the disposal” of other State.

by another State" within the meaning of draft article 9. Thus the present article usefully complements the rule expressed in the earlier article by specifying that the rule remains valid even if, in the specific situation in question, the organ concerned acted in the territory of another State.

(4) Lastly, if the draft is not to be criticized for omissions it is important to remember that, although the conduct of organs of a State acting in the territory of another State can in no event be attributed as such to the territorial State, the latter could nevertheless incur international responsibility for acts committed on the occasion of and in connexion with the conduct of such foreign organs. Those would not, of course, be acts of the organs of the foreign State, but acts of the organs of the territorial State, for example if they were unduly passive in their conduct in the face of acts prejudicial to a third State committed within the frontiers of the territorial State by an organ of a foreign State. In other words, the actions of foreign organs in the territory of a State, while not attributable to that State, may in certain cases afford a material opportunity for the territorial State to engage in conduct which might entail its international responsibility. For example, the organs of the territorial State might be guilty, in connexion with the actions of organs of a foreign State in the national territory, of failing to discharge an international obligation towards a third State to protect that State, its representatives or its nationals. Provision must therefore be made for cases in which the territorial State might be required to adopt a certain attitude in relation to the attitude of the foreign organ in question, but failed to do so. If that point was not covered, the conclusion might be drawn that, since the conduct of the foreign organ was attributable to the State to which it belonged, the territorial State was free of all responsibility even where its own conduct on the occasion of the action of a foreign organ exhibited internationally wrongful aspects.

(5) It would be dangerous, however, to draw too close a parallel between that situation and the situation contemplated in article 11, paragraph 2, with regard to the conduct of private persons not acting on behalf of the State. In the case of ordinary private individuals it is natural to postulate the existence of a set of obligations incumbent on the State with regard to the prevention and punishment of acts committed by such persons to the prejudice of foreign States or their nationals. It is therefore natural to contemplate the attribution to the State, as a source of international responsibility, of a breach of those obligations. It is less natural to imagine that the State could fail in an international obligation of that kind in the case envisaged in the present article, since organs of a foreign State are not subject in foreign territory to the same authority as private individuals. What is more, where organs of a State acting in that capacity commit in the territory of another State actions which are detrimental to a third State, it seems clear above all that the responsibility lies with the State to which the organ belongs, since as pointed out above, the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory. The responsibility of the State to which the organ belongs therefore tends to outweigh any responsibility which the territorial State might exceptionally incur, on such grounds as that its organs had neglected to prevent such actions. This perhaps explains why, in State practice, the territorial State has seldom been held responsible in such situations. It would nevertheless be wrong to conclude from this that the territorial State can never incur international responsibility in connexion with acts committed in its territory by organs of a foreign State. The very fact that the responsibility of the territorial State appears less significant in the exceptional cases envisaged here is yet another reason for providing for such a possibility in the present article, especially since specific cases have proved that such a provision is of practical value to States.

(6) On 6 February 1956 the Government of the Soviet Union addressed a protest note to the Government of the Federal Republic of Germany concerning the fact that the United States armed forces stationed in Germany had launched sounding balloons, equipped with automatic cameras and radio transmitters, from the territory of the Federal Republic. The balloons had been intercepted in Soviet air space. Two days earlier, on 4 February, a Soviet protest concerning similar activities had been addressed to the Government of Turkey. The Government of the Federal Republic of Germany and the Government of Turkey were accused of having allowed their territory to be used by United States organs for the purpose of committing wrongful acts. On the other hand, in a separate note addressed to the United States Government, that Government was held responsible for the activities of its own military organs, which had carried out the launching operations. In its reply of 6 March 1956 the Government of the Federal Republic referred to a note received on 8 February from the United States Government, in which the latter gave its assurance that it would try for the time being to avoid launching any more balloons, even though their purpose had been only to gather meteorological information. The Government of the Federal Republic accordingly considered the question closed. Its note added that investigations had been carried out and had shown that no balloons had been launched from the territory of the Federal Republic for the purpose of dropping political propaganda leaflets. But the Soviet Government replied, in a further note dated 24 March 1956, contesting the truth of the statements contained in the reply to its first note and again blaming the Government of the Federal Republic for allowing wrongful acts to be committed by United States forces stationed in Germany.168 Quite apart from the substantive issue involved, it is perfectly plain from this exchange of notes that the protests addressed to the territorial State were quite different from the principal protests addressed to the State of origin of the organs which perpetrated the acts complained of. The territorial State was blamed only for a breach of its own obligations.

(7) In the same context, we may recall an incident which occurred during the visit of Mr. N. Khrushchev, the

168 The details of this case are to be found in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Stuttgart), vol. 18 (1957–1958), pp. 723–724.
Chairman of the Council of Ministers of the USSR, to Austria from 30 June to 8 July 1960. The Soviet Premier made a number of speeches in which he accused the United States Government of seeking to torpedo the planned summit conference by organizing flights of U-2 "pirate planes". He also violently attacked the militarism of the Western countries, and particularly West German revanchism. At a press conference he went so far as to compare Chancellor Adenauer to Hitler. The Government of the Federal Republic considered those remarks to be an affront to its honour. But at the same time the Ambassador of the Federal Republic in Vienna made representations to the Austrian Government, stressing the unusual nature of the situation in that the words directed against the Government of the Federal Republic had been uttered in the presence of the Austrian Minister for Foreign Affairs. On the same day the United States Ambassador protested at the fact that the Austrian Government had not deemed it necessary to dissociate itself from the "slanderous attack" on his country. Dr. Raab, the Austrian Chancellor, then took the opportunity to indicate such dissociation in the course of his farewell speech. A note appeared simultaneously in the 

Wiener Zeitung stating that the Austrian Government had no connexion whatsoever with the remarks that had been made, and pointing out that a Government could only be responsible for what was said at a press conference if that Government itself held the conference. The note also stated that the speech by the Soviet Premier had been delivered at the headquarters of the Austro-Soviet Association, which was a private institution, and that the presence of the Austrian Minister for Foreign Affairs had merely been intended as a courtesy to the guest. Here, too, there is no need to enter into the substance of the case. We need only note that it provides further confirmation of the fact that what is alleged in such cases to be a source of responsibility of the territorial State is of course not the acts committed by foreign organs but the passive or negligent attitude considered to have been adopted by the organs of that State when the acts were committed.

(8) The principle that, in the cases envisaged, the international responsibility of the territorial State can be incurred only by some conduct engaged in by its own organs in connexion with the actions of the foreign organ and, as such, constituting a breach of an international obligation is also supported by the literature. It has been incorporated in certain draft codifications, such as that prepared by the Harvard Law School in 1929 and the preliminary draft submitted to the International Law Commission by F. V. Garcia Amador in 1961. To be sure, it has sometimes been contended that a whole series of cases, largely dating from the last century, were cases of indirect responsibility on the part of the territorial State but, as certain writers have pointed out since then, the responsibility of the territorial State was not involved in the cases in question except in so far as its own organs had failed to perform their duty to protect foreign States or foreign nationals. In all these cases, what was considered as an act entailing the responsibility of the territorial State was not an action committed in the territory of that State by a foreign organ, but the negligence or lack of reaction of the organs of that State in relation to such an action. Furthermore, such responsibility had sometimes been invoked in situations where the perpetrator of the injurious action committed in the territory of the State, although an organ of a foreign State, had acted only in a private capacity.

(9) The practice of States and the writers thus confirm the considerations and conclusions developed in the opening paragraphs of the present commentary. It seems well established: (a) that the conduct of an organ of a State is not attributable in international law to another State, as a possible source of international responsibility, in virtue of the mere fact that such conduct has taken place in the territory of the latter State; (b) that, as in the case of activities of private individuals, the responsibility of the territorial State is incurred on such occasions only by some conduct engaged in by its own organs in relation to the conduct of organs of the foreign State and constituting as such a breach of an international obligation borne by the territorial State.

(10) That having been said, it will be well to add two clarifications. The first is that, in the cases envisaged in the present article, the conduct of foreign organs in the territory of the State must be conduct engaged in by those organs acting in that capacity. If that is not the case, their conduct can only be regarded as the activity of private individuals, in relation both to the State to which the organ belongs and to the territorial State, and neither State can be held responsible except possibly for failing in its duty of protection as specified in article 11, paragraph 2, of the draft. In such a case it would remain to be determined, in the light of the circumstances, which of the two States was in fact under an obligation to act to prevent or punish such conduct on the part of individuals, and would thus bear responsibility for a failure in that respect.

(11) The second clarification repeats what has already been stated above: namely that, in the case of conduct

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170 F. Klein, Die mittelbare Haftung im Völkerrecht (Frankfurt-am-Main, Klostermann, 1941), pp. 256 et seq. and 299 et seq.
172 A. Verdross,
173 F. Klein, Die mittelbare Haftung im Völkerrecht (Frankfurt-am-Main, Klostermann, 1941), pp. 256 et seq. and 299 et seq.
174 This was the situation regarding the claims presented by Great Britain to the Tuscan Government in 1852 as a result of the ill-treatment inflicted on a British national named Mather by an Austrian officer who was stationed in Tuscany and who had acted in a private capacity.
175 See para. 3.
of organs of a foreign State in the territory of a State, the analogies with a case concerning the conduct of private individuals are more apparent than real. In the final analysis, the similarity between the two cases is merely a matter of recognizing that in either circumstance the territorial State may be faced with an international obligation to protect third States or their nationals and may be guilty of failing to meet that obligation. It stands to reason, however, that such an obligation may vary sharply in content and extent, and that the ways in which the territorial State has to discharge such an obligation may vary widely from case to case. In that connexion it will be necessary to take into account the incidence of the privileges and immunities enjoyed by the organs of the foreign State, any special status which they may possess, the possibility that the foreign State concerned has reserved for itself the exclusive performance of certain supervisory or punitive functions, etc. For instance, it is obvious that a State cannot punish a foreign ambassador who, in its territory, has insulted the head of a third State. However, this does not mean that the territorial State has no means of reacting against such conduct. The territorial State can at least be expected to dissociate itself from the conduct of the ambassador or to address a protest to the sending State. In the case of extremely serious incidents, the territorial State might conceivably be expected to request the recall of the ambassador concerned or to declare him persona non grata. If the territorial State took no action, the injured State could then accuse it of an internationally wrongful act in relation to the conduct of the ambassador in question.

(12) Other examples may also be mentioned. A head of State visiting a foreign country might be kidnapped by an armed commando under the orders of a third State. In such a case the territorial State would seem bound to incur an international responsibility if it had failed to take the necessary precautions or if, having taken such precautions, it did not try to catch the culprits, or if, having caught them, it failed to punish them. Even when the organs of a State acting in or from the territory of another State enjoy certain privileges and immunities or a special status, the territorial State is not thereby deprived of all means of reacting against acts committed in its territory by such organs and, in certain circumstances, it may even be bound to react against such acts if it is not to incur international responsibility through its own passivity in the face of events.

(13) In the light of the various considerations set out above, paragraph I of article 12 provides that 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. By adopting the extremely broad phrase "in the territory of another State or in any other territory under its jurisdiction", the Commission intends to cover not only acts committed in the "territory" proper of another State, including the territorial waters and air space adjacent thereto, but also acts committed in any other territory, space, zone, place or thing under the jurisdiction of such other State, for instance in a dependent territory, in an occupied foreign territory, on the continental shelf, at a base abroad, on board a ship or on aircraft flying the flag of that State, etc.

(14) The basic principle of non-attribution to the State of conduct of organs of another State in its territory by organs of another State being thus affirmed, paragraph 2 of article 12 lays down the rule that this principle is without prejudice to the attribution to the State of any other conduct which is related to that referred to in paragraph 1 and which is to be considered as an act of that State by virtue of articles 5 to 10 of the draft. Framed as a safeguard clause, the rule laid down in paragraph 2 provides only for the possibility of attributing to the territorial State, as a potential source of its responsibility, any failure to comply with its own obligations incurred in relation to conduct of organs of another State in its territory, or in any other territory under its jurisdiction.

(15) For the purposes which draft article 12 has to serve, the provisions laid down in its paragraphs 1 and 2 would appear to suffice. The situations envisaged in the article would certainly take on a different aspect if, in the individual case, it were established that there had been assistance or complicity, in the true meaning of these terms, on the part of organs of the territorial State, in the wrongful acts committed by organs of the foreign State. The case might then exhibit either participation by a State in an internationally wrongful situation created by another State, or an internationally wrongful act committed jointly by two States. Similarly it is not the intention of the Commission that article 12 should deal with the question whether the presence of a foreign organ in the territory of a State constitutes in itself a lawful or a wrongful situation. In a specific case in which that presence as such constituted an internationally wrongful act on the part of the foreign State, the territorial State or both States, the problems of attribution raised by such an act would come under draft article 5 and should be settled in accordance with the rule laid down in that article.

176 For instance, article 3 of the definition of aggression approved by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974 lists among the acts which qualify as acts of aggression "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State", and the Convention on the Prevention and Punishment of the Crime of Genocide adopted under General Assembly resolution 260 A (III) of 9 December 1948 declares not only "genocide" but also "conspiracy to commit genocide" and "complicity in genocide" to be punishable acts.

177 See para. 50 above.
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.

Commentary

(1) This article states the rule that the conduct of organs of an international organization acting on the organization's behalf in the territory of a State, or in any other territory under the jurisdiction of that State, shall not, by reason of that fact—or more precisely by reason only of that fact—be considered as an act of that State. This rule springs from considerations of principle which resemble mutatis mutandis those stated in the commentary to article 12 in connexion with the conduct adopted in the territory of a State by organs of another State acting in that capacity. Because, however, of the difference in nature between an international organization and a State, the problem takes a different form, at least in some respects.

(2) It should be noted first of all that the case in which the act of an organ of a State takes place in the territory of another State is the exception. The acts of an organ of an international organization, on the other hand, are invariably and necessarily carried out in the territory of a State, and hence of another subject of international law. Having no territory of their own, international organizations are obliged to act in the territory of a State, or in a territory under the jurisdiction or control of a State. As a general rule, an international organization acts in the territory of a particular State under an agreement concluded between that State and the international organization concerned. Thus the activities of organs at the organization's headquarters or permanent offices are carried on under a headquarters agreement concluded between the organization and the host State. Similarly the activities of organs of the organization away from its headquarters or permanent offices are normally subject to an agreement concluded between the organization and the State in whose territory those activities are expected to be carried on. For example, when an organ of the organization or a conference convened under the auspices of the organization holds a meeting away from the headquarters or permanent offices of the organization, it is customary to conclude an agreement between the organization and the host State specifying the privileges, immunities and facilities applicable to the meeting, including the right of access to the meeting for all persons entitled to attend it. Agreements between the organization and the territorial State are also concluded for a whole series of activities which international organizations carry on away from their headquarters and permanent offices, whatever the nature of the activity concerned: peacekeeping, political, diplomatic or economic activity, technical assistance, disaster relief, information, education and so on. The case of activities carried on by organs of an international organization in the territory of a State without that State's consent is somewhat exceptional, but cannot be ruled out. Situations of that kind may, for example, arise as a result of decisions taken by the United Nations Security Council under Chapter VII of the Charter after determining the existence of a threat to the peace, a breach of the peace or an act of aggression.

(3) Secondly, a distinction should be drawn between the case covered by the present article and that envisaged in the preceding article in that the act of an organ of a State acting in that capacity in the territory of another State is always considered as an act of the State to which the organ belongs. On the other hand, it is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed to the international organization as such rather than, in appropriate circumstances, to the States members of the organization, if it is a collective organ, or otherwise to the State of nationality of the person or persons constituting the organ in question. That being said, it would be a mistake to draw hasty conclusions from the fact that there are but few examples of international organizations being called to account at the international level for acts committed by their organs in the territory of a State. International organizations having an international personality of their own, separate from that of their member States, are a comparatively new category of subjects of international law. Furthermore it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts. Nevertheless, there have already been some specific cases in international practice in which the act of one of its organs has been attributed to an international organization as a source of international responsibility of the organization. Among the most instructive examples, mention may be made of the agreements concluded by the United Nations in 1965, 1966 and

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176 This situation has been described in the following terms by C. Eagleton: "Whereas a State agent is most frequently operating within the State, the United Nations has no territory under its sovereign control within which its agents operate; and whereas cases are comparatively rare in which a State agent contracts liability for his State through actions outside his State, the injurious acts of agents of the United Nations would much more often occur within the territory of some State."


179 The case can occur of an international organization being entrusted with the administration of a particular territory for a certain time. For example, in the course of the duties entrusted to it by Indonesia and the Netherlands and approved by the General Assembly, the United Nations performed temporary executive functions in the Territory of West New Guinea (West Irian) from 21 September 1962 to 31 March 1963 through a United Nations Temporary Executive Authority (UNTEA) headed by an Administrator appointed by the Secretary-General. Similarly, pursuant to the relevant resolutions of the General Assembly, the United Nations Council, for Namibia has been entrusted with certain functions and responsibilities to be discharged "Within the Territory". The fact, however, that the administration of a particular territory is entrusted to an international organization certainly does not mean that the territory in question becomes the "territory of the organization".

180 These agreements may take a great variety of forms, ranging from a formal agreement to an agreement in simplified form; they may even result from the acceptance of an invitation extended by a State to an organ or agent of the organization to go to its territory...
1967 with Belgium, Greece, Italy, Luxembourg and Switzerland relating to compensation for damage to the persons and property of nationals of those countries arising from the operations of the United Nations Force in the Congo. In these agreements, each of which constitutes a lump-sum settlement for the claims lodged by nationals of the State concerned, it is stated that the United Nations has agreed that the claims of nationals of the country in question who "may have suffered damage as a result of harmful acts committed by UNOC personnel, and not arising from military necessity, should be dealt with in an equitable manner" and that the United Nations "would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties." The point which must be stressed here, in any event, is not so much the positive determination of the subject of international law to which the conduct of United Nations agents is attributed in a specific case as the fact that the conduct of the Organization's agents in the territory of a State cannot be attributed to that State.

(4) The principle ruling out the attribution to the State of conduct adopted in its territory by organs of an international organization is expressly recognized in certain agreements concluded between international organizations and the States in which those organizations carry on operations. These agreements provide for the attribution of such conduct to the organization as such and, at the same time, institute procedures for settlement between the organization concerned and third parties who put forward claims arising out of conduct adopted by organs or agents of the organization. For example, the agreements concluded by the United Nations with regard to peacekeeping operations contain provisions under which claims may be lodged directly with the Organization for certain claims arising out of conduct adopted by organs or agents of the United Nations forces engaged in such operations. Thus paragraph 10 (b) of the Agreement of 27 November 1961 between the United Nations and the Congo (Leopoldville) relating to the legal status, facilities, privileges and immunities of the United Nations Organization in the Congo provides that:

If as a result of any act performed by a member of the Force or an official in the course of his official duties, it is alleged that loss or damage that may give rise to civil proceedings has been caused to a citizen or resident of the State in whose territory the dispute by negotiation or any other method agreed between the Parties; if it is not found possible to arrive at an agreement in this manner, the matter shall be submitted to arbitration at the request of either Party.

The Exchange of letters of 31 March 1964 between the United Nations and Cyprus constituting an agreement concerning the status of the United Nations Peace-Keeper Force in Cyprus provides that a Claims Commission established for the purpose shall deal, among other things, with any claim made by:

A Cypriot citizen in respect of any damages relating to an act or omission of a member of the Force relating to his official duties.

(5) The fact that acts of organs of an international organization involving a breach of an international obligation assumed by the organization are likely to be attributed to that organization, as a potential source of international responsibility, and not to the State in whose territory the act took place, goes far to explain why international organizations sometimes have reservations concerning proposals for their accession to multilateral conventions which contain obligations that they do not feel equipped to discharge.

(6) The rule of non-attribution to the State of conduct adopted in its territory by organs of an international organization is sustained, at least in principle, both by those writers who consider the question from the point of view of State responsibility and by those fewer writers who have studied the problems presented by the responsibility of international organizations.

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182 Ibid., vol. 565, p. 3.
183 Ibid., vol. 588, p. 197.
184 Ibid., vol. 585, p. 147.
185 Ibid., vol. 564, p. 193.
186 See, for example, the Exchange of letters of 20 February 1965 constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (ibid., vol. 555, p. 197). When the USSR saw fit to protest against the payment of compensation to Belgian claimants, the Secretary-General of the United Nations declared: "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable." (United Nations, Juridical Yearbook, 1965 (United Nations publication, Sales No. E.67.V.1), p. 41).
187 In most cases, the conduct in question will involve only a breach of obligations under internal law and will therefore give rise to responsibility under that law alone. The formula used in the agreements mentioned here, however, is such as to cover also the less frequent case in which the conduct adopted by the organ or an international organization constitutes a breach of an international obligation and, as such, entails a responsibility of the organization at international law.
the preliminary draft submitted to the International Law Commission by F.V. García Amador in 1961 provides expressly that acts and omissions of an international organization shall not be imputable to the State within whose territory they are committed.\(^{192}\)

(7) Should an exception of some kind to the rule laid down by the present article be seen in technical or other assistance agreements, which often contain clauses\(^{193}\) to the effect that the State receiving the assistance assumes responsibility in the event of claims by third parties against the international organization or its agents? For example, article I, paragraph 6, of the Agreement of 21 May 1968 between the United Nations, the ILO, FAO, UNESCO, ICAO, WHO, ITU, WMO, IAEA, UPU, IMO and UNIDO, on the one hand, and, Australia, on the other, for the provision of technical assistance to the Territory of Papua and the Trust Territory of New Guinea provides that:

The Government shall be responsible for dealing with any claims resulting from operations in the Territories under this Agreement which may be brought by third parties against the Organizations jointly or separately and their experts, agents and employees and shall hold harmless the Organizations and their experts, agents and employees in case of any claims or liabilities resulting from such operations, except where it is agreed by the Government and the Administrator of the United Nations Development Programme and the Organization concerned that such claims or liabilities arise from the gross negligence or wilful misconduct of such experts, agents or employees.\(^{194}\)

Independently of the questions which may arise as to the scope of such clauses,\(^{195}\) which seem to be concerned with possible instances of responsibility under internal rather than under international law, it is at all events clear that they are provisions relieving the organization of responsibility for conduct engaged in by its agents in the execution of the plans of operations covered by the agreement, and not clauses under which the conduct of agents of the organization would be attributed to the territorial State. In other words, it is not at all a matter of attributing the conduct of others to the territorial State, but simply of that State assuming, by virtue of a special agreement, the consequences of conduct which is not its own but that of the organization. That this is indeed the case is apparent from the very wording of such clauses, which provide for the possibility that the organization may nevertheless assume responsibility in the event that the claims in question result from gross negligence or wilful misconduct on the part of the organization’s agents. In so far as they are concerned with cases of international responsibility, such clauses are no more than an application of what is called “indirect responsibility”, or responsibility for the acts of another, a question which the Commission intends to study in another chapter of the draft.\(^{196}\) Hence their inclusion in the above-mentioned agreements merely confirms the validity of the principle, laid down in article 13, of non-attribution to the territorial State of the conduct of organs of an international organization.

(8) In formulating the rule laid down in this article, the Commission is not required to give a definition of the notion of an international organization; to establish how an international organization may become a subject of international law distinct from its constituent States; to indicate when the responsibility of the international organization or of its member States may be incurred, or in what cases there may be joint, concurrent or alternative responsibility; or to resolve a whole series of questions which may be highly pertinent to the formulation of rules governing the international responsibility of international organizations but which clearly exceed the scope of the present draft. The international personality of certain intergovernmental international organizations such as, for example, the United Nations, the specialized agencies and other bodies of the United Nations system does not seem to give rise to any problems.\(^{197}\) There are, admittedly, other international organizations whose personality at general international law is less well established, but for our present purposes it is sufficient to note that at least certain international organizations are endowed with international personality and that, being therefore competent to assume conventional or other international obligations, they are capable of finding themselves in breach of such obligations, and possibly of incurring international responsibility, as a result of internationally wrongful acts committed by their organs. Sufficient, at all events, to conclude that the cases in which the article now under discussion applies are those where the acts taken into consideration emanate from an international organization possessing an international personality of its own. In other situations, the conduct complained of can only be the conduct either of an organ of a State or of a private person: in either case, another article of the draft would apply.

(9) That having been said, it should be made clear straight away that, in studying the questions which arise

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\(^{191}\) See foot-note 171 above.

\(^{192}\) See United Nations, Jurisdiction Yearbook, 1968 (United Nations publication, Sales No. E.70.V.2), p. 44.

\(^{193}\) Frequently such clauses simply reproduce, with a few drafting changes, provisions contained in a standard agreement approved for the activity in question by an organ of the organization.

\(^{194}\) See para. 50 above.

\(^{195}\) A particularly firm foundation for the international personality of the United Nations is laid in the advisory opinion handed down by the International Court of Justice on 11 April 1949 in the "Reparation for injuries suffered in the service of the United Nations case (I.C.J. Reports 1949), p. 179."
in the context of this article, care must be taken not to go beyond the scope of the draft under consideration which, as already stated, is limited in respect of international responsibility to the responsibility of States, and does not deal with questions relating to the responsibility of subjects of international law other than States. Accordingly, while it should be stressed that the conduct of an organ of a foreign State acting in that capacity in the territory of a State is attributable to the State of origin by virtue of the draft articles themselves, it would be a mistake to seek in this draft a solution to the problem of attribution to an international organization of the conduct of organs of that organization acting on its behalf in the territory of a State; for the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States.

The codification of the rules governing the responsibility of States must not encroach on the rules which govern the international responsibility of international organizations; these latter rules are not required to be spelt out in a draft dealing exclusively with the responsibility of States.

(10) Article 13 presupposes that the organ of the international organization concerned acted in the capacity of an organ of the organization in the exercise of functions of the organization, and not under the control of the territorial State. It does not cover the specific case where the organ of the organization has been "placed at the disposal" of the territorial State and is acting in the exercise of elements of the governmental authority of the territorial State and under its control. The case just mentioned is covered by the rule laid down in article 9. That is the criterion to be applied when a decision must be taken in a particular case. For example, since the above-mentioned United Nations Force in the Congo acted at the request of the Republic of the Congo, it might be wondered whether the members of the Force ought not to have been regarded as agents of that State, to which their conduct would then have been attributable. An answer to this question is found in the report of the Secretary-General of 18 July 1960, which states:

Although the United Nations Force under the resolution [Security Council resolution 143 (1960) of 14 July 1960] is dispatched to the Congo at the request of the Government and will be present in the Congo with its consent, and although it may be considered as serving as an arm of the Government for the maintenance of order and protection of life—tasks which naturally belong to the national authorities and which will pass to such authorities as soon as, in the view of the Government, they are sufficiently firmly established—the Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council.

(11) It must also be borne in mind that activities undertaken within, under the auspices of, or through international organizations are not necessarily activities entrusted to organs of the organization. The operations of international organizations are often conducted by very different methods, sometimes in one and the same field of activity. The legal status of a relief team furnished through the United Nations in the event of a natural disaster may be that of a subsidiary organ of the Organization, that of an entity having a legal status separate from the Organization, or that of a national team of one of the Member States; the legal status of a United Nations peace-keeping force and of its component contingents in relation to the Organization may also vary from case to case etc. Obviously if, in a particular case, the perpetrator of the conduct adopted in the territory of a State is in reality the organ of a State and not the organ of an international organization, the applicable article is article 12, not article 13, of the draft.

(12) In the light of the foregoing considerations, article 13 is not to be taken as defining the responsibility of international organizations or the problems of attribution which such responsibility presents. It merely affirms that the conduct of organs of an international organization acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction. The meaning of the phrase "or in any other territory under its jurisdiction" has already been explained in the commentary to article 12. It should also be made clear that the expression "international organization" means an "intergovernmental organization" within the meaning of the draft articles prepared by the Commission on other topics. The phrase "acting in that capacity" usefully emphasizes that the organ in question must have acted in the name and on behalf of the organization, in the exercise of the organization's functions and under its exclusive control. Lastly, the phrase "by reason only of the fact" has been introduced so as not to prejudice problems of attribution which may arise for the territorial State by virtue of the rules governing the responsibility of international organizations where, for example, that State is a State member of the organization in question, or has participated in one way or another in the decision of the organization from which the conduct of the organ stemmed, or, again, has made its own facilities available to that organ.

(13) The Commission did not think it necessary to insert in this article, as it has done in articles 11, 12 and 14, a clause expressly providing that the rule stated in the article is without prejudice to the attribution to the territorial State of conduct which would be attributable to that State

199 See para. 32 above.

199 In this connexion, J. J. A. Salmon (loc. cit., p. 479) states: "The problem of the quasi-criminal or civil responsibility of an international organization is one of those which, on both the scientific and the practical plane, seem among the most abstruse in the law of international organizations." (translation by the Secretariat).


203 See para. 13 of the commentary.
by virtue of draft articles 5 to 10 and which has taken place in connexion with the conduct of the organ of the organization. In the case of article 13 the formulation of such a provision would pose special problems going beyond the scope of the present draft, for they would be problems connected, to a certain extent, with the status of the relations between the territorial State and the organization in question and with the specific provisions—including those relating to the legal status of the organization and to the privileges and immunities of its organs—laid down in agreements under which international organizations normally act in the territory of a State. The Commission was particularly reluctant to include in the draft any provision which might suggest the idea that the action of an international organization is subject to the controlling authority of the State in whose territory the organization is called upon to function. But the article’s silence on that point should not be construed as meaning that, in the cases envisaged in this article, the territorial State could never incur international responsibility by reason of its own conduct adopted in relation to the conduct of the organization in question. Thus, if the territorial State associated itself with the perpetration, by an organ of the organization, of an act constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action, it might incur international responsibility by reason of its own conduct which, by virtue of draft articles 5 to 10, would always be attributable to it.

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.

Commentary

-- As to the possibility that the responsibility of the territorial State may be incurred on the grounds of denial of justice following an internationally wrongful act of an international organization, see J.-P. Ritter, loc. cit., pp. 446-447.


(1) The present article deals with the question of the possibility of attributing to the State, as a possible source of its international responsibility, the conduct of organs of an insurrectional movement which is established in the territory of that State or in another territory under its administration. It should first of all be made clear that the problem of attribution or non-attribution to the State of the acts of organs of an insurrectional movement—the subject of the present article—cannot arise unless, at the time when the injured State filed with the territorial State a claim relating to the conduct of organs of an insurrectional movement, the movement still existed as such or had ceased to exist but had brought down in its fall its own structure and organization. In other words, the problem arises, for the purposes of the present article, only when both the insurrectional movement and the State in whose territory the movement is established continue to exist or when, after the revolt has been put down, the insurrectional movement has vanished altogether. When an insurrectional movement ceases to exist as such only because it has carried the day and its structures have since become, in whole or in part, the new governmental machinery of the pre-existing State or the structures of a new State set up on the movement’s initiative in a part of the territories formerly under the sovereignty or administration of the pre-existing State, the problems of attribution that arise are of an entirely different nature and are accordingly dealt with in article 15.

(2) The question of possible State responsibility in respect of acts committed by organs of an insurrectional movement proper is often dealt with in conjunction with the question of State responsibility concerning acts committed by private individuals in the course of riots, mass demonstrations, or other disturbances and disorders, or in the course of an insurrection which has not yet resulted in the formation of an insurrectional movement endowed with machinery separate from that of the State. There is really not only a simple quantitative difference—determined by the intensity of the disruption—between these latter cases and those in which an insurrectional movement assumes power over a portion of the State’s territory or of another territory under the State’s administration. There is also a qualitative difference between the two cases mentioned, which justifies dealing with them separately.

(3) It is true that, at the beginning of the insurrection, the conduct of persons or groups of persons who thereafter become organs of an insurrectional movement presents itself as the conduct of private individuals. For the purposes of attribution of an act to the State as a possible source of international responsibility, such conduct can in fact be placed on the same footing as that of persons or groups of persons who participate in a riot or mass demonstration and, like the conduct of such persons, falls within the scope of the provision laid down in article 11. But the situation changes as soon as an insurrectional movement, in the sense which this term has in international law, takes shape. From this time on there is in existence, side by side with the State, an organization which has its own machinery and whose organs may act on behalf of the insurrectional movement itself in a portion of the territory under the sovereignty or administration of the State. The organs which form part of the structures of the insurrectional movement and which act on its behalf are in no sense
organs of the State, any more than private individuals participating in a riot or mass demonstration; but as organs of an insurrectional movement they may engage in conduct liable to bring an international responsibility upon the insurrectional movement itself if that conduct should constitute a breach of an international obligation recognized as incumbent on the insurrectional movement.

(4) It is not, of course, the purpose of this draft to codify the rules governing the international responsibility, if any, of insurrectional movements but—once again—to proceed from the premise that, as soon as they begin their separate existence on the international scene, such movements may be capable within certain limits of committing internationally wrongful acts of their own. The next step is to draw from this premise the appropriate conclusions regarding the determination of the consequences for the State of the wrongful actions of an insurrectional movement. The first comment to be made in this connexion is that any responsibility that a State might incur by having failed to adopt the requisite measures of vigilance, prevention and punishment when it could have done so would be a much more exceptional responsibility than the responsibility which it might incur by failing in vigilance, prevention or punishment on the occasion of a mere riot or mass demonstration. It will rarely be possible to accuse a State of failing in its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement because, most of the time, the actions in question are entirely beyond its control. Even more rarely will such accusations be levelled against the State in cases where, after the insurrectional movement has succeeded in entrenching its authority over a sufficient portion of the State’s territory, third States come to hold the movement itself responsible for internationally wrongful acts of its own organs.

(5) The existence of an insurrectional movement per se creates certain specific problems which cannot be ignored in a draft codification of the rules of international law governing State responsibility. But taking these problems into consideration certainly does not make it necessary, in the course of the present codification project, to spell out the requirements imposed by international law for a given movement to be classified as an “insurrectional movement”, or to specify under what conditions, at what time and in relation to whom such a movement can be regarded as endowed with international personality and what is then the scope—which will in any event vary from one case to another and, in any one case, with the passage of time—of its international legal capacity. The consideration of all these questions—which, for that matter, should be raised equally, mutatis mutandis, in relation to States and in relation to international organizations—does not fall within the topic of the present study but rather within other major branches of international law, namely those dealing with subjects of international law.

(6) For the purpose of the present article, therefore, the existence of an “insurrectional movement” within the meaning of international law should be taken as a presumption of fact. If this presumption is correct, questions of attribution or non-attribution of the conduct of organs of the movement in question to the State fall within the scope of the cases to be considered. On the other hand, if the movement in question cannot be regarded as an “insurrectional movement” under international law, such problems of attribution as may arise should be solved in accordance with the provisions laid down in other articles of the draft, particularly article 11.

(7) In formulating the rules to be laid down in the present article, the Commission is, once again not required to say anything about the various forms which insurrectional movements may take according to whether there is a relatively limited internal struggle, a genuine civil war situation, an anticolonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movement and so on, or about the questions which may arise in connexion with the problem of the international legitimacy of some of these forms. In contrast, what needs to be kept in view here is that insurrectional movements may sometimes be directed against the State itself, as in the case of a secessionist movement or a movement for the decolonization of a former dependent territory. But insurrectional movements may also set themselves the objective of replacing the Government of the State by a new Government. Furthermore—and this is equally important for the purposes of formulating the pertinent rules—an insurrectional movement may be directed against a State or against the government of a State other than that of the State in whose territory the movement is established. This applies, for example, where an insurrectional movement has its headquarters in a third State and operates from that State.

205 Nor, of course, can they be likened to “persons in fact acting on behalf of the State”, in the sense in which this expression is used in article 8 of the draft. Persons or groups of persons who act as organs of an insurrectional movement directed against a State or against a particular Government in no way intend to act “in fact on behalf” of that State or Government or to be “in fact exercising elements of the governmental authority” of that State or Government for such time as certain exceptional circumstances persist. On the contrary, their aim is to overthrow the structures of the State in question and take their place as the new Government of that State or as the Government of a new State which has separated from the pre-existing State.

206 See H. Kelsen, Principles of International Law (New York, Rinehart, 1952), p. 292: "By the effective control of the insurgent government over part of the territory and people of the State involved in civil war an entity is formed which indeed resembles a state in the senses of international law." See also G. Arangio-Ruiz, loc. cit., p. 165.

207 This is the feature which often distinguishes the situation created as a result of actions of organs of an insurrectional movement from a situation created by actions of organs of a foreign State. In the latter case, the State normally retains its authority over the territory in which the actions occur, whereas it often no longer has any authority over the territory controlled by the insurrectional movement.

208 At this point, therefore, we must not linger to determine the requirements imposed by international law for a given movement to acquire, as such the international status of an "insurrectional movement", or even to establish whether those requirements should be determined on the basis of objective criteria (effectiveness, duration, scope, organization, etc.) or of subjective factors such as recognition by States or international organizations, and whether the international personality of a movement of this kind is valid erga omnes or is rather of a qualified nature, and so on.

209 In the course of discussion, some members of the Commission affirmed the international legitimacy of some forms of insurrectional movements and, in particular, the movements of anticolonial struggle and national liberation which claim the right of self-determination proclaimed by the Charter of the United Nations and developed in a whole series of resolutions of the General Assembly.
(8) The international responsibility of an insurrectional movement is normally more difficult to establish than that of a State proper. Such a movement is provisional by its very nature. Its duration is limited to the duration of the struggle in which it has engaged. At the end of that struggle, the movement as such is destined to disappear. If it is defeated, it comes to an end and its organization disintegrates. If it wins, it may either hand over the structures of its organization to the State as the new Government of that State, or itself turn into a new State set up in part of the territory formerly under the sovereignty or administration of the pre-existing State. To establish the international responsibility incurred through an internationally wrongful act is an operation which often takes a relatively long time, perhaps a longer time than the insurrectional struggle lasts. Furthermore the insurrectional movement may vary in scope and importance as the struggle waxes and wanes. For example, the territory in which the movement exercises its authority may contract or expand, and the financial or other resources under its control may also fluctuate. All these considerations create a climate of uncertainty regarding the prospect of obtaining from that movement, in the course of the struggle, reparation for an internationally wrongful act. Furthermore, if the State complaining of damage caused by wrongful conduct on the part of organs of the insurrectional movement does not recognize that movement, does not intend to recognize it, and does not maintain relations with it, there may be further difficulties in presenting a claim and bringing home the responsibility.

(9) Although this is not always the case, and there are examples in international practice in which claims have been presented in the course of the struggle, it often happens that, for the reasons given, States which have fallen victim to wrongful conduct on the part of organs of insurrectional movements think it advisable to wait for the situation to be clarified before filing their claims. Thus it often happens that claims are addressed, at the end of the struggle, either to the legitimate Government of the State, where that Government has put down the insurrection and re-established its authority throughout the territory, or to the new government which has replaced the previous Government upon the victorious issue of the insurrection, or again to the government of a new State formed by the secession of part of the territory of the pre-existing State or by decolonization of a former dependent territory of that State.

(10) These situations, however, differ sharply from one another, and the claims presented are not all based on the same grounds. Some of these situations are covered by article 15 and are outside the scope of the present article, which, as already stated, is concerned only with the problem of attribution or non-attribution to the State, as a possible source of international responsibility, of conduct adopted by organs of an insurrectional movement established in its territory, or in a territory under its administration, in cases in which the movement still exists as such when the claim is presented or has ceased to exist but has in its fall, brought down its own structure and organization.

(11) The scope of the present article having thus been defined, only three questions arise in connexion with its formulation. The first is whether it is possible to attribute to a State, as a source of responsibility, acts committed by organs of an insurrectional movement established in its territory or in another territory under its administration. The second question (which presupposes a negative reply to the first) is whether it is nevertheless possible for a State to incur international responsibility through the conduct adopted by its own organs in relation to actions of organs of an insurrectional movement, either before or after the end of the struggle against that movement and, where applicable, the restoration of the authority of the State over the whole of the territory. The third question is whether the article should include a safeguard clause providing for the possibility of attributing the conduct of the organ of the insurrectional movement to the movement itself.

(12) An analysis of international arbitral cases and of State practice confirms that acts committed by the organs of an insurrectional movement—leaving aside situations in which the movement is transformed into something else after its struggle has succeeded (the case envisaged in article 15)—cannot be attributed to the territorial State. Acts of the organs of the insurrectional movement cannot be attributed to the State as long as the struggle between that movement and constituted authority continues or, a fortiori, after the struggle has been decided in favour of the State. These conclusions are also those of the vast majority of writers who have considered the problem from a doctrinal point of view: Responsibility can be brought home to the territorial State only through some failure by its own organs on that occasion to discharge its obligations of vigilance, prevention or punishment. We may add that it makes no difference whether the alleged failure on the part of the State occurred before or after the active existence of the insurrectional movement came to an end: for example if, after internal peace had been restored, the authorities of the State failed to punish adequately the perpetrators of the injurious acts committed during the struggle. Indeed, it is on those grounds that the responsibility of the State will most often be invoked, since cases in which the “legitimate” Government was materially able, during the struggle, to prevent or punish the injurious acts of a person acting as an organ of an insurrectional movement are rather rare. Moreover,
the fact that the source of the State's responsibility lies not in the act of the person who was an organ of the insurrectional movement at the time when the act was committed, but in the conduct adopted by the organs of the State in relation to such an act, does not necessarily decide the choice of the criteria which, in a specific case, are applicable in determining the amount of compensation. There is no reason why the amount of the compensation due for failure of the State to fulfil an obligation to prevent or punish should not be determined on the criterion of the material damage caused by the act of the individual as an organ of the insurrectional movement. Lastly, insurrectional movements are recognized both in the practice of States and by the writers as having their own international responsibility for the acts of their organs.

(13) As far back as the nineteenth century, many mixed commissions affirmed on several occasions—and on the basis of explicit clauses in the treaties under which they had been established—the principle that as a general rule a Government was not responsible for injuries caused to aliens by the members of an armed insurrection which was beyond the control of that Government. The United States-Mexican Claims Commission established under the Convention of 4 July 1868 followed that principle in decisions relating to claims for injuries caused either by insurgents in Mexico or by the organs of the Confederate States in their struggle against the Federal Government in the United States of America. The American-British Mixed Claims Commission established under the Treaty of 8 May 1871 applied that principle also in connexion with claims arising out of the acts of the Confederate States during the War of Secession. The Spanish-American Mixed Commission established in 1871 likewise applied it in connexion with claims concerning injuries caused by the Cuban insurgents.

(14) As regards the twentieth century, international arbitral cases present a series of rulings all relating to the questions dealt with in this article, handed down in the decisions adopted between 1903 and 1905 by the claims commissions established under the Paris (1902) and Washington (1903) Protocols between Venezuela and other Powers. The latter had complained of injuries caused to their nationals, in particular in connexion with claims arising out of the acts of the Confederate States in their struggle against the Federal Government in the United States of America. The American-British Mixed Claims Commission under the Treaty of 8 May 1871 applied that principle also in connexion with claims arising out of the acts of the Confederate States during the War of Secession. The Spanish-American Mixed Commission established in 1871 likewise applied it in connexion with claims concerning injuries caused by the Cuban insurgents.

(15) Umpire Plomley, in the Aroa Mines case, which was submitted to the British-Venezuelan Mixed Claims Commission, in the Henriquez and Salas cases, which were submitted to the Netherlands-Venezuelan Mixed Claims Commission, and in the French Company of Venezuelan Railroads case, which was submitted to the French-Venezuelan Mixed Claims Commission, Umpire Duffield in the Kummerov, Redler, Fulda, Fischbach and Friedericy cases, which were submitted to the German-Venezuelan Mixed Claims Commission, Umpire Guiterrez-Otero in the Padron and Men cases, which were submitted to the Spanish-Venezuelan Mixed Claims Commission, and Commissioner Paul in the Acquatella case, which was submitted to the French-Venezuelan Mixed Claims Commission of 1903 applied practically the same principles in their decisions in all these cases and reached similar conclusions. In the Padron case, for example, the umpire affirmed as an accepted principle of international law that States were not responsible to aliens resident in their territory for damages and injuries inflicted upon them by persons in revolt against the constituted authorities, except where there was "negligence of the constituted authorities" in failing to adopt proper measures to provide protection against, or to punish, acts of rebels.

(16) The non-responsibility of the State for damage caused by a person or group of persons acting as organs of an insurrectional movement is also affirmed in the decision handed down on 1 May 1925 by the arbitrator, Huber, in the British Property in Spanish Morocco case.

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213 See the cases reported in J. B. Moore, History and Digest ... (op. cit.), vol. III, pp. 2873 et seq., 2881 et seq., 2886 et seq., 2902 et seq., and 2973—2981.
214 Ibid., pp. 2900—2901, 2982—2990.
215 Ibid., pp. 2981—2982.
216 United Nations, Reports of International Arbitral Awards, vol. X (United Nations publication, Sales No. 60.V.4), p. 524. After first examining the question from the standpoint of abstract right, Umpire Ralston concluded that:

"... from the standpoint of general principle ... save under ... exceptional circumstances ..., the Government should not be held responsible for the acts of revolutionists because—
1. Revolutionists are not the agents of government, and a natural responsibility does not exist.
2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.
3. The revolutionists were beyond governmental control, and the Government cannot be held responsible for injuries committed by those who have escaped its restraint" (ibid., pp. 512—513).

The Italian-Venezuelan Claims Commission applied the same principles in the Reveso et al. (ibid., pp. 582—583) and in the Guastini (ibid., pp. 577 et seq.).
217 Ibid., vol. IX (United Nations publication, Sales No. 59.V.5), pp. 408 et seq. and, especially, pp. 439 et seq.
218 Ibid., vol. X (op. cit.), pp. 714 et seq. and 720—721.
219 Ibid., p. 354.
220 Ibid., pp. 397—398.
221 Ibid., pp. 742—743.
222 Ibid., p. 749.
223 Commissioner Paul observed: "... only when it appears that the Government has failed to make prompt and efficient use of its authority to cause a return of said dissatisfied party to obedience, and to protect, within the measure of its ability, the property and persons threatened by the revolutionary disturbance, may it be considered as liable for the consequences of such abnormal condition." (Ibid., p. 6).
The Swiss jurist did not exclude, however, the possibility that the State could have invoked against it, as a source of international responsibility, lack of vigilance by its authorities in the prevention and punishment of injurious acts committed by rebels or organs of insurrectional movements, in so far as prevention and punishment were possible. Another application of the same principle, going back to more or less the same period, can be noted in the decision handed down on 19 November 1925 by the Great Britain-United States Arbitral Tribunal established under the Special Agreement of 18 August 1910 in connexion with the Several British Subjects (Iloilo Claims) case. The Tribunal rejected the British claims, having been unable to establish any negligence attributable to the United States forces.

(17) At about the same time, a further series of interesting decisions was handed down by various Claims Commissions established under the agreements concluded between Mexico and various Powers following the events which took place in Mexico between 1910 and the middle of the 1920s. For example, in the Home Insurance Company case, decided on 31 March 1926, the Mexico-United States General Claims Commission found that the Mexican Government was not responsible for an act committed at Puerto México, to the detriment of a United States firm, by the local commander of the de la Huerta revolutionary forces. The decision handed down on 3 October 1928 in the Solis case and written for the Commission by Commissioner Nielsen, found insufficient the evidence of alleged failure to protect of which the Mexican Government’s forces were accused by the claimant. The decision cites as a “well-established principle of international law” that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. Only failure on the part of the lawful authorities of the State to discharge that duty to protect could constitute the source of State responsibility. The principle that States are not responsible for wrongful acts committed by insurrectional movements is also evident in the opinion of the Presiding Commissioner Verzijl in the Georges Pinson case, decided on 19 October 1928 by the French-Mexican Claims Commission.

(18) Some of the decisions of the British-Mexican Claims Commission established under the Convention of 19 November 1926 are of particular interest, in that they take special account of possible failure to suppress insurrection or to punish the guilty parties. They even attempt to provide criteria for evidencing such failure. For example, in its ruling of 15 February 1930 in the Mexico City Bombardment Claims case, the Commission stated:

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong prima facie evidence can be assumed to exist in these cases in which first the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and second the Mexican Agent does not show any evidence as to action taken by the authorities.

For these reasons, the majority of the Commissioners held the Mexican Government responsible, noting in particular that the Mexican Agent had failed to produce any evidence as to action taken by the authorities to investigate, suppress or prosecute, despite the fact that, having been duly informed of the facts, they could have taken such action. In the John Gill case, the majority of the Commissioners held the Mexican Government responsible, for the same reasons as those set out in the decision in the Mexico City Bombardment Claims case.

(19) International arbitration bodies thus show remarkable uniformity in their opinions. The same may be said of diplomatic practice. It is many years since the chancelleries of the Powers endorsed the principle that a State could not be held responsible for acts of an insurrectionary movement in revolt against the lawful Government and that, in such cases, there could be no question of responsibility on the part of the State unless its organs were in a position to take appropriate preventive and punitive action but omitted to do so. Thus, the views of Governments coincided with those expressed at the time by arbitration bodies, often in connexion with the same situations. This can be seen in a number of cases, whether the injury done to aliens by organs of insurrectional movements occurred during the War of Secession of 1861–1865 in the United States, the Paris Commune of 1871 in France, the 1874 Carlist insurrection in Spain, the 1882 revolt of Arabi Pasha in Egypt, the two insurrections of 1868–1878 and 1895–1898 for the independence of Cuba, or the various insurrections against the Governments of other Latin American na-

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227 Ibid., pp. 358 et seq., Commissioner Nielsen noted that, irrespective of the facts of any given case, “the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection” (ibid., p. 362). Similar criteria were subsequently applied, by the same Commission, in the decision in the Bond Coleman case (ibid., pp. 364 et seq.) and referred to by Commissioner Nielsen in his opinion in the Russell case, decided by the Commission established under the Mexico-United States Special Convention of 10 September 1923 (ibid., p. 831).
228 Ibid., vol. V (United Nations publication. Sales No. 1952.V.3), pp. 352–353. See also in this connexion the criteria set forth in the decision of 19 May 1931 in the John Gill case (ibid., p. 159).
229 Ibid., p. 80.
230 For cases included in the digests of United States practice, see Moore, History and Digest ... (op. cit.), vol. II, pp. 1621–1624, and A Digest ... (op. cit.), vol. VI, pp. 957–958; for opinions of the Law Officers of the British Crown, see A.D. McNair, International Law Opinions (Cambridge, University Press, 1956), vol. II, pp. 256–257.
231 McNair, op. cit., pp. 261 et seq.
232 Ibid., p. 265.
233 Ibid., pp. 267–268.
234 Moore, A Digest ... (op. cit.), pp. 961 et seq. and 966 et seq.
(20) It is clear from the replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee for the Codification Conference of 1930 that there was substantial agreement among States that: (a) the conduct of organs of an insurrectional movement acting in the territory of the State against which this movement is directed cannot be attributed as such to the State or entail its international responsibility; (b) only conduct engaged in by organs of the State in connexion with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility if such conduct constituted a breach of an international obligation of that State. On the basis of the replies received, the Preparatory Committee of the Conference prepared two bases of discussion (No. 22(a), No. 22 (a),) but before it could consider them, the Conference had to break off its work. However, the opinion of Governments is quite clear from their replies to the request formulated by the Preparatory Committee. Moreover, this opinion seems to be fully confirmed by the view subsequently expressed by some of those Governments in connexion with specific cases in the 1930s.

(21) After the Second World War, the same principles were affirmed in the decisions of the national commissions set up in the United States to distribute among the claimants the funds paid as a lump sum by the United States Government in settlement of disputes concerning damage suffered by United States nationals. More recently, in 1958, during the war against the Indonesian dissidents, the merchant vessels San Flamiano and Daronia, and later the submarine Aurochs, all British, were bombed by aircraft in Indonesian territorial waters, and one of the merchant vessels was destroyed. When questioned in the House of Commons on the action taken by the Government, the British Under-Secretary of State stated on 11 June 1958 that:

In both cases Her Majesty's Ambassador at Djakarta made inquiries of the Indonesian Government, as a result of which Her Majesty's Government are satisfied that the action was not carried out by the armed forces of the Indonesian Government. It is presumed that the attacking aircraft were under the orders of the Indonesian dissident forces in North Celebes.

The British Government therefore did not feel it possible to attribute the wrongful acts of the insurgent armed forces to the Indonesian State as a source of responsibility on its part.

(22) Another example is the position taken by the Belgian Government in connexion with reparation of the damage suffered by Belgian nationals in the Democratic Republic of the Congo during the civil war. On 10 December 1969, the Belgian Minister for Foreign Affairs, replying to a question in the legislature, asserted that "wrongful and injurious acts committed by rioters or insurgents" could be the object of reparation only "if the forces responsible for maintaining order were culpably negligent in the performance of their duties".

(23) The positions taken by Governments in connexion with specific situations appear particularly significant in that most of them result in a negative decision with regard to the presentation of a claim. Apart from that, the language used in certain notes should not be taken literally. The fact that reference is made, for example, to negligence on the part of public authorities "in repressing insurrection" certainly does not mean that the State is regarded as responsible in the event of injuries caused by the organs of an insurrectional movement to a foreign State on the
grounds that the effort to crush the insurrection has not in general been conducted vigorously. The lack of vigilance and failure to intervene on the part of the State authorities must obviously have occurred in connexion with the protection of the foreign States or individuals harmed by certain acts committed by the insurgents, and what is more, it must have occurred specifically in relation to those acts. Likewise, the fact that the State is said not to be responsible “for the damage” caused by insurgents “unless” the State organs have in a specific case failed to provide protection certainly does not mean that such negligence would suddenly make possible the attribution to the State—which is in principle excluded—of the acts of the insurrectional movement. All that it means is that in such cases the State, being responsible for the omission on the part of its organs, is required to compensate for the damage caused by the acts of the insurgents, in reparation for that omission. However, the internationally wrongful act of the State still remains nothing more than the omission itself. In relation to the conduct of the State, the act committed by the organs of the insurgents is nothing more than the external event which serves as a catalyst for the wrongfulness of the conduct.

(24) From an analysis of the opinions of the writers, it is clear that international jurists, too, are remarkably unanimous in their views on questions falling within the framework of this article. They have long been agreed in recognizing that the conduct of organs of an insurrectional movement cannot be considered as acts of the State involving its international responsibility. They acknowledge that State responsibility cannot be spoken of in relation to such conduct unless the conduct has involved a failure on the part of the State’s organs to fulfil an international obligation. Some writers expressed this view as far back as the nineteenth century.245 The attempt by the Institute of International Law between 1898 and 1900 to bring about the accètage of a kind of objective guarantee on the part of the State for all injurious events caused by riots or civil wars was quickly abandoned. Moreover, the Institute’s proposals were posited essentially on the assumption that revolutionaries are nothing more than private individuals.246

245 See, for example, C. Calvo, “De la non-responsabilité de l’État à raison des pertes et dommages éprouvés par les étrangers en temps de troubles intérieurs ou de guerres civiles”, Revue de droit international et de législation comparée (Brussels), 1st series, vol. I, No. 3 (1869), pp. 417 et seq.

246 Brusa, Fauchille and von Bar proposed. Article II, paragraphs 2 and 3 of the resolution adopted in 1900 by the Institute of International Law (Annaire de l’Institut de droit international, 1900 (Paris), vol. 18 (1900), pp. 236 et seq.) made it clear that if the “insurrectional government” had been recognized as a “belligerent power”, and therefore as a subject of international law, it was to that government that injured States should address their claims for reparation of the injuries sustained. L. von Bar expressed the same view (“De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de troubles, d’éméutes ou de guerres civiles”, Revue de droit international et de législation comparée (Brussels), 2nd series, vol. I, No. 4 (1899), p. 475). Writers who later supported the proposition that, given certain circumstances, the State was responsible for acts committed by insurgents, all nevertheless excluded that responsibility in cases where the State has recognized the insurgents as “belligerents”. See, for example, A. Rougier, Les guerres civiles et le droit des gens (Paris, Larose, 1903), p. 462.

(25) As for modern writers, whether of special studies of the problem,247 whether of more ranging works on international responsibility248 or the problem of recognition,249 or whether of general treatises,250 while they may sometimes differ on other points, they are almost unanimous in agreeing that, under the rules at present in force,251 injurious conduct on the part of the organs of an insurrectional movement is not attributed to the State and thus does not entail its international responsibility. At most, such responsibility can arise only where organs of the State have omitted to fulfil their recognized obligation to exercise diligence in preventing or punishing the injurious conduct in question. Moreover, even that does not seem to follow automatically, according to some less recent writers, at least in the specific case of “recognized
which is unquestionably responsible in the event of wrongful failure of the "insurrectional government as a belligerent party" to hold responsible in cases of lack of diligence in preventing a mob, riot, insurrection or civil war", and the State was held responsible in such cases for the breach with which it is charged. This is because, in the case of a genuine insurrectional movement in the sense in which that term is understood in international law, there is a possibility of holding the movement itself responsible for the wrongful acts of its organs. Despite the frequent difficulties involved, States have sometimes actually presented claims to an insurrectional movement in the sense in which that term is understood in international law, there is a possibility of holding the movement itself responsible for the wrongful acts of its organs. Despite the frequent difficulties involved, States have sometimes actually presented claims to an insurrectional movement for injuries suffered by them or their nationals by organs of that movement. Cases can be quoted, even from the distant past, of claims of this kind. For instance, the note of 26 November 1861 from the British Secretary of State for Foreign Affairs, Earl Russell, to the United States Ambassador, Mr. Adams, justified the claim that the revolutionaries, in which event the State must place in reparations which the State may be required to pay in reparation for the breach with which it is charged. 

(26) According to some of the writers mentioned in the preceding paragraph, such as Silvanie, Reuter, Schwarzenberger and O'Connell, an exception ought to be provided to the general rule that the conduct of organs of an insurrectional movement cannot be attributed to the State as a source of international responsibility; the exception would apply to any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control. However, while on occasion a State may conceivably acknowledge that it is bound by certain obligations deriving from routine administrative acts performed by organs of an insurrectional movement in territory formerly under its administration, it is much less certain, not to say altogether unlikely, that a State would do so in the case of obligations arising out of internationally wrongful conduct of the same organs. Even supposing that a State was willing to assume in proprio certain obligations incurred by an insurrectional movement, that would be done by virtue of the succession of one subject of international law to the obligations of another subject, and not by virtue of the attribution to the former of the acts of the latter in accordance with the rules applying to the international responsibility of States. Another alleged exception to the general principle which seems to call for a negative conclusion is the attribution to a State of the wrongful conduct of an unsuccessful insurrectional movement in the event of a grant of amnesty by the State concerned. Some writers, such as Berlia, Reuter, Tévenkidiés and Brownlie, see the grant of a pardon to such insurgents as a kind of ratification of their acts by the State. It may, of course, happen that the State, in granting an amnesty, is breaching an international obligation to punish which it ought to have fulfilled, but that does not mean that it is endorsing the acts of others. In such a case, it is the breach which will be attributed to it as a source of responsibility, and not the acts committed by the organs of the insurrectional movement. 

(27) With regard to draft codifications, rule VII of the resolution adopted at Lausanne in 1927 by the Institute of International Law related to "injuries caused in case of mob, riot, insurrection or civil war", and the State was held responsible in cases of lack of diligence in preventing or punishing the injurious acts. The draft prepared in 1930 by the German International Law Association was noteworthy for the way in which it considered recognition of the insurrectional movement as a belligerent party to be a decisive factor. The two drafts prepared by the Harvard Law School, on the other hand, were noteworthy for the fact that they introduced a distinction between unsuccessful and successful revolutions. Among the drafts emanating from official sources, the two texts prepared by the Inter-American Juridical Committee—one expressing the views of the Latin American countries (article V) and the other giving the views of the United States (article VI)—both followed the same criteria with regard to injurious acts committed by insurgents as were adopted with regard to injurious acts committed by individuals. With respect to the drafts prepared under League of Nations or United Nations auspices, the 1926 Guerrero report also followed, in conclusion 8, the criteria laid down in conclusion 5, in connexion with the acts of private individuals; conclusion 9, however, introduced a reservation in case of seizures or confiscations by the revolutionaries, in which event the State must place all necessary legal means at the disposal of foreigners who suffered loss. The text of bases of discussion Nos. 22 and 22 (a) drawn up by the Preparatory Committee for the Conference was reproduced earlier. Lastly, the question was also dealt with by F. V. Garcia Amador in the drafts he prepared for the International Law Commission in 1957 and 1961. 

(28) As has already been pointed out from the very beginning of this commentary, the injurious conduct of organs of an insurrectional movement is to be distinguished from that of individuals or groups of individuals during a riot or demonstrations by a rebellious mob. This is because, in the case of a genuine insurrectional movement in the sense in which that term is understood in international law, there is a possibility of holding the movement itself responsible for the wrongful acts of its organs. Despite the frequent difficulties involved, States have sometimes actually presented claims to an insurrectional movement for injuries suffered by them or their nationals by organs of that movement. Cases can be quoted, even from the distant past, of claims of this kind. For instance, the note of 26 November 1861 from the British Secretary of State for Foreign Affairs, Earl Russell, to the United States Ambassador, Mr. Adams, justified the claim that the revolutionaries, in which event the State must place in reparations which the State may be required to pay in reparation for the breach with which it is charged. 

382 Spiropoulos, like Schoen and Strupp before him, argues that recognition of the "insurrectional government as a belligerent party" releases the lawful government from all responsibility, even in case of wrongful negligence. However, it is difficult to see why the State, which is unquestionably responsible in the event of wrongful failure to give protection against the conduct of organs of another State, should cease to be responsible when the conduct in question is that of organs of an insurrectional movement. 

383 This does not necessarily affect the question of the amount of compensation which the State may be required to pay in reparation for the breach with which it is charged. 


259 Article 11 of the 1957 draft (Yearbook... 1957, vol. II, p. 130, document A/CN.4/106, annex) and article 7, paragraph 1, of the 1961 revised draft (Yearbook... 1961, vol. II, p. 47, document A/CN.4/134 and Add.1, addendum) Article 7, paragraph 1, of the 1961 text reads as follows: "The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts." 

260 This is clearly further proof that the claimant States are of the firm opinion that the injurious conduct in question cannot be attributed to the "legitimate government."
necessity for the relations maintained by Great Britain with the Confederates in the following terms:

Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a State are injured by a de facto government, the State so aggrieved has a right to claim from the de facto government redress and reparation. 261

On 9 April 1914, members of the crew of the United States vessel *Dolphin*, anchored at Tampico in Mexico, were arrested by an armed band belonging to the forces of General Huerta, head of the Government which had then temporarily seized power. On 11 April the United States admiral in command requested various forms of reparation from the authorities of that Government. The Department of State supported his request in instructions sent on 14 April to the United States Chargé d'Affaires in Mexico. Since General Huerta had not given satisfaction, United States forces proceeded on 21 April to occupy Veracruz. 262 More recently, the United Kingdom Government on three occasions during the Spanish Civil War presented claims to the Nationalist Government, which was then located at Burgos or Salamanca. These occasions were after the loss of the destroyer *Hunter*, blown up on 13 May 1937 by a mine laid by the Nationalists four miles off Almeria, after the destruction of the steamer *Alcyra*, sunk 20 miles from Barcelona on 4 February 1938 by two seaplanes from the Nationalist base in Majorca, and after the attack on the British merchant vessel *Stamwell* by a Nationalist aircraft, on 15 March 1938, in the port of Tarragona. In all three cases, a formal request for reparation was addressed to the Nationalist authorities. 263

(29) With regard to the formulation of the rule to be laid down in this article, the Commission, taking into account the foregoing considerations, decided to set out in paragraph 1 the basic principle of the non-attribution to a State of the conduct of an organ of an insurrectional movement established: 1st. the territory of that State or in any other territory under its administration. The expression “or in any other territory under its administration” was included in order to take account of the legal status of dependent territories, which it is now incorrect to describe as the “territory of a State”. The expression “insurrectional movement, which is established in the territory...” was chosen as being that which best expressed the fact that the conduct of the organ of the insurrectional movement cannot be attributed to the territorial State, irrespective of whether or not that State is the State against which or against the government of which the movement is directed. The wording thus covers the case in which the insurrectional movement operates in, or from within, a third State. The case dealt with in article 14 is clearly that in which the organ of the insurrectional movement acts in that capacity. The Commission did not, however, deem it necessary to specify that point in the text of the article, since the latter is drafted in negative form. The principle of non-attribution to the State would also of course apply, by virtue of article 11, to acts committed by an organ of an insurrectional movement in a private capacity.

(30) In order to avoid any ambiguity with regard to any failure by a State to fulfil its own international obligations, paragraph 2 of the article stipulates, in the form of a safeguard clause, that the principle of the non-attribution to a State of the conduct of an organ of an insurrectional movement 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 of the draft. It should be noted that, by referring back to those articles of the draft, the formulation covers all the cases in which an act may be regarded as an “act of the State” under international law and may entail the international responsibility of the State, and not merely those cases in which the author of the conduct is an organ of the State under its internal law.

(31) Finally, paragraph 3 of the article contains a second safeguard clause, this time relating to the insurrectional movement itself. Under this clause, the non-attribution to a State of the conduct of an organ of an insurrectional movement is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement. The purpose of this clause is not to settle forthwith all problems of attribution which may arise in this connexion, but, in the light of international practice, to provide for the possibility of such attribution by referring the solution of those problems to the relevant principles of international law. It was precisely in order to avoid prejudging such solutions that the Commission had preferred the formula “in any case in which such attribution may be made under international law”, to any of the other expressions suggested during the discussion, such as “possessing separate international personality”, “possessing recognized international personality”, “if it controls part of the State in question”, or “the international status of which is applicable to the relations in question”. The use of any of those expressions might have given the impression that the Commission intended to take a position on problems which, as already mentioned, 264 are not relevant to the subject-matter of the present draft codification.

**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

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261 Moore, *A Digest ... (op. cit.)*, vol. I, p. 209.
263 These cases are described in C. Rousseau’s article, “La non-intervention en Espagne”, *loc. cit.*, pp. 277-278. The author also recalls that the National Defence Junta at Burgos accepted a Portuguese claim for events which had taken place before the Nationalists forces occupied the area in which they had occurred (*ibid.*, pp. 278 et seq.), but that it did so rather as the “successor” of the Government of the Spanish Republic. See also the position taken by the United States Government in connexion with the attack on the United States destroyer *Kane* (*Hackworth, op. cit.*, 1940, vol. I, pp. 362-363; *ibid.*, 1943, vol. VII, pp. 172-173).

264 See above, paras. 5-7 of the commentary.
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.

Commentary*/

(1) This article concerns conduct which, when it took place, was engaged in by organs of an insurrectional movement in conflict with the constituted power. It provides that, in the event of the insurrectional movement subsequently becoming the new government of the State against whose authority it rebelled, or the government of a new State which has become independent of that State, the conduct in question shall be considered as the act of those States. It should therefore be understood that the questions of attribution contemplated in the present article arise solely in the case where the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question, or in the case where the structures of the insurrectional movement have become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the pre-existing State.

(2) It is held in some instances that the attribution to the State, as a possible source of responsibility, of acts committed by subsequently victorious insurgents is justified by the fact that during the conflict the insurgents were already exercising authority as a “de facto government” in at least part of the territory of the State. But in practice, for the purpose of attributing acts to the State, no distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region. At the same time, as we have seen, the acts of insurgents are not considered to be acts of the State when the final outcome of the civil war is unfavourable to them, even if they succeeded at a particular moment in exercising de facto authority over some portion of the territory of the State; this proves that the attribution or non-attribution to the State of the acts of insurgents is quite independent of their exercise of de facto power. The idea has also been put forward that, where the action of the insurgents was successful, they would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of “national will” is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the “true” national will. Even leaving that aside, it is difficult to maintain that the outcome of fighting should, like a judgement of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated.

Furthermore, the idea that a subsequently victorious insurrectional movement was from the outset the “true” government of the State because it embodied the “true” national will would involve the consequence that only the acts of organs of that movement could be considered subsequently to be acts of the State. This, however, is clearly contradicted by the practice which, as we shall see, holds the State too to be responsible for acts committed during the struggle by the government which is overthrown by the insurgents.

(3) In truth, the point is not so much to find a justification for the attribution to the State, as a possible source of international responsibility, of conduct engaged in by the organs of an insurrectional movement before the latter has taken power. What is important is to determine whether that attribution is or is not made in the real world of international relations. But if we do wish, nevertheless, to find a justification of principle for such an attribution, we ought perhaps to seek it in the fact that there is continuity between the organization with which the insurrectional movement had provided itself before taking power and the organization with which, as the result of its success, it has endowed the government of the pre-existing State or that of the new State which has separated from the pre-existing State. It is indeed the existence of this continuity which justifies wondering whether or not it is possible to attribute to the State in question, as a possible source of international responsibility for that State, conduct engaged in by the organs of the insurrectional movement before the victory of the movement in the civil war. That having been said, it should be made clear that the question does not arise in the same way in respect of each of the hypotheses referred to above.

(4) In the first hypothesis, the insurrectional movement, as a new government or new régime, replaces the previous government or régime of the State. The ruling organization of the insurrectional movement takes power in the State and becomes the ruling organization of that State or is at least integrated, in one way or another, into the previous organization of the State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement therefore naturally leads to the attribution to the State of the acts which the organs of the insurrectional movement may have committed during the struggle; this is without derogation from the principles habitually applied.

(5) In such a case, the State does not cease to exist as a subject of international law. Its identity remains the same, without any break in continuity, despite the changes, reorganizations and adaptations which occur in the institutions of the State. That means that it is necessary to continue to attribute to the State, after the success of the insurrectional movement, the conduct previously engaged in by the organs of the pre-existing State apparatus. Consequently, the situation requires that the State should be responsible for acts committed during the struggle for power both by the apparatus of the insurrectional movement and by the apparatus of the legitimate government. There is nothing surprising in this. During the insurrectional struggle, two organizations are opposed to each other and are fighting for final victory. Each of the two wishes to be the organization of the State; at the outset, one is so in fact and the other potentially. In the case where the insurgents triumph and install themselves in the

government of the pre-existing State, the organization of the insurrectional movement is integrated within the framework of the State organization. The resulting State apparatus is in reality the continuation of both the organizations which confronted each other during the struggle. It is therefore logical to attribute to the State the acts of organs of its preceding organization and the acts of organs of the organization which grew up during the insurrection and then became the organization of the State itself. It should be added that this conclusion appears to be justified both in the case of total victory for the insurrectional movement, which then modifies the State apparatus to its liking, and in the case of an agreement between the legitimate government and the insurrectional government under which members of the insurrection are called upon to participate in the government of the State.265

(6) In the second hypothesis, the success of the insurrectional movement gives rise to the creation of a new State, either in part of the territory of the pre-existing State or in a territory which was previously under the administration of that State. The attribution to the new State of the acts of the organs of the insurrectional movement which preceded it, and of such acts only, is then justified by virtue of the continuity between the organization of the insurrectional movement and the organization of the State to which it has given rise. From being only an embryo State, the insurrectional movement has become a State proper, without any break in the continuity between the two. It is in fact the same entity which previously had the characteristics of an insurrectional movement and which now has those of a State proper. However, the acts of the organs of the pre-existing State are in no way attributable to the new State, which has separated from the pre-existing State by secession or decolonization. These are and remain exclusively the acts of the pre-existing State, which as a general rule, moreover, will continue to exist after the constitution of the new State by the insurrectional movement.

(7) It has sometimes been maintained that, in a number of the cases falling within the first of the two hypotheses discussed above, and in particular in the case of major social revolutions, the change brought about in the State apparatus by the insurrectional movement as a result of its success might be so far-reaching as to alter the identity of the State itself.266 Even for writers who support such

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265 It is only when the struggle ends in victory for the pre-existing power that the insurrectional organization is dissolved and only the established apparatus remains. It is then logical that one should attribute to the State only the acts of organs of this continuing apparatus, and not those of the organs of a movement which has ceased to exist without ever having succeeded in being the actual organization of the State or even in participating in it.

266 See, for example, R. Quadri, "Stato (Diritto internazionale)", *Nuovo Digesto Italiano* (Turin), vol. XII, part 1 (1940), pp. 815-816, and *Diritto internazionale pubblico* (op. cit.), pp. 500 et seq.; M. Giuliano, *La Comunità internazionale e il diritto* (Padua, CEDAM, 1950), pp. 248 and 290; Arango-Ruiz, *Sulla dinamica ...* (op. cit.), pp. 19 and 131 et seq., and "Stati e altri enti ...", (loc. cit.), p. 167. The last-named writer uses the term "revolution" to describe a situation where the entity resulting from the change presents such markedly different characteristics from the pre-existing entity that its "newness" must be acknowledged.

267 Arango-Ruiz, in "Stati e altri enti ...", (loc. cit.), p. 167, emphasizes that, in the most common case, the pre-existing personality does not cease to exist but is only modified "materially".


269 It does not therefore seem entirely correct to refer to these possible cases as though they were cases of State responsibility "for wrongful acts of an insurrectional movement".
“intermediary” phase did not occur. However, it is scarcely conceivable to talk of the succession of one subject of international law to the obligations of another such subject in cases where the insurgents did not constitute a movement having its own international personality. Also, it should be made clear that the article under consideration relates only to the attribution of certain acts to the State. It in no way seeks to define at the same time the international responsibility which might possibly derive from this attribution or to determine the amount of compensation due.

(9) Some international arbitral decisions expressly recognize the principle of the international responsibility of the State for acts committed during a civil war by agents of an insurrectional movement which was subsequently successful. The statements made in this respect are less numerous than those which could be cited in connexion with the questions discussed in the preceding article, but this can be explained specifically by the fact that there is no divergence of views, no doubt whatsoever, as to the validity of the principle in question. The most interesting statements are to be found in certain decisions of the mixed commissions which were established in respect of Venezuela in 1903 and of Mexico in 1920-1930. These decisions were given in connexion with disputes arising out of injuries inflicted on foreign nationals during the revolutionary events which had occurred in those countries.

(10) As regards the “Venezuelan arbitrations”, the best-known statement of principle is that which appears in the decision concerning the Bolivar Railway case written by Umpire Plumley for the British-Venezuelan Mixed Claims Commission in 1903. In this decision, the principle in question is stated in the following terms:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.

The principle of the attribution to the State of acts of successful insurrectional movements, affirmed in that decision, was also applied by the same umpire in the decision relating to the Puerto Cabello and Valencia Railway case, which involved specifically injuries caused to foreigners by wrongful acts of the insurgents and, for the French-Venezuelan Mixed Claims Commission of 1902, in the decision concerning the French Company of Venezuelan Railroads case. This decision affirms the principle that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.

In the statement of reasons for the decision concerning the Dix case, written by the United States Commissioner, Bainbridge, on behalf of the United States-Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903, it is stated that:

The revolution of 1899 ... proved successful and its acts, under a well-established rule of international law, are to be regarded as the acts of a de facto government. Its administrative and military officers were engaged in carrying out the policy of that government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government.

(11) In the context of the “Mexican arbitrations”, attention should be drawn above all to the decision concerning the Pinson case, given on 19 October 1928 by the French-Mexican Claims Commission of 1924, in which the President of the Commission, Verzijl, who wrote the decision, ruled that:

... if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State, in my opinion, cannot be denied.

State responsibility for the acts of successful insurgents was also affirmed by Nielsen in two opinions given by him, as United States Commissioner, in the Mexico-United States General Claims Commission established under the Convention of 8 September 1923 and in the Mexico-United States Special Claims Commission established under the Convention of 10 September of the same year. In the first opinion, dissenting from the decision in the Pomeroy’s El Paso Transfer Company case given on 8 October 1930 by the General Claims Commission, Nielsen points out that “international tribunals have repeatedly held a government responsible for acts of successful revolutionists”. In the second opinion, referring to the decision in the Russel case, given on 24 April 1931 by the Special Claims Commission, Nielsen maintains explicitly that, according to general international law, “a government is responsible for the acts of successful revolutionists”. In both cases, moreover, the other members of the Commission in no way defended a principle differing from that propounded by Nielsen.

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270 On the other hand, several arbitral decisions can be found which considered lawful acts committed during a civil war by successful insurgents, particularly contracts, to be acts of the State. But such decisions cannot generally be produced in support of the principle of State responsibility for the wrongful acts of the insurgents in question.

271 United Nations, Reports of International Arbitral Awards, vol. IX (United Nations publication, Sales No. 59.V.5), p. 453. The case in question in fact involved the attribution to the State not of an internationally wrongful act but of a lawful act, a debt contracted by the insurgents. However, the principle stated by the umpire is formulated in terms which are perfectly suited also to the case of the attribution to the State of a wrongful act. It should be added that, although the principle enunciated is correct and not open to challenge, the justification given by the umpire for the solution adopted is much less so and has been strongly criticized by certain authors.

272 Ibid., p. 513.


274 Ibid., vol. IX (op. cit.), p. 120. In this connexion, it should be noted that the justification given for the principle applied is the fact that, at the time of the injuries caused by its organs, the insurrectional movement was already exercising the authority of a de facto government. See also in this connexion the statement of reasons for the decision relating to the Henry case, written by Umpire Barge (ibid., p. 133).

275 Ibid., vol. V (op. cit.), p. 353 [translation from French].

276 Ibid., vol. IV (op. cit.), p. 563.

277 Ibid., p. 831.
They simply refrained from touching on the question because they deemed it irrelevant to the decision in the cases considered.

(12) An analysis of the practice of States shows that Governments have taken a position on the problem similar to that taken by the arbitrators responsible for ruling on certain claims. Thus, in an opinion given on 21 October 1861 by the Law Officers of the British Crown, i.e. in the early days of the American Civil War, on the possibility of obtaining compensation for the injuries caused to British subjects, we read that:

... should the party by whose officers or troops, or under whose authority, such losses or destruction have been inflicted, ultimately succeed in acquiring power, and be recognized by Her Majesty's Government as the Sovereign Government, it may be open to Her Majesty to insist upon compensation in respect of such losses and injuries.278

Subsequently, at the height of the War of Secession, the Law Officers of the Crown, in an opinion given on 16 February 1863, considered the possibility that the Confederates might succeed in their separatist aims and assert their sovereignty over the Southern territories by constituting there a State independent of the Union. Thus, the situation envisaged was that of the formation of a new State by secession from the pre-existing State. Referring to this specific situation, the Law Officers of the British Crown observed that:

In the event of the war having ceased, and the authority of the Confederate State being de jure as well as de facto established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's subjects by the Confederate Authorities during the War.279

(13) During the revolutionary events which took place in Mexico following the re-formation of the Republic and which led to the assumption of power by the insurgents and, subsequently, to the appointment of General Porfirio Díaz as President, Secretary of State Evarts sent to the United States Minister to Mexico, on 4 April 1879, instructions in which he declared himself convinced that the Mexican Government would not reject the claims of United States nationals for injuries sustained during the revolution as a result of acts by the insurgents. The Secretary of State believed that the usual objection that the State was not responsible for the acts of an insurrectional movement would not “be pleaded in this case, as the insurgent has become the regular government”.280

(14) Later, a number of interesting opinions were given with respect to the question of compensation for injuries caused to foreigners in Mexico in 1910, first by agents of the revolutionary movement of Francisco Madero and later by supporters of abortive insurrectional attempts against the Madero Government. The distinction between the two situations stands out very clearly in the notes sent by the British Minister to Mexico281 to his colleague, the Ambassador of the United States, who did not share his view. The United States Department of State, however, adopted a viewpoint similar to that maintained by the British Minister and in a despatch addressed to the Ambassador, signed on behalf of the Secretary of State, commented as follows:

It being assumed that the so-called Madero revolution was successful, it would appear that, under the generally accepted rules of international law, claimants seeking compensation for damages caused during that revolution would, as a class, be in a better legal position than would persons whose claims arose out of an unsuccessful revolution.

The statement in your notes to the Mexican Foreign Office and the British Minister, that the Government of the United States perceived no distinction between the two classes of claims, appears to have been made upon your own responsibility and without instructions from the Department. Probably it was intended to convey the opinion that claims arising out of the late revolutionary movements were valid; but it might, on the other hand, be construed as involving a renunciation or waiver of the benefit of the rule which imposes upon successful revolutionists liability for their acts. You will therefore take occasion to inform the appropriate authorities that the statements contained in your note of January 21, 1913, were made on your own responsibility, and were not intended to admit a doubt as to any of the established grounds of international liability; and you should make a similar expression to the British Minister with relation to the statements contained in your letter to him on January 27, 1913.282

(15) The possibility of holding the State responsible for acts of organs of an insurrectional movement where the latter has subsequently been successful was clearly brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference, under the general heading of point IX, concerning “damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence”.283 In reply to the question “What is the position ... where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government?”, (point IX (c)), 10 Governments284 all stated clearly that, where the insurgent party, having taken power, has become the government of the State, the latter must be liable for injuries caused by the insurgents during the civil war to the person or property of foreigners. On the basis of

278 McNair, op. cit., p. 255.
279 Ibid., p. 257.
280 Moore, A Digest ..., (op. cit.), vol. VI, pp. 991-992. Similar arguments were behind the claims for compensation submitted by the United States to the Governments established following successful revolutions in Honduras (Owens case, ibid., pp. 992-993) and Peru (Fowks case, ibid., pp. 993-994).
281 See, for instance, the note of 28 January 1913 (United States of America, Department of State, Papers relating to the Foreign Relations of the United States, 1913 (Washington, D.C., U.S. Government Printing Office, 1920), p. 938). In one of the notes exchanged, the British Minister refers to the instructions sent by the British Foreign Minister to British consular offices (ibid., p. 937).
282 Ibid., p. 949.
283 League of Nations, Bases of discussion ... (op. cit.), pp. 108 and 116.
284 These were the Governments of Australia, Austria, Great Britain, India, Japan, Norway, New Zealand, South Africa, Switzerland and the United States (ibid., pp. 116 et seq., and Supplement to Volume III, (op. cit.), p. 21). The replies sent by three other Governments (Hungary, the Netherlands and Czechoslovakia) are vague and no definite conclusions can be drawn from them (League of Nations, Bases of Discussion ..., (op. cit.), pp. 117-118). Two others, those of Denmark and Finland, seem to hold the State liable in the circumstances given in the request; they too, however, are not clear (Ibid., p. 117).
the replies received, the Preparatory Committee of the
Conference drew up Basis of discussion No. 22 (c).285
but the Conference had to end its work before it had an
opportunity to consider this basis of discussion. Note
should also be taken of the replies by two Governments286
which related to a different problem from that mentioned
in the request of the Preparatory Committee and
affirmed the principle of the responsibility of the govern-
ment which resulted from the revolution for the wrongful
acts committed by organs of the preceding government.

(16) As a whole, the replies sent by Governments to the
Preparatory Committee's questionnaire seem to be
sufficient to confirm the widely recognized existence of
a general principle of international law; a principle pro-
viding precisely for attribution to the State or government
resulting from a successful revolution of acts committed
by the insurgents during their struggle to take power, as a
possible source of international responsibility. The
practice of States on the question after 1930 is less
accurately known. But there is no reason to think that
there has been any change from the principle generally
accepted at the time of the Hague Conference. That
principle was taken up, for instance, in a recent opinion,
namely, the instruction sent on 26 January 1959 by the
Department of State to the United States Embassy in
Cuba.287

(17) The principle that it is legitimate to attribute to a
government resulting from a successful revolution the
injurious acts committed earlier by the revolutionaries
must also apply, as previously mentioned, to the case of
a coalition government formed following an agreement
between the "legitimate" authorities and the leaders of
the revolutionary movement.288 The Peruvian civil war,
which was terminated by an agreement signed on 2
December 1885 by the Head of State, General Iglesias,
and the leader of the insurrectional movement, General
Caceres, is a historic example of this kind. Pursuant to that
agreement, a provisional government was constituted,
composed of representatives of the two parties, and that
government held elections. On 3 June 1886, the Congress
which was elected as a result of that popular consultation
proclaimed Caceres President of the Republic. After these
events, the United States Government presented certain
claims to Peru in connexion with acts committed during the
revolution by supporters of General Caceres's insurrec-
tional movement. The first claim, which concerned the
seizure by the insurgent forces, in 1848, of a quantity of
guano belonging to a United States firm, rested on the
ground that the guano seized had been appropriated to
sustain a cause "which has become national by the voluntary
action of the people of Peru, its chief representative
being at the present time the duly elected and installed
constitutional executive of the Republic".289 A second and
more significant claim concerned the ill-treatment
inflicted in 1885 on a United States consul agent. The
Peruvian Government at first rejected the claim, arguing
that the acts complained of had been committed by
"a chief in arms against the government then recognized
as legitimate by all nations" and that the Peruvian State
could therefore not be held responsible. The United States
Minister to Peru replied that the Peruvian Government
now in office was the successor of the provisional govern-
ment of Iglesias and Caceres and that therefore it was
responsible for the acts of the officials of both. The
Peruvian Government thereupon abandoned its earlier
argument and acknowledged that the measures taken
against the United States consul agent emanated from a
"legitimate authority".290

(18) Writers on international law, while they differ in
details of their individual approaches, are in principle
agreed in affirming that a State whose government is the
expression of a successful insurrectional movement must be
answerable for the acts committed by agents of that
movement during the struggle.291 In that connexion,

285 "A State is responsible for damage caused to foreigners by an
insurrectionist party which has been successful and has become the
Government to the same degree as it is responsible for damage
caused by acts of the Government de jure or its officials or troops"
(League of Nations, Bases of discussion ... (op. cit.), p. 118, and
286 Those of Poland and Canada (League of Nations, Bases of
discussion ... (op. cit.), p. 118, and Supplement to Volume III (op.
cit.), p. 3).
287 This reads: "... a government which becomes the legitimate
government of a state by a successful revolution, such as the present
Government of Cuba ... is internationally responsible as a general
rule for damages caused by acts of forces or authorities of both the
former government and the revolutionists which were not legitimate
from a military standpoint or sanctioned by the rules of warfare,
such as wanton or unnecessary injury to persons or property and
pillage. The government of the successful revolutionists is also
internationally obligated to pay for property which was requisitioned
by either the former government or the revolutionists" (Whiteman,
op. cit., p. 819).
288 Such a situation is not to be confused with that of a "legiti-
mate" government which, after having overcome an insurrection,
grants an amnesty to the insurgents. In a case of that kind, the only
existing government is still the "legitimate" government. In this
connexion, see above, para. 26 of the Commentary to article 14.
they generally make no distinction between the situation where the insurgents have asserted their authority as a new government or new régime over the whole of the territory of the pre-existing State and the situation where they have, on the contrary, caused the formation of a new State in part of the territory of the pre-existing State, which is therefore detached from the latter. International jurists also generally agree that in the former situation the fact that the State is held responsible for wrongful acts committed by insurgents during the revolution in no way precludes the possibility of attributing to it, at the same time, responsibility for the conduct of organs of the preceding government. Finally, with a few exceptions, the writers who have gone most deeply into the question do not hesitate to affirm explicitly that the acts of insurrectional movements are to be regarded retrospectively as acts of the government which they have subsequently created. These writers take the view that such acts are to be considered as "acts of the State" from the time when the insurrectional movement became victorious.

(19) Apart from Basis of discussion No. 22 (c) drawn up by the Preparatory Committee of the 1930 Conference, five codification drafts deal with the question with which this article is concerned. The Harvard draft of 1929, the 1965 draft of the Inter-American Juridical Committee and García Amador's draft of 1957 speak in general of State responsibility for the acts of a successful insurrection. The Harvard draft of 1961 expresses more precisely the idea of attributing to a State the acts of organs of an insurrectional movement which has subsequently become the government of that State. Only García Amador's revised draft of 1961 departs from the others, since it seems to try to limit the question, even where the revolution is successful, to cases, in which there has been negligence on the part of the "legitimate" organs of the State.

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292 See Goebel, loc. cit., p. 818; Eagleton, The Responsibility of States... (op. cit.), p. 147; Ralston, op. cit., p. 343; Hyde, International Law... (op. cit.), pp. 987-988; Cavaré, op. cit., p. 547; Cheng, op. cit., p. 190; Reuter, op. cit., p. 94; Schwarzenberger, op. cit., pp. 628-629; Amersinghe, op. cit., pp. 127-128. It may also be pointed out that all those writers, like Borchard, Beria, Rousseau, Verdross and Castrén, who subscribe to the idea that successful insurgents are regarded as having from the outset represented the true national will must necessarily consider the organs of the insurrectional movement as being already organs of the State at the time when they committed the injurious acts. Of all the writers consulted, only Strupp and, following in his footsteps, Decenciére-Ferrandière appear to be negative regarding the attribution to the State of the conduct of organs of an insurrectional movement during the revolution.


296 Article 18, para. 1: "In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government." (Yearbook... 1969, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII).


(20) Having regard to the foregoing considerations, this article contains two paragraphs, dealing respectively with the situation where the organization of the insurrectional movement becomes the new government of the entire country and the situation where the organization of the insurrectional movement becomes that of a new State established in part of the territory formerly under the sovereignty or administration of a pre-existing State. The Commission considered that no distinction should be made, for the purposes of this article, between different categories of insurrectional movements on the basis of any international "legitimacy" or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it would be extremely dangerous to introduce concepts which might exonerate a new government or a new State from all responsibility by reason of the fact that it derived from an insurrectional movement characterized as "illegitimate" or from an insurrectional movement which had attained power as the result of internationally wrongful actions. If the success of the insurrectional movement is due to the intervention of a foreign State which has provided it with assistance that played a decisive role, in violation of its international obligations, that act of the foreign State in question will be attributed to that State and will entail its international responsibility. However, that does not affect the problem of the attribution to the State in which the insurrectional movement has taken over the government, or to the State whose creation it has brought about, of internationally wrongful conduct engaged in by the insurrectional movement during the struggle. For such an attribution, no condition is required other than the mere existence of that movement and the relationship of continuity between its organization and that of the new government or State established as a result of its action.

(21) Paragraph 1 of the article begins by stating the rule that the act of an insurrectional movement that becomes the new government of a State is regarded as an act of that State. There can be no exceptions to this general principle. The second sentence of that paragraph specifies that such attribution is without prejudice to the attribution to that State of any conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10 of the draft. In other words, this provision emphasizes that the attribution to the State of the behaviour of the organs of the insurrectional movement in no way excludes the parallel attribution to that State of the actions carried out, during the conflict, by the organs of the government then established, since it is important to maintain the possible responsibility of the State for the acts of the government which had been in power until the moment of its replacement by that of the insurrectional movement. The rule in question, which is formulated as a saving clause, does not exclude the possibility of taking into account exceptional situations, such as those mentioned in paragraph 7 of the present commentary.

(22) Paragraph 2, as we have pointed out, concerns the case of the formation of a new State by means of secession or decolonization. It provides that 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 which had previously been under its administration, shall be considered as an act of the new State. As already explained,\footnote{See above, para. 29 of the commentary to article 14.} the expression "or in a territory under its administration" was inserted in order to take account of the legal status of dependent territories. It goes without saying that, since the pre-existing State will continue to exist, although with a reduced territory, it will still be responsible for its own acts carried out before the creation of the new State, by virtue of the provisions contained in other articles of this chapter of the draft. It is quite unnecessary, therefore, to add a special saving clause on this subject.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary*/

(1) Article 3 of the draft lays down the two essential conditions for the existence of an internationally wrongful act.\footnote{\textit{2/ Yearbook... 1976}, vol. II (Part Two), pp. 75-78.} The first of these two conditions, namely, the existence of conduct consisting of an act or omission attributable to the State under international law (subjective element), is the subject of chapter II of the draft, in which the Commission has tried to determine what kinds of "conduct" are regarded by international law as "acts of the State" for the purpose of establishing the possible existence of an internationally wrongful act. It is to the second of these conditions, which it has been agreed to call the \textit{objective element} of an internationally wrongful act, that the present chapter is devoted.

(2) This \textit{objective element} consists—as is amply confirmed by the practice of States, international judicial decisions and doctrine—in the fact that the conduct attributed to the State as a subject of international law constitutes a failure by that State to comply with an international obligation incumbent upon it, or, to use the terms of article 3, subparagraph (b) of the draft, in the fact that such conduct constitutes "a breach of an international obligation of the State". The Commission has already stated\footnote{Ibid., p. 184, para. (15) of the commentary to article 3.} its reasons for discerning the objective element of an internationally wrongful act in the "breach of an international obligation" and for preferring that term to others, such as the "breach of a rule" or of a "norm of international law". It has pointed out that the term selected was not only the one most commonly used in international judicial decisions and State practice, but also the most accurate. A \textit{rule} is the objective expression of the law, whereas an \textit{obligation} is a subjective legal situation by reference to which the conduct of the subject is judged, whether it is in compliance with the obligation or in breach of it. Moreover, an obligation does not necessarily and in all cases have its immediate origin in a rule, in the true sense of the term: it may have been imposed on a State by a unilateral legal act of that State, or by the decision of an international tribunal or an organ of an international organization authorized to do so. The Commission has also stated its reasons for preferring, in the French version, the term \textit{violation} to other similar terms such as \textit{manquement}, \textit{transgression} and \textit{non-exécution}; in particular, \textit{violation} is the term used in the French text of article 26, paragraph 2(c) of the Statute of the International Court of Justice. The \textit{objective element} which characterizes an internationally wrongful act being defined in this way, chapter III of the draft develops the specific notion of a "breach of an international obligation". The aim is to determine—as was done in chapter II for the notion of an "act of the State"—in what circumstances or on what conditions it must be concluded, in the various possible cases, that the State has committed such a breach.

(3) As the Commission has emphasized in its commentary to article 3\footnote{Ibid., p. 181, paras. (7) and (8) of the commentary.} the \textit{objective element} is the element which distinguishes the internationally wrongful act from the other acts of the State to which international law attaches legal consequences. The very essence of the wrongfulness, the source as such of international responsibility, lies precisely in the conflict or, rather, the non-conformity, of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. In other words, it is to conduct attributed to the State by international law and repre-
senting a breach on its part of an international obligation incumbent upon it that international law ascribes the creation of these new legal situations unfavourable to the State in question, which are grouped under the common denomination of international responsibility. This relationship which international law establishes between the failure to fulfil an international obligation and the imposition of other obligations (or the application of sanctions as a consequence of that breach), demonstrates what the Commission has frequently pointed out: that the rules relating to the international responsibility of the State are, by their very nature, complementary to other rules of international law which give rise to the legal obligations that States may be led to breach.

(4) It should also be noted that in international law the idea of breach of an obligation can be regarded as the equivalent of the idea of infringement of a subjective right of another.\textsuperscript{375} Unlike the situation in municipal law, and particularly administrative law, the correlation between the breach of a legal obligation by the State committing the internationally wrongful act and the infringement of an international subjective right of another represented by that breach, admits of no exception in international law. In international law, there is always a correlation between the obligation of one subject and the subjective right of another, whether it be the subjective right of a particular subject, of a number of subjects or of all subjects. Of course, this does not mean that the relationship of responsibility which results, in international law, from the breach by a State of an existing obligation incumbent upon it is always and exclusively equivalent to a relationship between the State committing the offence and the State directly injured. On the contrary, this relationship may extend in various forms to States other than the State directly injured if the international obligation breached is one of those linking the State, not to a particular State, but to a group of States or to all States members of the international community.

(5) The Commission has also given its views, in its commentary to article 3 of the draft, on the question whether there should not be an exception to the principle that the characteristic of the \textit{objective element} of an internationally wrongful act is that it consists in a breach by the State of an international obligation incumbent upon it.\textsuperscript{376} In the Commission's view, such a general definition of the \textit{objective element} of an internationally wrongful act admits of no exceptions. If one admits the existence in international law of a rule limiting the exercise by a State of its rights and capacities and prohibiting their \textit{abusive exercise}, then such abusive exercise would also represent a breach of an international obligation of the State: the obligation not to exceed certain limits in exercising its own right and not to exercise it with the same intention of harming others or of interfering with other subjects in their own sphere of competence. In this case, the constitutive element of the internationally wrongful act would still be the breach of an obligation. The possible solution to the problem of the abusive exercise of a right thus has no effect on the definition of the objective element of an internationally wrongful act. In fact, this is a matter which concerns the framing of certain "primary" rules of international law, rather than rules governing responsibility.

(6) Chapter III therefore begins with a provision whose purpose is to specify when it may be considered that there is a "breach of an international obligation", and to state expressly the principle that the existence of the breach consists in the difference between the actual conduct of the State and the conduct required by the obligation incumbent upon it, in other words, the non-conformity of the "act of the State" with its duty under international law. The basic concept having been defined in this way, the other provisions of the chapter are devoted to specifying how this concept applies to the various possible situations and cases.

(7) In this context, an answer must first be found to the questions which arise concerning the formal aspects of the international obligation breached, and it must be considered whether the source from which an obligation derives—in other words its customary, conventional or other origin—does not affect the conclusion regarding the very existence of the internationally wrongful act and its characterization. In the same context, it must also be considered whether the fact that the international obligation breached was in force at the time when the State acted is, or is not, an essential condition for concluding that an international obligation has been breached.

(8) The chapter then takes up a range of questions relating to the way in which the subject-matter of the international obligation breached affects the existence and, especially, the characterization of an internationally wrongful act. The first problem encountered is one of the most delicate and important in the whole study, and one of the most decisive for the eventual determination of the type of responsibility that international law attaches to different kinds of internationally wrongful acts, namely, the problem of deciding whether a basic distinction should be made between internationally wrongful acts according to the degree of importance that fulfillment of the obligation in question has for the international community, precisely because of the content of the obligation, the subject-matter to which it relates, and, of course, according to the gravity of the breach committed. It will then have to be decided whether, in determining the existence of an internationally wrongful act, a distinction should be made between international obligations whose subject-matter is such that a breach occurs when a State simply engages in conduct different from that expressly required of it, and international obligations whose breach only takes place when the conduct of the State is accompanied by an external event which that State should have prevent-

\textsuperscript{375} \textit{Ibid.}, p. 182, para. (9) of the commentary.
\textsuperscript{376} \textit{Ibid.}, para. (10) of the commentary.
Consideration will also have to be given to the difference between the breach of an international obligation of conduct, specifically requiring a particular action or omission on the part of the State machinery, and the breach of an obligation of result, which only requires the State to ensure the existence of a particular situation, without specifying the means and acts to be employed to secure it.

(9) Finally, the chapter will deal with the various problems involved in determining the time and duration of the breach of an international obligation, that is to say, what is known as the tempus commissi delicti, taking into account the different consequences which may follow, in various forms, from an immediate breach, a breach of a continuing nature, or a breach constituted by a series of conducts relating to separate situations or a succession of conducts relating to the same situations.

(10) The complications caused by the adoption of theoretical and a priori positions which were encountered when determining the subjective element, do not arise in the consideration of the various aspects of the objective element. Nevertheless, the difficulties to be overcome in the present chapter are no less great. The problem which arises at every stage in studying the objective element of an internationally wrongful act is essentially a problem of "boundaries": that is establishing how far certain aspects can be analysed without overstepping the limits of the sphere of legal wrongfulness in international law and the resultant responsibility. For example, it must be asked whether the breach of an international obligation having its origin in a specific source does or does not differ from a failure to comply with an obligation having a different origin; but the consideration of this question must not in any circumstances lead us to formulate a theory of the sources of international obligations in the context of the codification of the international responsibility of States. Similarly, the subject-matter of different categories of international obligations must be taken specifically into account in order to determine against what subjects, or at what time, a breach of a particular category of obligation allegedly took place; for it is only on that basis that certain characterizations and essential distinctions in the sphere of internationally wrongful acts can be made. But all that should not lead to a search for a specific definition of the international obligations which in one sphere or another are incumbent on States, and thereby to a departure from the purpose of the present draft articles: codification of the general rules on the international responsibility of States. There would be no chance of achieving a favourable result if, while ostensibly codifying international responsibility, the Commission in fact engaged in codifying the "primary" rules of international law. The failure of past attempts at codification in the sphere of responsibility for damage caused to the person or property of foreigners is a good example of the absolute necessity of not attempting to codify together, in the same draft, rules relating to international responsibility and "primary" rules of international law, the breach of which entails State responsibility.

(11) Nor is it the purpose of the present chapter to settle aspects of the problems considered which belong rather to the subject-matter of other parts and chapters of the draft and which will be considered in the context of those other parts and chapters. Thus, for example, the existence of obligations of result, which are very common in international law, especially obligations relating to the treatment which the State should accord to individuals, constitutes the most acceptable explanation of a well-known principle, namely, the principle that initial recourse to available local remedies is a prerequisite for establishing, at the international level, the responsibility of a State accused of having acted towards individuals in a manner contrary to its international obligations. But it must be explicitly stressed, in order to avoid misunderstandings on the subject, that the rule of prior exhaustion of local remedies will only be taken into consideration in the present chapter from the point of view of its justification and its possible effect on the determination of whether or not a breach of certain obligations has been committed. The eventual formulation of such a rule, the description of the technique of its application, the analysis of its procedural aspects and the determination of the conditions of its application in accordance with general international law and certain treaties, will have to be examined in another context—that of the part of the draft relating to the implementation of international responsibility of the State.

(12) In the same context, it must also be borne in mind that the rules on the objective element of an internationally wrongful act stated in chapter III must be understood in the light of all the provisions which are to appear in the draft articles. The finding that a breach of an international obligation exists, which might result simply from the application of the provisions of chapter III, and its characterization as internationally wrongful, which might follow for an "act of the State", could be negated by the fact that one of the various circumstances excluding wrongfulness (force majeure and fortuitous event, state of emergency, self-defence, legitimate application of a sanction, consent of the injured State, etc.) to which chapter V of the draft will be devoted, applies in the case in point. Similarly, the particular characterization of a wrongful act and the determination of the régime of responsibility applicable could be altered by the existence, in the case in point, of one of the attenuating or aggravating circumstances which will also be dealt with in chapter V.

(13) Lastly, the Commission wishes to point out that, in preparing the material which is the subject-matter of this new chapter of the draft, it relies, as in the previous chapters, on the inductive method followed by the Special Rapporteur in his reports. Thus State practice and international judicial decisions are analysed and, on the basis of that analysis, the rules to be laid down are formulated. Neverthe-
less, account must be taken of the fact that, at least in regard to certain points, the wealth of precedents is not the same, for example, as it is for determining criteria for the attribution of an act to the State. Where necessary, therefore, this lack has to be made good by giving careful consideration, as a source of guidance for formulating certain rules, to the true requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging. In other words, the progressive development of international law sometimes has to take precedence over codification in the strict sense.

Article 16
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Commentary 2

(1) As has been stated already, 377 it is the breach of an international obligation of a State by an act of that State which constitutes, in the light of article 3(b), the objective element of an internationally wrongful act. It is now necessary to specify what is meant by a “breach” by a State of an international obligation incumbent upon it, and on what grounds it may be concluded that such a breach exists.

(2) In deciding to meet this need by including in the draft the general wording employed in the text of the present article, the Commission primarily had in mind considerations of a logical and systematic nature relating to the general structure of the draft, but it also wished to emphasize, at the outset of the chapter devoted to the study of the objective element of an internationally wrongful act, the autonomy of international law in this matter. It is for international law, and more specifically the general rules governing State responsibility for internationally wrongful acts, to define what constitutes a breach of an international legal obligation; this is so despite the fact that such a notion is not essentially different, in international law, from the notion which exists in other legal orders of a “breach” of the obligations they impose on their respective subjects.

(3) Thus in international law, as in systems of internal law, a breach by a subject of a legal obligation consists in the fact that the subject engages in conduct which is not in conformity with what is required of it by the obligation in question. It is unanimously agreed that conduct of a State which is not in conformity with the conduct to be expected of it under a particular international obligation constitutes a breach of that obligation. The breach of the obligation in question lies in the fact that the conduct required of the State by the obligation and the conduct in which it actually engages do not coincide. To sum up, there is a breach of an obligation when it is established that the subject bound by the obligation has acted otherwise than it should have acted in order to comply with that obligation.

(4) The Commission therefore considered that the wording “is not in conformity with what is required of it by that obligation” was the most appropriate to indicate what constitutes the essence, in terms of the present draft articles, of a breach of an international obligation by a State. This wording was found preferable to other expressions such as “is in contradiction with” or “is contrary to”, because it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it. For a breach to exist, it is by no means necessary for the act of the State to be in complete and total conflict with what is required of it by the international obligation in question; it is quite sufficient that one aspect or another of the conduct of the State should not be in conformity with what is required of it by that obligation. In every case, it is a comparison of the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation which makes it possible to determine whether or not there is a breach of the obligation by the State. If the act of the State is in conformity with the conduct required of it by the international obligation, there is no breach of the obligation and the act in question is perfectly lawful. If, on the other hand, it is found that the act of the State is not in conformity with the conduct required of it by that international obligation, a breach of the obligation exists and it must be concluded that the act of the State is internationally wrongful.

(5) It is obvious that the “international obligations” whose breach is envisaged in the present articles must be legal obligations incumbent upon the State under international law. Hence they are legal obligations which States assume in accordance with norms of international law, and not, for example, obligations of a moral nature or obligations of international courtesy. Nor are they legal obligations which may possibly be incumbent upon a State under a legal order other than the international legal order.

(6) For example, the obligations embodied in “contracts” which States conclude with foreign persons (and, sometimes, with another State) to govern economic matters are certainly legal obligations, but they are not legal obligations which derive from the international legal order; this is so regardless of whether such “contracts” are governed by the internal legal order of the State (or one of the States) which con-

2/ Yearbook... 1976, vol. II
(Part Two), pp. 78-79.

377 See above, paras. 1 of the introductory commentary to chapter III.
cludes them or by another legal order differing from both the internal legal order and the international legal order. Accordingly, the breach by a State of an obligation assumed under a “contract” of this kind cannot, as such, constitute a breach of an international legal obligation capable of engaging what, in the international legal order, is defined as the international responsibility of States. For that to be the case, the whole or at least part of the “contract” in question would, in fact, have to be an agreement concluded between States acting as subjects of international law, and therefore governed by international law. If this is true of certain clauses of the “contract” only, a breach of an obligation stipulated in the contract cannot be considered as a breach of an “international” obligation unless the obligation actually breached is among those incumbent upon the State under one of those clauses.

(7) Consequently, the failure of a State to discharge legal obligations governed by a legal order other than the international legal order does not constitute a breach of an “international obligation” within the meaning given to that expression in the present article and in other provisions of the draft articles. Yet it may per se give rise to a breach by the State of an obligation incumbent upon it under international law. In that case, however, it is the breach of that international legal obligation, and not the breach of the obligations governed by the other legal order, which constitutes the objective element of an internationally wrongful act. For example, the breach by a State of a private “contract” governed by a uniform law incorporated in the internal law of that State is and remains a breach of internal law, even if the uniform law was established and prescribed by a treaty. But if the breach of the “contract” results from the fact that the State party to the convention establishing the uniform law has not adapted its legal system to that law as it should have done, the non-performance of the contract gives rise to a breach of a true international obligation which engages the State's responsibility under international law. Similarly, although non-performance by a State of a private “contract” concluded with a foreign person constitutes a wrong only under the legal order which governs the “contract”, that wrong may subsequently involve a denial of justice and thus give rise to a breach of an obligation under international law which engages the international responsibility of the State.

(8) In drafting the provision contained in the present article, as well as those appearing in the following articles, the Commission was mindful that, for there to be a breach by a State of an international obligation incumbent upon it, the conduct constituting the breach must be an “act of the State” under international law, in other words, it must be conduct consisting, as stated in article 3, subparagraph (a), of an action or omission attributable to the State under international law. That is why article 16 specifies that there is a breach of an international obligation by a State “when an act of that State” is not in conformity with what is required of it by the obligation. This phrase must be understood in the light of the provisions of chapter II of the draft, which concerns the subjective element of an internationally wrongful act and defines the conditions under which specific conduct is to be considered as an “act of the State” according to the rules of international law governing State responsibility.

(9) Lastly, the Commission wishes to stress that the general definition given in the present article is simply a basic provision confined to stating what constitutes the essence of a breach of an international obligation. In order to be able to conclude that there is a breach of an international obligation in a specific case, it is clearly necessary to take account of the other provisions of chapter III, including in particular those which specify other conditions relating to the existence of a breach of an international obligation; for example, the provisions of article 18, which lay down that, for a breach to exist, it is necessary and also sufficient for the obligation to be in force for the State when it engaged in the conduct complained of.

Article 17

Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.
(1) The subject-matter of this article is the bearing which the origin of the obligation breached may have on the wrongfulness of an act of a State which is not in conformity with what is required of it by that obligation, and on the régime of responsibility applicable to that act should its wrongfulness be established.

(2) In international law, and indeed in internal law, legal obligations may have diverse origins. An international obligation may, for example, be established by a customary rule of international law, by a treaty provision or, according to prevailing opinion, by a general principle of law applicable within the international legal order. In addition, States sometimes assume international obligations by a unilateral act. A given international obligation may also have at least its immediate origin in obligation-creating procedures stipulated in a treaty (a decision of an organ of an international organization competent in the matter by reason of its constituent instrument, a judgment given in certain circumstances by the International Court of Justice, an award made by an international arbitral tribunal, etc.). That having been said, it should be clear that the examples of the different ways in which international obligations can arise are not mentioned with any intention of including in article 17 a full statement of the various possible origins of an international obligation. The sole purpose of the examples given here is to draw attention to the problem which this difference in the origins of international obligations may create as regards the characterization of an act of the State as internationally wrongful and the determination of the régime of responsibility applicable to it.

(3) The fact that international obligations have differing origins raises two questions. The first, and by far the simplest, is whether the breach by a State of an international obligation always constitutes an internationally wrongful act, regardless of the origin of the obligation. The second is whether the origin, customary, conventional or other, of the obligation breached, or the fact that, for example, the obligation derives from a general normative treaty or from a treaty intended only to establish specific legal relationships, has or has not any effect, not on the characterization as internationally wrongful of the act breaching the obligation, but on the kind and forms of international responsibility engaged by the act. This second question derives particular pertinence from the fact that most systems of internal law distinguish between two different régimes of civil liability, one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation having its origin in another source (custom, a statute or regulation, etc.).

(4) It is clear, as indicated earlier, that to answer the above questions it is neither necessary nor useful to begin by trying to establish all the sources, i.e. all the possible origins of an international obligation. The multiplicity and diversity of these origins is only implicit in the problems which the present article is intended to solve. Speaking in general terms, it is not in the context of a codification of the rules concerning responsibility that the determination of all the possible origins of an international obligation should be undertaken, nor is it in this context that the content of the "primary" obligations whose breach may engage the responsibility of the State should be defined.

(5) On the other hand, it is appropriate to point out that, in seeking adequate answers to the questions raised by the present article, only the relevant provisions of general international law can be taken into account. Subject to the possible existence of peremptory norms of general international law concerning international responsibility, some States may at any time, in a treaty concluded between them, provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision. Should such a breach occur, the State committing it would normally be subject to the special régime established by the treaty in question, rather than to the régime prescribed by general international law. But this clearly has nothing to do with the question answered by article 17, which is whether the origin of the obligation breached should or should not be taken into consideration for the purpose of determining the international responsibility incurred under general rules of international law, not under the provisions of a particular treaty. To be able to conclude that, in general international law, the breach of an obligation of conventional origin constitutes a wrongful act different in kind from the breach of an obligation which is of customary or other origin, it would be necessary to prove that the legal consequences attaching to the internationally wrongful act in the first case are always different legal consequences, even where the treaty imposing the obligation breached makes no special provision for responsibility. Similarly, in establishing whether a given system of internal law distinguishes between "contractual" and "extra-contractual" wrongs, reference is made to the consequences which that system usually attaches to breaches of obligations created by contracts and to those created by legislation or some other general law-making enactment. The special provisions of a particular contract are not taken into account for the purposes of this conclusion.

(6) Nevertheless, the fact that the present article, 381 For example, the constituent instruments of some international organizations provide for the possibility of suspension of the membership rights, and even expulsion, of a member State which fails to fulfil certain obligations stipulated in the instrument.
like other articles of the draft, is concerned exclusively with elucidating the pertinent rules of general international law, does not mean that the régime of responsibility provided for in particularly important multilateral treaties, such as the Charter of the United Nations, is to be ignored. The régimes prescribed by treaties of that kind sometimes reflect general international law on the subject or decisively influence its development. Where that is the case, account must be taken of them in the articles of the present draft; not, however, as régimes established by a particular treaty, but as régimes ascribable to general international law.

(7) The answer to the first of the two questions raised by the present article can hardly be in doubt on the level of pure logic alone. If an international obligation is incumbent upon a State and is a true legal obligation, its having this or that origin is a circumstance which cannot per se preclude the characterization as internationally wrongful of an act of that State which is not in conformity with what is required of it by the obligation. For it to be actually decided that an act of a State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude, rather, that the obligation did not exist, or at least that it was not a legal obligation. Accordingly, the real question raised when account is taken of the origin of the international obligation breached, is the second question: that of the possibility of a difference in the régime of responsibility applicable depending on whether the obligation has one origin rather than another. At all events, following our usual inductive method, we must consider whether and in what manner the two questions raised have been treated in international jurisprudence, in State practice and in the works of learned writers.

(8) International jurisprudence has not often had occasion to consider explicitly the question whether the formal origin of the international obligation breached by an act of the State has a bearing on the characterization of that act as "internationally wrongful". However, an examination of the enormous number of international decisions which recognize the existence of an internationally wrongful act (and, consequently, of the international responsibility of the State), is sufficient to show that the wrong attributed to the State in these decisions is in some cases the breach of an obligation established by a treaty, in others the breach of an obligation of customary origin, and more rarely the breach of an obligation arising from some other source of international law. This alone should be sufficient proof that, in the opinion of the judges and arbitrators who have made these decisions, a breach of an international obligation is always an internationally wrongful act, regardless of the origin of the obligation in question. Furthermore, there are even cases in which international adjudicators and arbitrators have stated explicitly the principle that the breach of an international obligation is always an internationally wrongful act regardless of the origin of the obligation in question.

(9) For instance, in reply to the question what should be understood by acts contrary to "the law of nations" in the Goldberg case between Germany and Romania, where a claim was based on the provisions of paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles, R. Faizy, the sole arbitrator, made the following statement in the award rendered on 27 September 1928:

The expression "the law of nations" has a different meaning according to whether it is restricted to written international law or extended to cover all that falls within the wider notion of general international law.

In the interpretation of the clause in question, there is no possible doubt. First, as the Anglo-German arbitrator has already pointed out, the text of paragraph 4 contains nothing to suggest that the Treaty intended that the right to reparation should be confined to exceptional cases where the damage resulted from an act contrary to an express rule of written international law. Secondly, the third preambular paragraph of the Treaty makes a clear reference to the understandings of international law as a whole. Lastly, and most important of all, the fact that the Treaty left the settlement of so-called "neutrality" damages to a tribunal equivalent to the international arbitral tribunals usually set up to decide such questions, makes it clear that it tacitly accepted that the sole arbitrator should follow the practice of those tribunals in the application of the law of nations. That practice has always been based not only on the written rules of international law but also on international custom, the general principles recognized by civilized nations, and judicial decisions, the last-named as subsidiary means for the determination of rules of law.

An act contrary to the law of nations, for the purpose of the clause in question, ought therefore to be defined as follows: any act which, in the pre-war relations between State and State, could, if submitted to an international arbitral tribunal, have entailed an obligation to make reparation, in accordance with the ordinary rules of general international law.382

Mention may also be made in this connexion of the award rendered on 22 October 1953 in the Armstrong Cork Company case by the Italian-United States Conciliation Commission set up under article 83 of the Peace Treaty of 10 February 1947. Having endorsed a definition of internationally wrongful acts as all actions of a State which are in contradiction "with any rule whatsoever of international law", the Commission subsequently asserted that the responsibility of the State entailed the obligation to repair the damages suffered to the extent that they were the result "of the inobservance of the international obligation".383 The Conciliation Commission thus made it clear that it regarded the breach of any obligation arising from any rule whatsoever of international law as an internationally wrongful act. The principle in question is also sometimes explicitly stated when an international judicial or arbitral body acknowledges the right of a State to bring a case before it if the State can allege a breach of an obligation created by a rule of


383 Ibid., vol. XIV (United Nations publication, Sales No. 65.V.4), p. 163.
In a number of awards concerning Claims by Italian subjects residing in Peru rendered on 30 September 1901, the arbitrator Gil de Uribarri, appointed by the Italian-Peruvian Commission of 25 November 1899, said that "... it is a universally recognized principle of international law that a State is responsible for breaches of public international law committed by its agents..." (United Nations, Reports of International Arbitral Awards, vol. XV (United Nations publication, Sales No. 66.V.3), p. 399 (Chessa claim), p. 401 (Sestorego claim), p. 404 (Sanguinetti claim), p. 407 (Vercelli claim), p. 408 (Queirolo claim), p. 409 (Roggero claim) and p. 411 (Miglio claim) [translation by United Nations Secretariat].

In another award of July 1931 concerning the Dickson Car Wheel Company case, indicated what it considered to be the conditions for attributing international responsibility to a State, by requiring that "... an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international standard".

It is therefore clear that international jurisprudence does not consider the origin of the international obligation breached to have any bearing on the characterization of the act of the State constituting the breach as internationally wrongful. That having been said, it now remains to be seen—and this is the more important question—whether, according to international jurisprudence, the origin of the international obligation breached by the act likewise has no bearing on the determination of the international responsibility arising from the act and does not require a distinction to be made, on the basis of that origin, between different categories of internationally wrongful acts. This too is a question which does not seem to have been brought directly to the attention of an international tribunal. But a comprehensive review of international decisions leads to the conclusion that, once again, the origin of the various obligations has played no part in the matter. No such distinction can be noted in any determination of the consequences of an internationally wrongful act. The customary, conventional or other origin of the obligation breached is not invoked to justify the choice of one form of reparation in preference to another for instance, or to determine what subject of law is authorized to invoke responsibility.

State practice does not give other answers to the questions with which the present article is concerned. It will suffice to mention the opinions expressed by Governments during the preparatory work for the Conference for the Codification of International Law, held at The Hague in 1930 and, subsequently, in discussions in the Third Committee of that Conference. The request for information addressed to Governments by the Preparatory Committee of the Conference contained no proposals specifically designed to sound out the views of the countries invited to the Conference as to whether the breach of a treaty obligation should have consequences different from those following from the breach of a customary or other obligation. However, this question was implicit in the wording of Points II, III and IV of the request for information.

In Point II, Governments were asked whether they agreed with the contents of a proposal which first stated that membership of "the community governed by international law" implied an obligation for the States concerned to conform to certain "standards of organization" and "rules of conduct" of the community, and then drew the conclusion "that a State which fails to comply therewith... incurs responsibility". All the replies were in the affirmative. They include a number which distinguished, according to source between three different categories of rules of international law that imposed obligations on States concerning the treatment of foreigners (treaty provisions, special rules of customary law and general norms of customary law); at the same time they stated that the infringement of any obligation deriving from these three sources directly entailed State responsibility. Affirmative replies were also given by governments to the question whether the State became responsible by virtue of having enacted legislation (Point III, No. 1), or having taken judicial decisions (Point IV, No. 2) incompatible with...
its “treaty obligations” or its “other international obligations”, or by virtue of having failed to take action to implement those obligations. None of the replies proposed that a distinction should be made, as regards the existence of State responsibility, between the breach of a treaty obligation and the breach of an obligation having some other origin, whatever it might be.\(^{391}\)

(14) Taking into account the replies received, the Preparatory Committee drafted bases of discussion which mentioned international obligations of the State “resulting from treaty or otherwise”\(^{392}\) and “treaty obligations” or “other international obligations of the State”.\(^{393}\) When the Third Committee of the Conference studied these bases of discussion, there was general agreement that a breach of any international obligation engaged the international responsibility of the State. The only divergencies were as to what the origins of international obligations were.\(^{394}\) It was finally agreed to mention three: treaties, custom and the general principles of law. Approval was thus given to the text of article 1, which established that any breach of an international obligation entailed an international responsibility of the State, and of article 2, which specified that:

The expression “international obligations” in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.\(^{395}\)

We may leave aside the question—which does not concern us—whether this article determined, fully and exhaustively, the possible origins of international obligations relating to the subject-matter covered by the draft convention.\(^{396}\) What seems beyond doubt, however, is that the Committee intended to give equal status, as regards the responsibility engaged by a breach, to all existing international legal obligations relating to the treatment of foreigners, without making any distinction between the formal origins of such obligations.

(15) The conclusions which follow from the work of the 1930 Hague Conference as regards the question whether the origin of the obligation breached could have a bearing on the international responsibility attached to an internationally wrongful act are also negative. In the Preparatory Committee’s request for information a single form of responsibility, the obligation to make reparation for the injury caused, was envisaged for all breaches of international obligations concerning the treatment of foreigners. None of the Governments which replied expressed a different view.\(^{397}\) Moreover, in Point XIV of the request for information, which deals with reparation itself, various forms of reparation were provided for, but the choice between them in no way depended on the origin of the obligation breached.\(^{398}\) Nor did origin play any part in the distinction made in Basis of Discussion No. 29 between the various kinds of consequence following from the breach of international obligations causing injury to foreigners.\(^{399}\) During the debate on this Basis of Discussion in the Sub-Committee and then in the Third Committee, no one suggested that different kinds of responsibility should apply according to whether the origin of the obligation breached was conventional, customary or other.\(^{400}\) Article 3, adopted by 32 votes to none, read as follows:

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.\(^{401}\)

Read in conjunction with article 2,\(^{402}\) this text shows that, in the view of the Conference participants, the breach of an international obligation concerning the matters proposed for codification always had the same effects with respect to international responsibility, regardless of whether that obligation originated in a treaty, a custom or a general principle of law.

(16) It would also seem useful to mention in this connexion that, when the reports of the ILC have been discussed in the Sixth Committee of the General Assembly, it has never been suggested that breaches of obligations having as their origin a treaty, custom or other source of law should be subject to different régimes of responsibility. Although mem-

\(^{391}\) Ibid., pp. 25 et seq., 41 et seq., and Supplement to vol. III... (op. cit.), pp. 2, 6 et seq.


\(^{394}\) The Third Committee’s insistence on dealing with the question of sources was probably connected with the fact that the draft convention was supposed to cover all substantive aspects of the obligations of States with regard to the treatment of foreigners. The discussion dealt mainly with the question whether general principles of law could be adduced to establish the international obligations of States in that matter. See League of Nations, Acts of the Conference for the Codification of International Law, vol. IV, Minutes of the Third Committee (C.351(c),M.145(c) 1930.V) pp. 32 et seq., 112, 116, 159 et seq.


\(^{396}\) Here we find once again the error criticized in the introductory commentary to chapter III, which is, in defining the rules on responsibility, to seek to specify the sources of international law instead of simply stipulating that the breach of any international legal obligation, whatever its origin, engages the responsibility of the State.

\(^{397}\) League of Nations, Bases of Discussion... (op. cit.), pp. 20 et seq. and Supplement to vol. III (op. cit.), pp. 2 and 6.

\(^{398}\) See League of Nations, Acts of the Conference... (op. cit.), pp. 20, 21 et seq. and pp. 4, 24 et seq.

\(^{399}\) For point XIV and the replies of Governments, see ibid., respectively pp. 146 et seq., and pp. 4, 24 et seq.


\(^{402}\) See para. 14 above.
bers of the Sixth Committee have sometimes recommended that the ILC should devote particular attention to the consequences of the breach of obligations deriving from certain principles of the Charter of the United Nations or certain resolutions of the General Assembly. These suggestions seem to have been prompted by the particularly important content of the obligations concerned rather than by their origin.

(17) The codification drafts relating to State responsibility drawn up by private bodies and those prepared under the auspices of international organizations are both based on the same criteria as are to be found in State practice and international jurisprudence. Most of these drafts attach international responsibility to the breach of an international obligation regardless of the origin of the obligation. In a few rare cases, the proposition that a breach of an international obligation engages the responsibility of the State is followed by an indication of what are deemed to be the origins of international obligations. But although these indications suggest that the authors of the drafts consider that the only international obligations concerning the matters they deal with are those whose origins are enumerated, there can be no doubt that they also believe that the breach of an international obligation, regardless of whether it has one or another of these origins, always constitutes an internationally wrongful act and always entails international responsibility. It is of particular interest to note that some drafts expressly provide that international obligations whose breach engages the responsibility of the State are those "resulting from any of the sources of international law". In addition, none of the drafts referred to provides for the application of different regimes of responsibility according to whether the obligation breached has one origin rather than another.

(18) The works of writers devote but little space to the question of the possible bearing of the origin of the international obligation breached. Many writers merely affirm that there is an internationally wrongful act and, hence, international responsibility, when there has been a breach of an international obligation. This silence on the part of writers is tantamount to implicit recognition of the fact that the origin of the obligation, its formal source, has no bearing on the characterization of an act of the State as internationally wrongful, or on the consequences which international law attaches to such an act as regards responsibility. It is of interest to note, moreover, that there are also writers who expressly draw attention to the point that international law makes no distinction between internationally wrongful acts according to the origin of the obligation breached, some of whom formulate this conclusion in very clear terms. Finally, it should be added that those

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403 Suggestions of the kind were made, for example, by the representative of Jamaica in 1970 (Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1188th meeting, para. 35), and by the representative of Romania in 1973 (ibid., Twenty-fifth Session, Sixth Committee, 1405th meeting, para. 18).


customary law or a general principle of law recognized by civilized nations, constitutes an international tort"); C. F. Amer-
asching, op. cit., p. 43; A. Verdross, Völkerrecht, 5th ed., (Vienna,
authors who have expressly questioned, in the light of the logic of the principles involved, whether it is advisable to extend to international law the distinction, characteristic of internal legal orders, between contractual and extra-contractual responsibility, have generally answered in the negative.\(^{409}\)

(19) A study of State practice, international jurisprudence and doctrine leads to two conclusions: (a) that the origin of the international obligation breached by an act of the State has no bearing on the characterization of that act as internationally wrongful; and (b) that the origin of the international obligation breached has no bearing either, as such, on the régime of the international responsibility generated by the internationally wrongful act. It might certainly be asked, and the Commission has done so, whether there are any valid reasons for changing this state of affairs de jure condendo. The Commission, however, considers that this is not the case. There would be no justification for a differentiation, according to the origin of the obligation breached, of the international responsibility attaching to internationally wrongful acts—a differentiation which might be based, for example, on the distinction between international obligations originating in a treaty and international obligations originating in custom, or on the distinction between international obligations established by a treaty-contract and international obligations established by a normative treaty. The idea of making a distinction in international law between contractual and extra-contractual responsibility could only be the result of a mistaken assumption that the situation existing in international law is the same as the situation in internal law, which is in fact quite different.

(20) Any attempt to equate internal law with international custom, or contracts in internal law with international treaties, is a false parallel. Only some of the vast mass of international treaties show characteristics resembling those of contracts in private law. In the international legal order, the task of establishing common rules of conduct devolves not only on international custom, but also on international treaties, in particular multilateral treaties; for in the international community there is no authoritative instrument, like legislation, for establishing rules of objective law.\(^{410}\) Nor should it be forgotten that many rules of international customary law have now been codified by multilateral treaties so that the same obligation is sometimes covered by a customary rule and by a rule codified conventionally. In such a situation, it would not be logical to attach different legal consequences, in the matter of international responsibility, to two identical wrongful acts, simply because in one instance the State which breached the obligation was a party to the codification convention in question, and in the other, it was only subject to a customary rule.\(^{411}\) As regards the distinction between normative treaties and treaty-contracts, it should be noted that it is not easy to make that distinction in practice. There is nothing to prevent States from using one and the same treaty to perform both normative and contractual functions, and there is thus too large a grey area between treaties that are clearly law-making treaties and those which unquestionably fall within the category of treaty-contracts for it to be possible to establish, on such a basis, distinctions relating to the consequences of internationally wrongful acts as regards international responsibility. In practice, any differentiation of the legal consequences of internationally wrongful acts according to whether the obligation breached is embodied in a normative treaty or in a treaty-contract, would merely introduce dangerous uncertainties in regard to international responsibility, which should be avoided at all costs.\(^{412}\)

(21) The existence of what are called “constitutional” or “fundamental” principles of the international legal order might perhaps be regarded as a more solid foundation for establishing a distinction between international responsibility incurred in consequence of the breach of an obligation deriving from one of those principles, and responsibility resulting from a breach of other international obligations. There is no denying that the obligations imposed on States by some of these principles sometimes affect the vital interests of the international community, so that their breach merits, in some cases, a stricter régime of responsibility than that applied to other internationally wrongful acts. But the pre-eminence of these obligations over others is determined by their content, not by the process by which they were created. Once again, it is only by erroneously equating the


\(^{410}\) There are still writers today who regard international custom as a tacit treaty. For those who hold this view it is impossible to conceive of the application of different régimes of responsibility to breaches of obligations having origins which, to their way of thinking, are of the same nature.

\(^{411}\) See, for example, Tunkin, op. cit., pp. 192-193.

\(^{412}\) In this connexion, it has been said that although the theory which distinguishes between law-making treaties and treaty-contracts embodies a certain amount of truth “it is impossible to derive from it any difference with respect to the régime of international responsibility” (P. Reuter, op. cit., p. 55).
situation under international law with that under internal law that some lawyers have been able to see in the “constitutional” or “fundamental” principles of the international legal order an independent and higher “source” of international obligations. In reality there is, in the international legal order, no special source of law for creating “constitutional” or “fundamental” principles. The principles which come to mind when using these terms are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties. Consequently, the view that international responsibility generated by a breach of certain obligations established by those principles is more grave, cannot be justified on the basis of their “origin”, but rather by taking account of the undeniable fact that the international community has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligations in question. It is therefore left to another article of the draft—article 19—to make the necessary distinction between internationally wrongful acts consisting in a breach of obligations of fundamental importance to the international community and internationally wrongful acts consisting in a breach of other international legal obligations.

(22) Similar considerations led the Commission to conclude that a reference to the Charter of the United Nations was not necessary in article 17 either. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The very special importance of the Charter in connexion with the preparation of chapter III of the draft does not derive from any kind of higher formal source of law considered to be the origin of the obligations stated there, but from the fact that some, especially, of these obligations are essential to the life of the international community. Once again, therefore, it is within the framework of article 19 of the draft that account must be taken of the particularly important obligations embodied in the Charter, and of any other international obligation having the same vital importance for the international community as a whole.

(23) The Commission also considered whether article 17 should not contain an express reservation concerning the provision in Article 103 of the Charter; but it decided against such a reservation. Without prejudging in any way the interpretation of Article 103 of the Charter, or its effects on relations between Member States and relations between Members of the United Nations and non-member States, it seems to the Commission that the consequences of applying the principle stated in that Article do not relate to international responsibility arising from a breach of international obligations, but rather to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter. As a result of the provision in Article 103, an obligation under an agreement in force between two States Members of the United Nations, which is in conflict with an obligation under the Charter, becomes ineffective to the extent of the conflict; consequently, it cannot be the subject of a breach entailing international responsibility. And if an obligation in conflict with those laid down by the Charter binds a Member State to a non-member State, the problem created will be that which normally arises in the event of conflict between obligations contracted by one State with several other States: that is to say, unless the rule in the Charter establishing a certain obligation has meanwhile become a peremptory rule of general international law binding, as such, on all States. Thus there is no special problem of responsibility to be solved. The reasons justifying the reservation in Article 103 of the Charter in article 30 of the Vienna Convention do not, therefore, appear to impose a similar solution in the present draft article.

(24) Having regard to the foregoing considerations, paragraph 1 of article 17 provides that an act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation. The principle of the irrelevance of the origin of the international obligation in question for the purposes of characterizing as internationally wrongful an act of the State which is not in conformity with what is required of it by that obligation, is thus clearly affirmed. It may be maintained that this principle is already implicit in the wording of article 3, sub-paragraph (b) of the draft, but the Commission takes the view that it should be stated expressly in article 17. It is preferable for the injured State to be able to base its legitimate reaction on a clear and explicit text, so as to be protected against any interpretations or pretexts which the State committing the offence may invoke in order to evade its international responsibility.

(25) In adopting the formula “regardless of the origin, whether customary, conventional or other” of the international obligation, the Commission really means to refer to all possible “sources” of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. Some members of the Commission considered that the word “source” was more suitable than the word “origin” and invoked, in support of their position, the fact that the preamble to the Charter of the United Nations uses the formula “treaties and other sources of international law”. Other members pointed out, however, that the Preamble to the Charter refers to the sources of rules of law, not to the obligations imposed by those rules on States, as does the present article. Furthermore, they noted that the word “origin” rendered the desired meaning, without any risk of creating the doubts to which a term such as “source”—sometimes used to denote not only a “formal source”, but also a “material source” of law—might give rise. The Commission as a whole

443 See footnote 42 above.
finally adopted the word "origin", but qualified it by adding, by way of example, the adjectives, "customary, conventional or other", so as to leave no ambiguity.

(26) Paragraph 2 of the article states the rule that the origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State. The fact that the international obligation breached was established, for example, by a customary rule, by a treaty provision or by a general principle of law applicable in the international legal order, or by any other process recognized by international law, does not, as such, justify different legal consequences being suffered by the State which committed the breach.

(27) By the expression "... does not affect the international responsibility ..." the Commission intends, precisely, to refer to the consequences which ensue for the author of the internationally wrongful act of breaching the international obligation, both as to the forms of responsibility applicable (reparation, satisfaction, sanctions, etc.) and as to determining the subject of international law entitled to assert its claim (State directly injured, other States, all the States making up the international community, etc.). As the origin of the international obligation breached "does not affect" all this, there is no raison d'être in general international law for a distinction between different types of internationally wrongful act according to the origin of the obligation. The expression "the international responsibility" seemed preferable to others which were also considered, as being the most comprehensive and at the same time the best calculated to avoid misunderstandings and confusion with other notions.

Article 18

Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Commentary

(1) Article 16 of the draft articles states the general principle that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. The present article amplifies that provision by specifying at what time the international obligation must have been in force for the act of the State to be considered a "breach" of that obligation and consequently to be characterized as "internationally wrongful".

(2) This provision is needed because the rules of international law, and consequently the obligations they impose on States, are not immutable; they are born and they die. And since an act of the State takes place at a given time or during a given period, there are three possible cases: (a) the act in question is not in conformity with what was required of the State by an obligation which came into existence but which also ceased to exist for that State before it committed the said act; (b) the act is not in conformity with what is required of the State by an obligation which came into existence for that State before it committed the said act; (c) the act is not in conformity with what is required of the State by an obligation which was not laid on that State until after it had committed the said act.

(3) Taking these three possibilities into account, paragraph 1 of the present article states the basic rule on the subject. This rule embodies the following gen-
eral principle: for an act of the State which is not in conformity with what is required by an international obligation to be characterized as a "breach" of that obligation by that State, it is necessary—and at the same time sufficient—that the obligation should have been incumbent on the State at the time when the act took place.

(4) Paragraph 2 provides for an exception to the basic rule stated in paragraph 1. This exception concerns a very special case in which it must be accepted that a specific act which, at the time it was performed, was not in conformity with an international obligation then incumbent on the State performing the act, subsequently ceases to be considered an internationally wrongful act on the part of that State and consequently ceases to entail its international responsibility. This case arises when the obligation which was in force at the time when the act was performed, and in the light of which the act was found to be wrongful, has since been replaced by a peremptory obligation to the opposite effect, which not only allows the State to act in the manner previously prohibited, but goes so far as to require it to adopt the conduct prohibited by the earlier obligation.

(5) In paragraphs 3, 4 and 5 the Commission has specified how the general basic rule stated in paragraph 1 of the article, applies to cases in which the act of the State not in conformity with an international obligation happens to be an act which extends over a period of time and coincides only partly with the period during which the obligation is in force for that State: that is to say, either the act began before the obligation came into force for the State and continued thereafter, or, conversely, the act began when the obligation was in force for the State and continued after it had ceased to exist for the State. Accordingly, three different cases are treated separately in the three paragraphs mentioned: that of a single State act of a continuing character extending over a period of time (continuing act); that of an act consisting of a systematic repetition of actions or omissions relating to separate cases (composite act); and that of an act consisting of a plurality of different actions or omissions by State organs relating to a single case (complex act).

(6) The text of the article having been thus paraphrased as an aid to the reader, it is now necessary to explain and justify the solution applied by the Commission to the questions considered in the various paragraphs.

(7) To establish the basic rule stated in paragraph 1, the Commission, as usual, turned first to the practice of States and international jurisprudence. First of all it noted that certain opinions are to be found which, though not directly concerned with determining the existence of a breach of an international obligation, might nevertheless be applied for that purpose also. The most famous statement of this kind appears in the award rendered on 4 April 1928 by the arbitrator, Max Huber, in the Island of Palmas case between the Netherlands and the United States of America. The arbitrator noted that both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled.415

The Commission also noted that there were opinions concerned more specifically with determining the existence of a breach of an international obligation. It found, for example, that the arbitration agreements relating to certain disputes specify that the arbitrator shall apply the rules of international law in force at the time when the acts alleged to be wrongful took place;416 and it seems beyond doubt that these stipulations are made by way of explicit confirmation of a generally recognized principle, not as a departure from that principle.

(8) The opinions mentioned above state a criterion which is applicable in general to the determination of the existence or non-existence of a breach in the three cases set out.417 However, the validity of this criterion can be verified more concretely in each of those cases. In the first case, namely, that in which the international obligation requiring certain conduct of the State was incumbent on it only for a period preceding the time when it adopted conduct not in conformity with that required, it is clear that only a negative solution is possible. If, at the time when the act of the State takes place, the obligation is no longer in force for that State, there can be no question of attributing to it "a breach of an international obligation" within the meaning of article 3(b). Moreover, whenever the problem has arisen in this form in a specific case, it has been settled, either by diplomacy or judicially, in accordance with this rule. The Commission sees no valid reason to depart from that solution.

415 United Nations, Reports of International Arbitral Awards, vol. II (op. cit.), p. 845. The arbitrator had to decide whether the fact that Spain had discovered the island of Palmas in the sixteenth century was or was not sufficient to establish Spain's sovereignty over the island. He took the view that the rules governing the acquisition of territories which were res nullius had changed since the time when the island was discovered. What he had to decide first, therefore, was whether the question should be settled on the basis of the rules in force at the time of the discovery, or on the basis of the rules in force at the time when the dispute arose or at the time it was settled by the arbitral award. 416 For example, in the declarations exchanged between the Government of the United States and the Russian Government on 26 August (8 September) 1900, for the submission to arbitration of certain disputes involving the international responsibility of the Russian Empire for the seizure of American ships, the stipulation relating to the applicable principles of the law of nations is accompanied by the following proviso:

"It is understood that this stipulation shall have no retroactive effect and that the Arbitrator will apply to the cases in dispute the principles of the law of nations and the international treaties which were in force and binding on the Parties involved in the dispute at the time when the seizure of the above ships took place" (United Nations, Reports of International Arbitral Awards, vol. IX, United Nations publication, Sales No.: 59.V.5) p. 58 (translation by the United Nations Secretariat).

See also article 4 of the arbitration agreement of 24 May 1884 between the United States of America and Haiti in the Pelletier case (J. B. Moore, History and Digest of International Arbitrations to which the United States has been a Party (Washington (D.C.), U.S. Government Printing Office, 1898), vol. II, p. 1750. 417 See para. (2) above.
(9) In the second case, the State performs an act not in conformity with what is required of it by the international obligation at a time when the obligation is still in force for it: that is to say, after the obligation has been laid on it and before it has ceased to exist for it. A positive solution to this problem might seem just as obvious as the negative solution to the previous one. This conclusion is irrefutable where, in addition, the obligation is still in force for the State at the time of settlement of the dispute; no international practice or jurisprudence need be cited in support of it. But the conclusion may not appear so obvious where the obligation ceases to exist for the State between the time the act was committed and the time when the dispute falls to be settled. If we refer, for a comparison, to most systems of internal law, we find that the principle generally applied in cases of civil liability is that reparation can be claimed for damage caused by an act committed in breach of an obligation which was incumbent on the person committing it at the time of the act, regardless of whether that obligation has ceased by the time judgment is given. In criminal law, on the other hand, the principle is that no criminal liability attaches to a person who commits an act in breach of an obligation which was incumbent on him at the time when he committed the act, but which has ceased to exist at the time when judgment is given. This follows the general principle that, where there is a succession of criminal laws, it is always the law most favourable to the accused that is applied. In the Commission's view, however, there is no reason to extend to international law the internal criminal law principle of applying the law most favourable to the accused. Such a principle may be justified in a relationship in which the individual is opposed to society as represented by the State, but it seems out of place in a relationship in which one State is opposed to another State. To apply, on principle, the law most favourable to the State which has committed an internationally wrongful act would mean applying, on principle, the law most unfavourable to the State which is injured by the act.

(10) Moreover, the attitude adopted by arbitrators and State representatives in specific cases bears out this conclusion. First, we may cite the conclusions reached by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853, concerning the conduct of British authorities who had seized American vessels engaged in the slave trade and had freed the slaves, who belonged to American nationals. The incidents referred to the Commission had taken place at different times, and the umpire therefore set out to establish whether or not, at the time each incident took place, slavery was "contrary to the law of nations". On that basis he found, as regards the earliest incidents, dating back to a time when in his view the slave trade was lawful, that the conduct of the British authorities was a breach of the international obligation to respect and protect the property of foreign nationals and therefore engaged the international responsibility of Great Britain. The later incidents, on the other hand, he found to have occurred when the slave trade had been "prohibited by all civilized nations" and when, consequently, the obligation of Great Britain to respect and protect such property had ceased to exist; he therefore held that no responsibility could attach to Great Britain. Thus the umpire made it a condition for establishing that there had been a breach of an international obligation, that the act of the State must have been contrary to an obligation in force at the time when the act took place. Where he found that the obligation had still existed at that time, the fact that it had later ceased to exist and was no longer in force at the time of the award was, in his opinion, irrelevant. The same attitude is found in the awards of T.M.C. Asser, who was appointed arbitrator between the United States of America and Russia under the arbitration agreement of 26 August (8 September) 1900. The arbitrator had to decide whether or not the seizure and confiscation by the Russian authorities, outside Russia's territorial waters, of United States vessels engaging in seal-hunting should be considered as "unlawful acts". On this subject the arbitrator, in his award in the James Hamilton Lewis case, rendered on 29 November 1902, observed:

Considering that this question should be settled according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel;

That at that time there was no Convention between the two Parties providing for a derogation, in the special case of seal-hunting, from the general principles of the law of nations relating to the breadth of the territorial sea;

... Considering that any agreements concluded between the Parties after the date of the seizure and confiscation of the James Hamilton Lewis cannot affect the consequence resulting from the principles of law generally recognized at the time of these acts;...

And since the arbitrator held that, according to the principles in force at the time of the acts complained of, Russia had no right to seize the American vessel, he concluded that the seizure and confiscation of the vessel should be considered unlawful acts for which Russia must pay damages.

418 This is what happened in the case of the Enterprize (A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Les Editions internationales, 1957), vol. I, pp. 703 et seq.). See also the Hermosa and Créole cases (ibid., pp. 704 and 705). The English texts of these awards are published in J. B. Moore, op. cit., pp. 4373 et seq.

419 He made this award in the case of the Lawrence (A. de Lapradelle and N. Politis, op. cit., p. 741). For the English text see J. B. Moore, op. cit., pp. 2824 et seq. See also the Volusia case (A. de Lapradelle and N. Politis, op. cit., p. 741).

420 United Nations, Reports of International Arbitral Awards, vol. IX (United Nations publication, Sales No: 59.V.5), pp. 69 et seq. (English translation of quoted passage by the United Nations Secretariat). The arbitrator developed the same arguments in his award in the C. H. White case (ibid., pp. 74 et seq.). The importance of these decisions is somewhat diminished by the fact that in these cases the arbitrator was bound by the arbitration agreement itself to apply the law in force at the time the acts were per-
the same principle stated once again in the award rendered on 5 October 1937 by arbitrator J. C. Hutcherson in the “Lisman” case and in the judgment of 2 December 1963 of the International Court of Justice in the Northern Cameroons case.

(11) In the third case contemplated, the State commits an act at a time when that act is not contrary to any international obligation incumbent upon it. It is only in the light of a new obligation laid upon the State subsequently that such an act could be characterized as wrongful. The point to be settled, therefore, is whether an act committed by the State at a time when the obligation did not yet exist for it could constitute a breach of that obligation. On this point the Commission found that the principle that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (nullum crimen sine lege praevia) is a general rule of all legal systems. The same principle is stated in article 11, paragraph 2, of the Universal Declaration of Human Rights, of 10 December 1948; in article 7, paragraph 1, of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950; and in article 15, paragraph 1, of the International Covenant on Civil and Political Rights of 16 December 1966. In matters of civil liability the principle in question is less often expressly stated, but there is no doubt that here too it is the general rule. The reasons for its existence are obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in one direction and divert it from another, this function can only be discharged if the obligations exist before the subjects prepare to act; secondly, and more important, the principle in question provides a safeguard for these subjects of law, since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others. As this is a general principle of law universally accepted and based on reasons which are valid for every legal system, it ought necessarily to apply in international law also.

(12) Moreover, an examination of international practice and jurisprudence shows that this principle has hitherto been constantly applied, being either explicitly mentioned or implicitly followed. In affirming or denying the existence of responsibility of a State, reference has always been made to an international obligation in force at the time when the act or omission of the State took place. No significance has ever been attached, for the purpose of reaching a conclusion on the basis of general international law, to the fact that an obligation has subsequently arisen and was thus incumbent on the State at the time of settlement of the dispute. The European Commission of Human Rights is probably the body which has had occasion to state this principle most often. The clearest statement on the subject is to be found in its decision on application 1151/61. A Belgian national, relying on article 5, paragraph 5, of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, claimed compensation from the Government of the Federal Republic of Germany for the damage caused him by the detention and death of his father in a German concentration camp in 1945. The Commission rejected his claim, pointing out that:

427 The draft codifications of


427 See in particular the monograph by P. Tavernier, Recherche sur l'application dans le temps des acts et des règles en droit international public (Problèmes de droit intertemporel ou de droit transposé) (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119 et seq., 135 et seq., and 292 et seq.; the reports of M. Sørensen to the Institute of International Law on “Le problème dit du droit intertemporel dans l'ordre international”, Annales de l'Institut de droit international, 1973 (Basle) vol. 35, pp. 1 et seq. and in particular pp. 38, 56 et seq.; the articles of J. T. Woodhouse (“The principle of retroactivity in international law”, The Grotius Society, Transactions for the Year 1953 (London),
the international responsibility of States do not touch upon this question. It is, however, considered in the resolution on “the intertemporal problem in public international law” adopted by the Institute of International Law in 1975. The solution adopted there is essentially the same as that set out in paragraph 1 of article 18.43

(14) On the basis of the considerations briefly stated above, the Commission therefore came to the conclusion that the fundamental principle in the matter can only be that there is no breach of an international obligation unless the obligation in question was in force for the State at the time when it performed the act not in conformity with what was required of it by that obligation. Having formulated the rule, the Commission nevertheless wondered whether the principle it embodied ought not to be subject to certain exceptions. It noted that neither the practice of States, nor international jurisprudence, nor the literature provide examples of such exceptions, save in certain cases prescribed by treaty law, which will be examined later. But is this fact sufficient to warrant the outright conclusion that there is no reason to provide for any exceptions to the fundamental principle stated? Before answering this question, the Commission considered it necessary to examine certain hypothetical cases which do not happen to have arisen in the past and are likely to arise only very rarely in the future, but which nevertheless cannot be ruled out.

(15) The cases in question are those in which the changes that have occurred in the law are due essentially to moral influence. Where an act of the State appeared, at the time of its commission, to be wrongful from the formal legal point of view, but turns out to have been dictated by moral and humanitarian considerations: which have since resulted in a veritable reversal of the relevant rule of law, it is difficult not to see retrospectively in that act the action or omission of a forerunner. And if the settlement of the dispute caused by that act comes after the change in the law has taken place, the authority responsible for the settlement will be loath to continue treating the earlier action or omission as internationally wrongful in spite of everything, and to attach international responsibility to it.

(16) In this connexion we may refer back to the cases of freeing of slaves already mentioned.49 In a first series of cases, the umpire condemned as wrongful the freeing of slaves found aboard a United States vessel by the British authorities: he did this in the light of the rules in force at the time when the act took place, and acknowledged that, if the same act had been committed at the time when the award was rendered, the decision would have been different. But the change in the attitude of international law towards slavery did not stop at the stage noted by umpire Bates. The slave trade has now become a practice banned by a humanitarian rule of international law which is considered peremptory by the international community as a whole. States are required not only to abstain from such a practice and to prohibit it for their subjects, but also to combat it by every means at their disposal. The authorities of a State who lay hands on a ship carrying slaves today and free them, certainly no longer breach an international obligation as they did at the time of the first cases adjudicated by umpire Bates. But neither do they perform a merely lawful act, as they would have done at the time when Bates made his award. They do much more than exercise a right; they perform a duty. If, therefore, by one of those chances which are not unknown in history, it should fall to an arbitral tribunal of today to judge the former actions of the British authorities condemned by Bates, it seems inconceivable that the tribunal would still regard those actions as internationally wrongful acts entailing responsibility. In principle, therefore, the Commission concluded that a State cannot be held responsible for an act which, although contrary to what was required of it by an obligation incumbent on it at the time when it committed the act, has been made not only lawful, but obligatory by a rule of jus cogens existing at the time of settlement of the dispute.

(17) Although certainly rare, concrete cases in which the exceptional principle considered here would apply, can by no means be ruled out. While it is difficult to imagine an arbitrator being appointed today to settle a dispute arising out of conduct adopted at a time when action to put down the slave trade came under the prohibition of interference with the property of foreigners, other situations less remote in time can be envisaged. For instance, it is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a State which, being bound by a treaty to deliver arms to another State, had refused to fulfill its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of

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438 The resolution provides that:

"1. Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of rules of law that are contemporaneous with it.

"2. In application of this principle:

(a) any rule which relates to the licit or illicit nature of a legal act, or to the conditions of its validity, shall apply to acts performed while the rule is in force;" (Rivista di diritto internazionale (Milan), vol. LIX, fasc. I, (1976), p. 217).

439 See para. (10) above.
apartheid and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful, but obligatory. Similarly, if it were accepted that, as some maintain, a peremptory rule is in process of formation, which requires States to give assistance to a people struggling to free itself from foreign domination, it would be impossible to continue to treat as internationally wrongful assistance rendered under those conditions at a time when the right to self-determination was not yet recognized and such assistance constituted internationally wrongful interference in the domestic affairs of the country against which the struggle was directed.

(18) In thus accepting the existence of the exception in question, the Commission has sought to avoid any undue extension of that exception which might weaken the general rule. The scope of the exception should be kept within strict limits. If it is to apply, and prevent the application of the general rule laid down in paragraph 1 of this article, it is necessary—as we have seen—that the act of the State prohibited by a rule of international law in force at the time of its commission, should since have become not only lawful but obligatory, and that this should have come about, not in consequence of any ordinary customary or conventional rule, but under a peremptory norm of general international law. It must also be emphasized that, if this dual condition is met, the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force.\(^{(18)}\) Hence, if the dispute concerning the consequences of the act of the State in question has been settled before the new rule of *jus cogens* supervenes, and if the State has been held responsible for that act, the settlement remains final and is in no way affected by the exceptional rule laid down in paragraph 2. For example, there can be no claim for restitution of the sum paid as reparation in execution of the settlement. It is only if the dispute concerning such an act has still to be settled after the rule of *jus cogens* supervenes that it will no longer be possible to plead wrongfulness of the act committed earlier, and to impute international responsibility to the State which committed it.

(19) On the other hand the Commission did not consider it advisable to allow any exceptions to the basic principle in the other two cases considered.\(^{(19)}\) In reality, in the case in which the obligation ceased to exist before the State committed the act, no exception is even theoretically conceivable. On the other hand, in the case in which the obligation came into force for the State after it committed the act, an exception is not theoretically inconceivable. Even in international law, and even, in particular, in regard to the criminal liability of the individual, this principle is sometimes subject to exceptions. Nevertheless, the Commission sees no valid reason to apply to international law certain "precedents" furnished by internal criminal law, where acts which were previously permitted, and which took place before the adoption of the new law, have been retroactively held to be punishable. The situation in international law is too radically different.\(^{(20)}\) The principle of the nonretroactivity of international legal obligations and, in particular, of the impossibility of considering *ex post facto* as wrongful acts which were not wrongful at the time when they were committed, should not, it seems, be weakened, even if the new rule prohibiting such acts in the future is a rule of *jus cogens*. For it would not then, as in the case of the exception provided for in paragraph 2 of this article, be a matter of providing retroactively that an act regarded as wrongful at the time of its commission does not entail responsibility; it would mean attributing wrongfulness retroactively to an act which at the time of its commission was not wrongful, and this would strain the basic principle much further. An effect of such magnitude would not seem to be acceptable to the legal conscience of members of the international community.

(20) What holds good for the position in general international law does not, of course, preclude the possibility that a treaty may apply different criteria. There is nothing to prevent a particular treaty from providing expressly that certain acts, although contrary to international obligations in force at the time of their commission, shall henceforth cease to be regarded as wrongful acts entailing responsibility or, conversely, from providing that certain acts committed by one of the parties at a time when there was no obligation to refrain from them shall be regarded as wrongful and as entailing responsibility.\(^{(21)}\) The ar-

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430 Some members of the Commission wondered whether, in the cases considered in this paragraph, it would not be better to speak of exclusion of responsibility or lack of jurisdiction, rather than non-existence of the breach and the wrongful act. But it was pointed out that what might seem shocking in the case considered would be not so much that a particular act should have to be redressed, but that an act which had become obligatory should continue to be regarded as wrongful.

431 See pars. (2) above.

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432 Furthermore, in internal criminal law there are sometimes special punitive provisions which, in particular circumstances, introduce severer penalties for certain crimes, or even make new crimes where none existed before. All with retroactive effect. Even in internal law, however, it is inconceivable that the criminal law should exclude in principle, for the future, the application of the general rule of non-retroactivity to certain classes of obligation, as would have to be done in international law if this course were adopted.

433 Of course great caution must be exercised before affirming that, under a given treaty, certain acts must be regarded as wrongful even though they were committed at a time when there was no obligation to refrain from them. A treaty sometimes provides that the obligations it imposes on the parties shall themselves be retroactive obligations. This is expressly permitted by article 28 of the Vienna Convention. But the fact that the clauses of a treaty provide that the treaty provisions shall have retroactive effect does not necessarily mean that they are intended to characterize as wrongful, and as entailing responsibility, an act of the State which is not in conformity with what is required of it by the treaty, and which was committed before the treaty entered into force. The Convention of 17 October 1951 between Italy and Switzerland concerning social insurance has been cited as an example in this connexion. This Convention provides that it shall enter into force on the date of its ratification (which took place on 21 December 1953), but with retroactive effect from 1 January 1951. Obviously this provision in no way implies that a State which is bound by
guments for accepting the principle stated in paragraph 1 of this article lose much of their force if the parties concerned agree to derogate from that principle.\(^{434}\) The Commission considered, however, that there was no need to provide expressly in this article for the possibility of making exceptions, by special agreement, to the rule stated in paragraph 1. In principle, derogations from all the rules in the present draft articles may be made by special agreement, subject to the existence of any rules of *jus cogens*. After completing its draft, the Commission will decide whether it should be stated in a special article that derogations may be made from the provisions of the future convention—and possibly which provisions—by special agreement.

(21) Having thus established the content of the basic rule and of what, in its opinion, should be the only exception allowed, the Commission turned, as already indicated,\(^ {435}\) to determining the specific criteria for application of the rule in the case of acts of the State which extend over a period of time and coincide only partly with the period during which the obligation is in force for the State. In regard to the simplest case, that of an act of the State which can be characterized as a *continuing act*—that is to say, one which is a single act but extends over a period of time and is of a lasting nature (the maintenance in force of a law which the State is internationally required to repeal or, conversely, failure to pass a law which it is internationally required to enact; unjustified occupation of the territory of another State; unlawful blockade of foreign coasts or ports, etc.)—the Commission took the view that the solution to any problem is bound to be self-evident. There will be a breach of the obligation with which the act is in conflict in so far as, at least for a certain period, the act of the State and the obligation incumbent on it are contemporaneous, and the breach will, of course, occur during that period only. The European Commission of Human Rights recently applied this criterion: it declared that applications claiming a “continuing violation” of the European Convention for the Protection of Human Rights and Fundamental Freedoms are admissible if the act constituting the violation, although it began before the entry into force of the Convention, continued thereafter, and in so far as the applications relate to the latter period.\(^ {436}\) It is appropriate to point out that, from the standpoint which concerns us here, a “continuing” act of the State must not be confused with “an instantaneous act producing continuing effects”, for example, an act of confiscation. In this case, the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting. In the latter event, the existence of a breach of an international obligation will be established solely on the basis of an obligation which was in force for the State at the time when the instantaneous act occurred, and the conclusion reached cannot be altered by the fact that the effects of the act continue after an obligation to refrain from such an act has entered into force.\(^ {437}\)

\(^{434}\) The *de Becker* case provides the clearest expression of the Commission’s judicial practice. The applicant complained that, as a result of a conviction in 1947, he had *ipsa jure* been deprived for life of certain rights, including the right to practise the profession of journalist and writer. He argued that this deprivation constituted a violation of the right to freedom of expression recognized by article 10 of the Convention. The respondent Government objected that the act had occurred before the entry into force of the Convention. However the Commission stated that it was called upon to examine whether the applicant’s claim concerned facts which, “although prior in origin to the date on which the Convention came into force in respect of the respondent Government, might constitute a continuing violation” of the Convention extending after that date”. The Commission therefore disregarded the period prior to the date on which the Convention had come into force for the respondent; so far as the period following that date was concerned, however, it found that the applicant was placed “in a continuing situation” in respect of which he claimed to have been the victim of a “violation of the right to freedom of expression guaranteed by Article 10 of the Convention”. Accordingly, it ruled that the application was admissible in so far as it concerned “this continuing situation” (Yearbook of the European Convention on Human Rights, 1958–1959 (The Hague), vol. II (1960), p. 232 et seq.).

\(^{435}\) See para. (5) above.

\(^{436}\) Once again, it is the judicial practice of the European Commission of Human Rights which has brought out the distinction between a “continuing violation” and an “act producing lasting effects”. In various cases in which the applicants complained of such acts (confiscation of property, theft of works of art, etc.), the Commission rejected the applications, observing that the acts dated back to a period prior to the entry into force of the Convention for the respondent Contracting Party and could *ipsa facto* be classified as instantaneous acts; their consequences, although lasting, were nevertheless no more than simple effects. (See Yearbook of the European Convention… (op. cit.), vol. I, p. 159, pp. 246 et seq.; ibid., vol. II, pp. 412 et seq.; and Council of Europe, op. cit., p. 128).
stitute an act which is not in conformity with what is required of the State by the obligation in question. But if the applications of nationals of that country have been rejected by the authorities of the State in a whole series of cases, that conduct, taken as a whole, clearly constitutes a “discriminatory practice” and therefore conflicts with what is required of the State by the obligation. 438 In the case here considered, the problem of intertemporal law may arise, since some of the actions or omissions which in the aggregate would probably constitute an act conflicting with what is required by the international obligation invoked, may have occurred before the obligation was laid on the State. It is also possible that some of these actions or omissions may have occurred after the obligation ceased to be incumbent on the State. In both cases, the solution is manifestly the same: the only actions or omissions to be taken into consideration are those which occurred while the obligation was incumbent on the State. If these actions or omissions, taken together, although less than the whole are nevertheless sufficient by themselves to constitute an act prohibited by the obligation, it must be concluded that the obligation has been breached, if not, the opposite conclusion must be reached. To revert to the example of an obligation which prohibits the State from engaging in a discriminatory practice with regard to the admission of foreign nationals to certain professions, it seems evident that if, during the period for which the obligation was in force, foreigners have been denied admission to those professions in only one or two cases, there can be no question of a “discriminatory practice” and, consequently, no breach of the obligation. This holds good even if a great many such cases occurred before the entry into force of the obligation for the State or, conversely, after its extinction with respect to that State.

(23) Lastly, the conditions for application of the general rule where the act of the State is a complex act coinciding only partly with the period during which the obligation was in force, may perhaps call for some more detailed explanations. A complex internationally wrongful act can be said to exist where the act is the aggregate of a series of actions or omissions on the part of a single organ or, more frequently, of various organs, relating to a single matter and not, as in the case of a composite wrongful act, to a series of separate and independent situations. It is, precisely, the aggregate of these actions or omissions which constitutes the complex wrongful act. To understand this phenomenon clearly, it must be borne in mind that international obligations often require, not a specific action or omission, but the achievement of a certain result, leaving it to the State to decide how it should set about achieving that result and, especially, allowing it to do so by extraordinary means if the desired result cannot be achieved by ordinary means. In this case, the fact that an organ or even several organs, of the State engage in conduct different from that which would directly achieve the result required by the international obligation, is not sufficient to warrant a definite finding that the State has breached that obligation. For such a breach to be certain, it must be complete: even the last organs which could still have rectified the situation and brought about the result required by the international obligation must, in their turn, have failed to do so. Each and every one of the successive actions or omissions of organs of the State in the case in question will then form part of a single whole which, as such, constitutes the complex act by which the international obligation is breached. For example, if an international obligation of conventional origin requires the State to allow that foreigner seeking to practise a particular profession, and if the administrative authority dealing with an application to practise that profession rejects the applications, the rejection is not in itself a definite breach of the international obligation in question. It will not be possible to conclude that such a breach exists so long as the result required by the obligation can still be achieved, either by review of its initial decision by the same authority, or by rescission or alteration of that decision by a higher authority. It is only if the competent higher authorities successively approached by the foreigner concerned have all confirmed the decision of the first organ, and only then, that refusal to allow that foreigner to practise the profession covered by the international obligation will become an internationally wrongful act definitely committed. Only then can the State be rightfully accused of not having achieved, by any one of the means at its disposal, the result required by the obligation can still be achieved, either by review of its initial decision by the same authority, or by rescission or alteration of that decision by a higher authority. It is only if the competent higher authorities successively approached by the foreigner concerned have all confirmed the decision of the first organ, and only then, that refusal to allow that foreigner to practise the profession covered by the international obligation will become an internationally wrongful act definitely committed. Only then can the State be rightfully accused of not having achieved, by any one of the means at its disposal, the result required by the international obligation, and then alone will the breach of that obligation, begun by the first organ which acted in the matter, be completed by the last organ having the power to remedy the consequences of the action taken by the first.

438 In this context it may be of interest to note that, in the practice of the United Nations Economic and Social Council, consistent violation of human rights and fundamental freedoms has come to be established as an offence in itself, distinct from the offence constituted by an isolated violation of those rights and freedoms. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has set up a special supervisory system designed solely to detect and follow up “situations” characterized by “a consistent pattern of gross violations” (see in particular Economic and Social Council resolutions 1235 (XLII) of 6 June 1967, 1503 (XLVIII) of 27 May 1970 and 1919 (LVIII) of 5 May 1975; Commission on Human Rights, decision 3 of 6 March 1974 and decision 7 (XXXI) of 24 February 1975 and resolution 1 (XXIV) of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Obviously, an isolated case of State conduct that infringes the rights or freedoms in question is not sufficient to justify imputing to the State a “situation” falling within the above provisions; such a situation will not exist unless the State in question can be charged with a whole course of conduct of this kind.

(24) Such being the notion of a complex act of the State, it is natural to provide, once again, for the possibility that only some of the actions or omissions constituting such an act took place while an obligation requiring a result different from that produced by the complex act was in force for the State. For the obligation in question may have been laid on the State after the initial action or omission had taken place. To revert to the example given above, it may be supposed that the foreigner seeking to practise a certain profession met with a refusal by a competent
administrative authority, but that this occurred before the international obligation concerning the practice of that profession was laid upon the State. In that case, what was done before the obligation existed obviously cannot be regarded as even the beginning of a breach of the obligation in question. If, subsequently, after that obligation has entered into force for the State, the foreigner concerned appeals to a higher authority, that authority will in no sense be called upon to censure or rescind the decision taken previously by the local authority, since that decision was perfectly legitimate at the time. The fact that it is not retrospectively rescinded after the obligation comes into effect is not such as to constitute, in itself, an internationally wrongful act, or to complete an act which has not even begun to exist. It is, however, possible that, on approaching the higher authority, the foreigner may renew his application for admission to the profession he wishes to practise. In that case, if the higher authority is itself competent to deal with the application, it must grant the desired permission, so that its decision may conform to the result required by the international obligation which has now entered into force; otherwise it will have to send the applicant back to the lower competent authority, which will then have to take a decision different from the one it took on the first application. A fresh refusal by either of these authorities would set in train the process of a new complex act, which would then be carried out from the beginning within the scope of the international obligation and would therefore probably constitute an internationally wrongful act in so far as it was confirmed and not set aside by the decision of another State authority—for example, a judicial authority—which took up the case later.

(25) Conversely, however, the international obligation may have been in force for the State when the decision of the first State organ acting in the case was taken, and have ceased to exist before the organs, or at least the last organs, competent to rectify the initial decision have had an opportunity to act. In that case it seems undeniable that the process of a complex breach of the international obligation has been started, and if no action is taken to stop it, either before or after the obligation ceases to exist for the State, the mere cessation of the obligation cannot eliminate the fact that the previous action of the State has made it impossible to achieve the result required by the obligation when it was in force. In other words, the extinction of the obligation—for example, as a result of denunciation of a treaty in the meantime—may have the effect of precluding any future breach, but it cannot eliminate the breach which has been started. If the other organs which act in the matter later should wish to prevent the breach from hardening, becoming definitive and thus producing its effects in terms of international responsibility, they will have to act in such a way as to make the situation conform ab initio to the result required by the obligation, and must not be deterred by the fact that, in the meantime, the obligation has ceased to be incumbent on the State. For example, if an international obligation of conventional origin requires the State to refrain unconditionally from expropriating certain foreign property, and an expropriation measure is nevertheless taken while the obligation is in force, the higher State authorities to which the dispossessed foreigner applies after the extinction of the obligation will be required to rescind the measure taken and to make good the damage. If they fail to do so, the breach of the international obligation will be definitively completed.

(26) In order to take into account the different aspects of the possible influence of the intertemporal factor on a complex act of the State, the Commission has accordingly formulated, in paragraph 5 of article 18, the rule that there is a breach of an international obligation only if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for the State, and then even if that act is not completed until after that period.

Article 19

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

439 This does not mean, of course, that a new expropriation measure—possibly accompanied by adequate compensation—cannot be taken later, when the conventional obligation to refrain from expropriation has ceased to be incumbent on the State.
(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.

Commentary/*

(1) Article 19 is concerned with the question of the possible bearing of the subject-matter of the international obligation breached on the characterization as internationally wrongful of the act of the State committing such a breach, as well as on the regime of responsibility applicable to that act if its wrongfulness should be established. The question presents certain analogies with that examined in article 17, but in the present article the criterion for the distinction is no longer, as in article 17, a purely formal one, namely the origin or the source of the international obligation breached, but a substantive one: the content or subject-matter of the obligation in question, the matter to which the conduct required of the State by the obligation relates.

(2) The purpose of the present article is therefore to establish: (a) whether it should be recognized that, regardless of the subject-matter of an international obligation incumbent upon a State, a breach of that obligation always constitutes an internationally wrongful act; and (b) whether it must be concluded that, regardless of the subject-matter of an international obligation incumbent upon a State and of how essential the obligation is to the international community, a breach of that obligation always gives rise to one and the same category of internationally wrongful acts and, consequently, justifies the application of a single régime of international responsibility, or whether, on the contrary, a distinction should be made on the above basis between different types of internationally wrongful acts and different régimes of international responsibility.

(3) No long exposition is needed to show what the answer must be to the first of these two questions. The breach by a State of an international obligation incumbent upon it is an internationally wrongful act regardless of the subject-matter of the international obligation breached. There can be no restriction in that regard. This conclusion, which derives implicitly from the wording of article 3, sub-paragraph (b)—and which cannot give rise to any doubt even on a purely logical basis, for reasons similar to those already indicated—is unanimously confirmed by international jurisprudence, State practice and the opinions of learned writers. In specific cases, the exact content of an obligation imposed on a State by international law is often discussed in order to determine whether, in the particular instance concerned, there has been a breach of the obligation; it has never been contended, however, that only breaches of international obligations relating to a given field, or requiring the State to behave in some particular way, entail international responsibility.

(4) There is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, or a single international arbitral award, that recognizes either explicitly or implicitly the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility. Furthermore, the international awards specifying in general terms the conditions for the existence of an internationally wrongful act and the creation of international responsibility speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached, despite the fact that, in the different cases in question, the judges and arbitrators were concerned with obligations having the most widely different content. The same conclusions are reached when considering the positions taken by States. It is true that the work of codification of State responsibility done under the auspices of the League of Nations, and the first work done by the United Nations, was confined to responsibility entailed by the breach of obligations relating to the treatment of foreigners. But this was because interest at the time centred mainly on that particular subject, and not because it was ever considered that only the breach of obligations relating to that matter constituted an internationally wrongful act which was a source of responsibility. The replies by States to the request for information addressed to them by the Preparatory Committee of the 1930 Conference and the positions taken by the representatives of Governments at the Conference itself show that, in their opinion, a breach of an international obligation, whatever its content, was an internationally wrongful act and engaged the responsibility of the State. The same conviction is evident in the views expressed by the representatives of States in the Sixth Committee of the United Nations General Assembly during the

*/* Yearbook ... 1976, vol. II (Part Two), pp. 95-122.

440 See above, para. (7) of the commentary to article 17.

441 See, for example, the judgments of the Permanent Court of International Justice in the Chorzów Factory case (26 July 1927 (Jurisdiction) (P.C.I.J., Series A, No. 9, p. 21) and 13 September 1928 (Merits) (ibid., No. 17, p. 29)), and the advisory opinion of the International Court of Justice concerning Reparation for injuries suffered in the service of the United Nations (I.C.J. Reports 1949, p. 184). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also the advisory opinion of the International Court of Justice concerning the Interpretation of peace treaties with Bulgaria, Hungary and Romania (second phase) (I.C.J. Reports 1950, p. 228), and the judgments and arbitral awards mentioned in paragraph (9) of the commentary to article 17.

442 See, in particular, the replies to point II of the request for information (League of Nations, Bases of Discussion... (op. cit.), pp. 20 et seq.; and Supplement to vol. III (op. cit.), pp. 2 and 6).

discussions on the codification of international responsibility. 444

(5) Among the writers who have dealt with the international responsibility of States, it is generally taken for granted that a breach by a State of an international obligation implies it is an internationally wrongful act regardless of the subject-matter of the obligation breached. This is clearly implied in their writings, either because the characterization as internationally wrongful of the act of the State committing the breach of an international obligation is not made subject to any restriction as regards the subject-matter of the obligation, 445 or because they are careful to specify that a breach of any international obligation may be involved. 446 Many writers have, it is true, paid special attention to the consequences of breaches of international obligations in a given sector, for example, the treatment of foreigners and, more recently, the safeguarding of international peace and security. But it would be absurd to conclude that this proves that, in their opinion, only a breach of obligations in these sectors is wrongful and entails the responsibility of the State. Nor do the codification drafts on State responsibility which cover the entire subject of State responsibility for internationally wrongful acts in general, or those which deal only with international responsibility for the breach of obligations concerning the treatment of foreigners, place any restrictions on the subject-matter of the international obligation breached.

(6) The second of the two questions mentioned above 447 namely, whether there is any justification for drawing a distinction between different types of internationally wrongful act on the basis of the subject-matter of the international obligation breached and, more particularly, of the importance which the international community attaches to obligations relating to certain matters, represents one of the most difficult aspects of the task of codifying the general rules of international law relating to State responsibility. Formerly, the view was generally shared that the rules of general international law relating to State responsibility provided for a single régime of responsibility applying to all internationally wrongful acts of the State, whatever the content of the obligations breached by such acts. Today this view is far from having wide support. In the period between the two world wars, doubts were already expressed in different quarters concerning the validity of the "traditional" view. But it was only after the Second World War that a real trend of opinion emerged in favour of a different view, a trend which is now gaining in strength. According to this view, general international law provides for two completely different régimes of responsibility. One would apply in the case of a breach by a State of one of the obligations whose fulfilment is of fundamental importance to the international community as a whole: for example, the obligations to refrain from any act of aggression, not to commit genocide and not to practise apartheid. The other régime, on the other hand, would apply in cases where the State had merely failed to fulfil an obligation of lesser and less general importance. On this basis, there is a growing tendency to distinguish between two different categories of internationally wrongful acts of the State: a limited category comprising particularly serious wrongs, generally called international "crimes", and a much broader category covering the whole range of less serious wrongs.

(7) It need hardly be said that the reason for the adoption of such a distinction in the text of draft articles likely to become an international convention on State responsibility is, precisely, that the value to be attached to the distinction in question is not purely descriptive or didactic, but "normative": the fact of establishing, in the context of the present chapter, a possible distinction between "international crimes" and other international wrongs is justified only because of our conviction that contemporary international law requires the application of different régimes of international responsibility to these different categories of internationally wrongful acts, and that this difference should in due course be reflected in the rules to be formulated in subsequent chapters of the draft. In other words, it should be known now that the establishment of a distinction between internationally wrongful acts, based on the difference in importance—for the international community as a whole—of the subject-matter of the obligations breached, and at the same time of the extent of the breaches, will necessarily be reflected in the legal consequences attached to the internationally wrongful acts falling into one or the other of the two categories, and in the determination of the subject or subjects of international law authorized to implement (mettre en œuvre) those consequences. That being

444 There is no reason to assume that there was any doubt about the principle i.e., question because some representatives on the Sixth Committee at i., expressed dissatisfaction at the fact that every breach of an international obligation should be regarded as internationally wrongful. They considered that some of these obligations were not "just" and, consequently, that it was not always wrong to breach them. In reality, such opinions cast doubt on the very existence of certain "primary" obligations, rather than on the validity of the principle of the wrongfulness of a breach of any obligation recognized as existing, regardless of its subject-matter.


446 See, for example, L. Oppenheim, op. cit., vol. I, pp. 337 and 343; C. C. Hyde, op. cit., vol. II, p. 882; G. Schwarzenberger, op. cit., p. 563. Other writers, such as C. Eagleton, H. Accioly, P. Guggenheim, J. H. W. Verzijl and G. Ténekiédés, have emphasized the link existing between any international obligation, the wrongful act and responsibility. According to Ténekiédés ("Responsabilité internationale", Répertoire de droit international (Paris, Dalloz, 1969), vol. II, p. 783), "to compile a list of cases of breaches giving rise to responsibility is tantamount to specifying the content of all the rules of international law".

447 See para. (2) above.
said, it is obvious that respect for the general structure of the draft requires that we should not go beyond the scope of the present article by encroaching on matters which will form the specific subject of part 2 of the draft, which will be concerned, precisely, with the content, forms and degrees of international responsibility. We must confine ourselves here to mere references to these topics, in so far as they are necessary for defining and understanding the subject-matter of the present article.

(8) International judicial and arbitral bodies seem never to have considered explicitly the question whether or not the subject-matter of the international obligations breached in particular cases, and the importance attached by the international community to the fulfilment of those obligations, justified a distinction between different types of internationally wrongful act. Their decisions do not show that they have deliberately examined questions regarding a possible difference in regimes of responsibility to be made between the internationally wrongful acts of States on the basis of these factors. It may be asked, however, whether an opinion of the judges and arbitrators concerned is not, nevertheless, implicit in their decisions. As to forms of responsibility, it will be found that, except perhaps in a few marginal cases, which in any event can be interpreted in different ways,448 the responsibility applied by international tribunals always derives from the same general concept, that of "reparation". Nor has the choice between the different possible types of reparation been based on the subject-matter of the obligation breached, though this does not justify any hasty conclusions. International tribunals have always recognized that a State which has committed an internationally wrongful act has an obligation to make reparation, and they have always recognized that obligation only, but this is no justification for deducing that in their view the State could never be subject to any form of responsibility other than that of making reparation,449 or that a possible difference in regimes of responsibility could not be linked with the difference in the subject-matter of the international obligations breached.

(9) It is easy, moreover, to explain why international judicial and arbitral bodies have not had occasion to determine whether a form of responsibility other than the obligation to make reparation can be applied to internationally wrongful acts. While it may be assumed that, in certain circumstances, international law authorizes recourse to "sanctions" against a State which breaches certain obligations, States which intend to avail themselves of that authorization in a given case have not usually applied to an international tribunal to ask whether or not the application of such a form of international responsibility was justified in the case in question. The jurisdiction of international tribunals always has its origin in consent, and sovereign States have so far been reluctant to submit to the judgment of a third party in a matter of the above kind. Consequently, the treaties establishing international tribunals, the statutes of these tribunals and the clauses or compromis setting out the conditions for recourse to them often stipulate that, where the tribunals are called upon to rule on the breach of an international obligation by a State, they are empowered solely to determine whether reparation is due and in what amount.450 However, there is no justification for believing that, in adopting these texts, the parties wished to rule out the possibility that the breach of an international obligation might have legal consequences in international law other than the obligation to make reparation; they simply wished to exclude the possibility that the tribunal in question might have to pronounce on those other of the breach. Confirmation of these remarks may be found in the analysis of some well-known decisions of the Permanent Court on the jurisdiction and the merits in the Chorab Factory case, of 26 July 1927 (P.C.I.J., Series A, No. 9, p. 21) and 13 September 1928 (ibid., No. 17, p. 29) respectively; the award by the arbitrator Max Huber concerning the British claims in Spanish Morocco, of 1 May 1925 (United Nations Reports of International Arbitral Awards, vol. II (op. cit., p. 641); and the award made in the Armstrong Cork Company case on 22 October 1953 by the Italian-United States Conciliation Commission established under article 83 of the Treaty of Peace of 10 February 1947 (ibid., vol. XIV (op. cit.), p. 163).

448 The decisions referred to here are a number of awards in which international arbitral tribunals have required States to pay what are known as "penal damages". The question raised by the application of these "penal damages" will be considered in more detail in the chapter to be devoted specially to the forms of State responsibility. For the purposes of this analysis, it is enough to indicate that these so-called "penalties" have in any case never been imposed on a State because of the particular subject-matter of the obligation it failed to respect. On this basis, therefore, international jurisprudence cannot be viewed as endorsing the theories of those who distinguish between different categories of internationally wrongful acts on the basis of the subject-matter of the obligation breached.

449 This is not invalidated by the fact that some decisions of the Permanent Court of International Justice and of arbitral tribunals and conciliation commissions have explicitly affirmed that the breach of any international obligation entails the obligation to make reparation. The judges and arbitrators who made this affirmation were expressly requested to determine, in connexion with a given case, whether or not there was an obligation to make reparation for the injury. Their reply, based on what the Permanent Court defined as "a principle of international law" as well as a "general conception of law", was that if an obligation had been breached there was also an "obligation to make reparation in an adequate form". But they had not been asked to establish also that the latter obligation was, in any case, the sole consequence.
possible consequences. Moreover, it has happened that an international arbitral tribunal has expressed an opinion nonetheless on the lawfulness of the application by the injured State of a sanction, which in the cases in question took the form of acts of armed reprisal. This was in the award on the Responsibility of Germany arising out of damage caused in the Portuguese colonies of southern Africa (Naulilaa incident), rendered on 31 July 1928 by the arbitral tribunal established under articles 297 and 298, paragraph 4 of the annex to the Treaty of Versailles, and in the award made by the same tribunal on 30 June 1930 on the Responsibility of Germany arising out of acts committed after 31 July 1914 and before Portugal took part in the war (Cysne case).

In the cases in question, the tribunal considered that it was lawful to apply a sanction in the form of reprisals, on two conditions: that the reprisals taken must be proportionate to the wrongful act and that the injured State must first have attempted unsuccessfully to obtain reparation for the injury sustained. Thus the tribunal did not question the existence of different forms of responsibility. On the other hand, what is not distinctly clear from these awards is whether, in the opinion of the tribunal, refusal by the guilty State to make reparation should really be considered the only case in which the application of a sanction could be deemed legitimate.

(10) In the cases directly submitted for their ruling, and excepting those in which a different conclusion has been explicitly or implicitly provided for in a particular treaty, international judicial and arbitral bodies have acknowledged only that the State directly injured, in its own "legal interests", has the right to bring a claim invoking the responsibility of a State committing an internationally wrongful act. When required to pronounce on this point, the International Court of Justice, in its judgment of 18 July 1966 on the South West Africa cases refused to allow that contemporary international law recognized "the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest". However, in a subsequent judgment, that of 5 February 1970 given in the Barcelona Traction case, the Court added a clarification of great importance for the question at present under consideration. Referring to the determination of the subjects of international law having a legal interest in the performance of international obligations, the Court declared:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

This passage has been the subject of differing interpretations; but it seems undeniable that the Court intended by such affirmations to draw a fundamental distinction between international obligations and hence between the acts committed in breach of them. And it implicitly recognized that this distinction should influence the determination of the subjects of international law entitled to invoke the responsibility of the State. In the Court's opinion, there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are—unlike the others—obligations in whose fulfilment all States have a legal interest. It follows, according to the Court, that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State which was the direct victim of the breach; it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking—probably through judicial channels—the responsibility of the State committing the internationally wrongful act.

(11) The foregoing analysis of the opinions of international tribunals shows that in principle these bodies do not deny the existence of different regimes of State responsibility for internationally wrongful acts. On the contrary, they seem in some instances to support the idea that, at least in certain circumstances, another form of responsibility could be substituted for the obligation to make reparation, and subjects of international law other than the one directly injured could be entitled to invoke the responsibility flowing from the wrongful act. What cannot always be deduced from these opinions is whether, even disregarding refusal to make reparation, the application of a form of responsibility other than reparation, and obviously more serious than reparation, would be justified by reason of the specific subject-matter of the international obligation breached and its importance for the international community. Nevertheless, however isolated the expression of such an opinion in an international judgment may still appear to be, the passage quoted from the judgment of the International Court of Justice in the Barcelona Traction case and, in particular, the conclusions that can be drawn from it as regards the subject of international law entitled to invoke responsibility, seem an important argument in support of the theory that there are

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452 Ibid., pp. 1056 et seq.
two separate regimes of international responsibility depending on the subject-matter of the international obligation breached, and consequently that, on the basis of that distinction, there are two different types of internationally wrongful acts of the State.

(12) State practice in this matter has undeniably evolved during the twentieth century. Two successive stages must be distinguished: that preceding the Second World War and that beginning after the War. During the first period, the dominant idea of States seems to have been that the subject-matter of the obligation breached had no bearing on the regime of responsibility applicable to an internationally wrongful act—yet a few examples of a trend towards a different view are already to be found in this period. The States which, under the auspices of the League of Nations, participated in the work of codifying the responsibility of States for damage caused to foreigners never expressed, in the course of that work, the view that the subject-matter of the obligation breached should have a bearing on the regime of responsibility attaching to the breach. On the other hand, although the replies of Governments to the request for information addressed to them by the Preparatory Committee of the 1930 Hague Conference, and the discussions which took place at the Conference itself, certainly justify the conclusion that, at that time, States unanimously recognized that the breach of any international obligation entailed an obligation to make reparation, they nevertheless fail to indicate that, in the view of those same States, the obligation to make reparation was the only form of responsibility engaged by an internationally wrongful act. It also appears from the work in question, although indirectly, that Governments recognized the faculty of the injured State to take reprisals against the State which had breached an international obligation relating to the treatment of foreigners, generally on the condition that the injured State had first vainly attempted to obtain reparation. They also agreed in recognizing that there were several forms of “reparation”, which could be applied “according to the circumstances”. But the positions of Governments do not suggest that they regarded the subject-matter of the international obligation breached—or its greater or lesser importance for the international community—as having any bearing on the applicability of one form of reparation rather than another, or on the legitimacy or illegitimacy of taking reprisals. Nor was the subject-matter of the obligation breached considered as having a bearing on the determination of the subject of international law entitled to invoke the responsibility of the State which committed an internationally wrongful act. No distinction between two or more categories of internationally wrongful acts according to the subject-matter of the obligation in question was in fact possible on these grounds. It could, of course, be objected that the limited field of the 1930 codification work (treatment of foreigners) perhaps offered less opportunity than other fields for singling out exceptionally important obligations, breaches of which could have very serious consequences for the international community as a whole. However, leaving aside the possibility that internationally wrongful acts in that category can occur in this field as well, it would seem unjustifiable to assume that the positions of Governments would have been different in regard to other fields. It should be borne in mind that these positions were often formulated in very general terms and thus did not refer solely to the field in which codification was being attempted.

(13) The attitude adopted by States in specific situations confirms what has just been said. In disputes resulting from the breach of a particular international obligation, the parties concerned were often greatly at variance as to whether the State committing the breach was obliged to restore the injured State to the condition it had enjoyed before the breach, or to make a payment as compensation or as penal damages. Another seriously disputed issue was whether the injured State was justified in imposing a sanction on the State committing the internationally wrongful act. Lastly, the parties discussed the amount of reparation due or the limits of the sanction authorized under international law. However, there was no question of relying on the subject-matter of the obligation breached and maintaining that the choice between the different possible forms of responsibility should be made on the basis of that subject-matter; nor was the latter referred to in justification of any conclu-
sions with respect to the determination of the subject of international law authorized to invoke the international responsibility.

(14) However, as indicated above, there were already signs of a change in the period preceding the Second World War. Between the two world wars, the principle prohibiting recourse to war as a means of settling international disputes was progressively affirmed, on a par, in the legal thinking of the members of the international community, with the belief that a breach of that prohibition could not be treated as a wrong "like any other". It may seem superfluous to mention in this connexion the decisive influence which certain important multilateral treaties, particularly the Covenant of the League of Nations and the General Treaty for the Renunciation of War as an Instrument of National Policy known as the "Pact of Paris" or the "Briand-Kellogg Pact") exerted during this period on the evolution of the general attitude of the international law of the time towards the lawfulness of the use of force to settle international disputes. During the same period, the draft "Treaty of Mutual Assistance" prepared in 1923 by the League of Nations already characterized a war of aggression as an "international crime". The preamble to the 1924 Geneva Protocol for the Pacific Settlement of International Disputes defined a war of aggression as a violation of the solidarity of the members of the international community and as "an international crime"; the resolution adopted on 24 September 1927 by the League of Nations confirmed that definition; and lastly the resolution adopted on 18 February 1928 by the Sixth Pan-American Conference declared that a war of aggression constituted "an international crime against the human species". Admittedly, nothing is said in these texts about the régime of responsibility to be applied in the event of a breach of the prohibition of acts of aggression; however, it is unthinkable that States could have believed that such a breach, unhesitatingly qualified as a "crime", would entail no consequences other than those which normally followed from internationally wrongful acts that were much less serious. As soon as the use of force as an instrument of international policy is prohibited, it has to be accepted, as a logical consequence, that the breach of such a prohibition necessarily entails the application of penalties which are themselves coercive and the possibility that subjects of international law other than the State directly attacked may act to that end. It should also be borne in mind that the Covenant of the League of Nations already provided for a special régime of responsibility for any breach of the obligation, imposed by the Covenant, not to resort to force in order to settle international disputes until the available procedures for peaceful settlement had been utilized. Articles 16 and 17 provide for a régime of responsibility consisting of subjecting the aggressor to penalties which all Member States were bound to apply.

(15) The need to distinguish, in the general category of internationally wrongful acts of States, a separate category comprising exceptionally serious wrongs has in any case become more and more evident since the end of the Second World War. Several factors have no doubt contributed to this accentuation of the trend. The terrible memory of the unprecedented ravages of the Second World War, the frightful cost of that war in human lives and in property and wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large fractions of mankind, and every trace of civilization, which would result from a new conflict in which the entire arsenal of weapons of mass destruction would be used—all these are factors which have implanted in peoples the conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes. The feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi régime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected; all this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, apartheid and other inhuman practices of that kind. The solidarity of broad strata of the world's population in the liberation struggle carried on by the peoples subject to colonial domination, and the firmness with which those peoples have resolved to defend the supreme treasure of liberty which is now theirs, are the decisive elements in the assertion and recognition of the right of every people to become an independent political entity and in the general prohibition of any action which challenges the independence of another State. More recently, the requirements of economic and social development on all sides and the marvellous achievements, but also the terrible dangers, of scientific and technological progress have led States to realize the imperative need to protect the most essential common property of mankind and, in particular, to safeguard and preserve the human environment for the benefit of present and future generations. New rules of international law have thus appeared, others in course of emergence.

460 See League of Nations, Official Journal, Fourth Year, No. 12, December 1923, p. 1521. It was only because of the difficulty of reaching agreement on the meaning of the term "aggression" that the draft was not adopted. However, the Contracting Parties were in agreement in regarding a war of aggression as an "international crime".

461 See League of Nations, Official Journal, Special Supplement No. 21, October 1924, Geneva, 1924, p. 21. The Protocol was adopted unanimously by the 48 States Members of the League of Nations. Although signed by 19 States, it obtained only one ratification.


463 The resolution was adopted unanimously by the 21 States present at the Conference. (For text, see Carnegie Endowment for International Peace, The International Conferences of American States, 1889-1928 (New York, Oxford University Press, 1931), p. 441.)
have become firmly established and yet others, already existing, have acquired new vigour and more marked significance; these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen the conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach “like any other” but that it necessarily represents an internationally wrongful act which is far more serious, a wrong which must be differently characterized and therefore be subject to a different régime of responsibility.

(16) As direct or indirect evidence of this conviction, three facts seem, in the Commission’s view, to be of considerable significance: (a) the distinction, recently established among the rules of international law, of a special category of rules known as “peremptory” rules or rules of “jus cogens”; (b) the development of the principle that an individual who is an organ of the State and by his conduct has breached international obligations of specific content must himself, even though he acted as an organ of the State, be regarded as personally punishable, and punishable under particularly severe rules of internal penal law; and (c) the fact that the United Nations Charter attaches specific consequences to the breach of certain international obligations.

(17) With regard to the first point, it is hardly necessary to review here the entire process that has led to the formal distinction, among the general rules of international law, of the particular category of rules of “jus cogens”. It is important to emphasize that the appearance of rules of this kind at the international level proves that, in the legal thinking of the members of the international community, the subject-matter of the obligations imposed upon States by the law of nations is taken into consideration for the purposes of a differentiation between two kinds of rules and, hence, of legal obligations—a differentiation entailing the application of different legal consequences to breaches of the two different kinds of obligations. The content of the rules of international jus cogens is so important to the community of States that derogation from those rules by special agreement between two or more of its members has been prohibited, as stipulated in article 53 of the Vienna Convention. Of course, the prohibition of any derogation from certain rules does not necessarily and automatically imply that a breach of the obligations arising therefrom should be subject to a régime of responsibility different from that associated with the breach of the obligations created by the other rules. But it is unlikely that the development of the legal thinking of States as regards the idea of the inadmissibility of a derogation from certain rules should not have been accompanied by a parallel development in the sphere of State responsibility. Indeed, it would seem contradictory if the same consequences continued to be applied to the breach of obligations arising out of the rules defined as “peremptory” and to the breach of obligations arising out of rules from which derogation by special agreement is permitted. Similarly, it would seem contradictory if, in the case of a breach of a rule so important to the entire international community as to be described as a “peremptory” rule, the relationship of responsibility was established solely between the State which committed the breach and the State directly injured by it.

(18) Article 53 of the Vienna Convention gives a general definition of the norms which must be considered to be of a peremptory character (jus cogens), one of the elements of the definition being that a rule of this kind must be “accepted and recognized” as such “by the international community of States as a whole”. The purpose of this definition is to serve as a criterion for States and international tribunals in identifying these norms in concreto. Consequently neither the Convention, nor indeed the International Law Commission’s draft articles which served as a basis for its preparation, give specific examples of peremptory norms of general international law. During the discussions which took place in the Sixth Committee of the General Assembly before the United Nations Conference on the Law of Treaties, as well as at the Conference itself, representatives of States did, however, sometimes mention a few examples of norms which they regarded as having that character. Generally speaking, most of the examples mentioned can be said to correspond, in essence, to those put forward by the members of the International Law Commission during the debate on the draft articles on the law of treaties, where the following treaties are described as “void” because they constitute derogations from a peremptory norm of international law:

- (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples...

(19) The second point seems no less significant for
the purposes considered here. It is known that today international law imposes upon States the obligation to punish crimes known as “crimes under international law” (“crimes de droit international”); this single category includes “crimes against peace”, “crimes against humanity” and “war crimes” in the strict sense. 467

467 The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal were confirmed by the General Assembly in resolution 95 (I) of 11 December 1946. In resolution 177 (II) of 21 November 1947, the General Assembly directed the International Law Commission to formulate those principles and prepare a draft code of offences against the peace and security of mankind. In 1950, the International Law Commission drew up a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (Yearbook... 1950, vol. II, p. 374, document A/1316, para. III). Principle I provides that any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment, and principle VI lists the following crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

The revised text of the draft Code of Offences against the Peace and Security of Mankind was submitted by the International Law Commission to the General Assembly in 1954 (Yearbook... 1954, vol. II, p. 149, document A/2693, chap. III). Article I of the draft Code states that "offences against the peace and security of mankind", as defined in the Code, are "crimes under international law, for which the responsible individuals shall be punished". Article II lists the various acts which, under the Code, are "offences against the peace and security of mankind". The draft is limited to "offences which jeopardize or endanger the maintenance of international peace and security, in 1957, the General Assembly postponed examination of the draft Code until it resumed consideration of the definition of aggression. In 1968, it was decided not to reconsider this question or that of international criminal jurisdiction and to defer consideration of them to a later session, when work on the preparation of a definition of aggression would be further advanced. Specific international conventions concerning "crimes under international law" were nevertheless concluded under the auspices of the United Nations. Some examples are the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (United Nations, Treaty Series, vol. 78, p. 277), the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, of 26 November 1968 (ibid., vol. 754, p. 73) and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (not yet in force; for the text, see General Assembly resolution 3068 (XXVIII), annex). A conference of plenipotentiaries convened in pursuance of Economic and Social Council resolution 608 (XXI) adopted the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, of 7 September 1956 (United Nations, Treaty Series, vol. 266, p. 3), supplementary to the Slavery Convention signed at Geneva on 25 September 1926 (League of Nations, Treaty Series, vol. LX, p. 253). It is pointed out in the preamble to the Supplementary Convention that the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations, states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms.

The right-duty to punish the perpetrators of these crimes is generally recognized as resting with the State in whose territory the crimes were committed, whether or not that State is the same as the State whose organs the individuals are. See, for example, resolution 3 (I) on the extradition and punishment of war criminals, adopted on 13 February 1946 by the United Nations General Assembly; article VI of the Convention on Genocide (for reference, see above, foot-note 467); and paragraph 5 of General Assembly resolution 3074 (XXVIII), of 3 December 1973, stating the "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity". Sometimes the jurisdiction of the State in whose territory the crimes were committed is supplemented by that of an international criminal court that may be established (article VI of the Convention on Genocide). Lastly, it is possible that in certain cases the perpetrators of international crimes may be punished by any State having jurisdiction over them under its own internal law (article V of the Convention on Apartheid, for reference, see above, foot-note 467).

468 See paras. 2, 4, 5, 6, 8 and 9 of General Assembly resolution 3074 (XXVIII) of 3 December 1973.

469 Para. 7 of General Assembly resolution 3074 (XXVIII) and article 1, para. 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967 (resolution 2176 (XXXII)).

470 See, for example, article VII of the Convention on Genocide and article XI of the Convention on Apartheid.

471 See the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (for reference, see above, foot-note 467).
this kind.\(^473\) The obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State, and such punishment certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs. Punishment of those in charge of the State machinery who have started a war of aggression or organized an act of genocide does not per se release the State itself from its own international responsibility for such acts. Conversely, as far as the State is concerned, it is not necessarily true that any "crime under international law" committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a "special form" of responsibility for that State. For the purposes of the subject-matter of the present article, the fact that State organs which have committed certain acts have been found liable to personal punishment is mainly important because it testifies unquestionably to the exceptional importance now attached by the international community to the fulfilment of obligations having a certain subject-matter. It is, moreover, no accident that the obligations described in the foregoing paragraphs, whose breach entails the personal punishment of the perpetrators, correspond largely to the obligations imposed by certain rules of jus cogens. The specially important content of certain international obligations and the fact that their fulfilment affects the realities of life in the international community are factors which, at least in many cases, have precluded any possibility of derogation by special agreement from the rules imposing those obligations. These are also the factors which make a breach of these obligations appear quite different from failure to comply with other obligations. The need to prevent the breach of obligations which are so essential would indeed appear to warrant both that the individual-organ committing such a breach should be held personally liable to punishment, and that concurrently the State to which the organ belongs should be subject to a special régime of "international responsibility".

(22) The third point referred to above\(^474\) has an obvious bearing on the question at issue. It derives from the fact that in formulating the "primary" obligation, which must today be considered as the most essential obligation—or set of obligations—under international law, the United Nations Charter combines the formulation with an explicit indication of the consequences attendant upon any breach. It may be useful to summarize briefly the system which exists under the Charter in this respect. Article 2, paragraph 3, provides that the Members of the United Nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".\(^475\) This principle is supplemented by the one laid down in Article 2, paragraph 4, which stipulates that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

To ensure respect for this obligation by Member States and even by non-member States,\(^476\) Chapter VII of the Charter provides for the possibility of "preventive measures" against a threatened breach of the peace or "enforcement action" to restore international peace and security where a breach has been committed.\(^477\) Competence to determine "the existence of any threat to the peace, breach of the peace, or act of aggression" is attributed under Article 39 to the Security Council which, after making such a determination, "shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security". As regards these measures, whose eminently "collective" nature is borne out by several provisions,\(^478\) Article 41 enumerates measures not involving the use of armed force\(^479\) and Article 42 enumerates measures involving the use of force which may be undertaken if the measures provided for in Article 41 would be or have proved to be inadequate.\(^480\) Moreover, until such time

\(^{473}\) It seems clear that it would be wrong to refer to a "criminal" responsibility of the State in connexion with the applicability of penalties to certain persons who are its organs, whether in one country or another. Furthermore, even if it were desirable that the responsibility for applying manifestly repressive and punitive measures should more correctly be represented as a criminal responsibility of the State, it is doubtful whether there would be any point in extending to international law the specific legal categories of internal law. For the purposes contemplated here, the essential question is not so much whether the responsibility incurred by a State by reason of the breach of specific obligations entails "criminal" international responsibility, but whether such responsibility is "different" from that deriving from the breach of other international obligations of the State.

\(^{474}\) See above, para. (16)(c) of this commentary.

\(^{475}\) This provision is at the origin of the whole set of provisions set out in Chapter VI of the Charter (Pacific Settlement of Disputes).

\(^{476}\) Article 2, para. 6, provides that "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

\(^{477}\) Article 5 speaks of "preventive or enforcement action".

\(^{478}\) Article 2, para. 5, provides that: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."

\(^{479}\) These may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

\(^{480}\) The action which the Security Council is empowered to take "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".
as the Security Council is able to take the necessary steps to organize and implement such collective enforcement action, the possibility of immediate enforcement action, "individual or collective", is also provided for in Article 51 which, for the specific use of force in "self-defence", allows the temporary suspension of the general prohibition on the use of force. This temporary exception applies to a Member State which is the victim of an armed attack, as well as to other Members which consider themselves threatened by the acts of the aggressor or are merely associated with the victim of the aggression by collective security agreements, especially under one of the regional arrangements referred to in Chapter VIII (Articles 52-54) of the Charter. Articles 5 and 6 complete the Charter provisions concerning the consequences of a breach of one of the legal obligations established by the Charter with respect to the pursuit of the institutional purposes of the United Nations. Article 5 provides for the possibility that a Member "against which preventive or enforcement action has been taken by the Security Council" may be suspended from "the exercise of the rights and privileges of membership". Article 6 provides for the possibility of expelling from the Organization a Member which has "persistently violated" the principles contained in the Charter.

(23) The Commission does not consider it necessary, for the purposes of formulating the present article, to embark on a theoretical analysis of the various measures which might be taken under the United Nations system in order to establish, in particular, which of them may be characterized, from the strictly legal angle, as "sanctions". Nor does it find it necessary to retrace the history of the circumstances which have prevented, at least partially, the establishment of the system provided for in Chapter VII of the Charter, or to consider here to what extent the Security Council's power to take action by means of decisions that are binding on Members has been partially made good through use of the Council's power to act by recommendation, or the power of the General Assembly to make recommendations on the basis, for example, of its resolution 377 (V) of 3 November 1950—the "Uniting for peace" resolution. Lastly, there is no question of examining here the procedures followed in practice in regard to peace-keeping operations. On the other hand, what is of undoubted importance for the purposes of formulating the present article is the question of how to identify the broad categories of legal obligations for which the Charter is specifically intended to ensure respect and whose breach entails the application of special measures of repression.

(24) In the Commission's view, the basis for replying to this question is provided by the abovementioned requirement of Article 2, paragraph 4, of the Charter, that Member States shall refrain from the threat or use of force, and by the provisions of Article 1 stating the purposes of the United Nations, namely the prevention and removal of threats to the peace and ... the suppression of acts of aggression or other breaches of the peace, and the assurance of respect for the principle of equal rights and self-determination of peoples and for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. As regards these enactments, it is also necessary to mention that according to the communis opinio the obligations established in these provisions of the Charter have become part of international customary law and are binding upon all States, whether the Members of the United Nations or not.

(25) The Charter establishes a link between the possibility of enforcement action against a State, initiated and organized by the United Nations itself, and the pursuit of the first of the Organization's purposes (Article 1, paragraph 1), the one which the draftsmen of the Charter unquestionably considered as the most essential for the life and survival of international society. The internationally wrongful acts which it was intended to prevent and suppress by this exceptional possibility of resort to collective enforcement action are covered by the three terms "threat to the peace", "breach of the peace" and "act of aggression", 484

481 These arrangements and, in general, the whole system of safeguards provided for in Article 51 have acquired increased importance as a result of the impossibility of concluding the agreements which should have been reached in pursuance of Article 43 and of implementing the transitional security arrangements provided for in Article 106 (Chapter XVII).

482 At first sight, Article 94, para. 2, of the Charter would appear to extend indirectly to all international legal obligations the safeguards specifically established with respect to fulfilment of the obligations imposed on Member States in connexion with the pursuit of the institutional purposes of the Organization. In fact, however, there is only one obligation which this provision safeguards through the possibility of Security Council action, namely, the obligation incumbent upon Members pursuant to Article 94, para. 1, "to comply with the decision of the International Court of Justice in any case to which it is a party". The right conferred by Article 94, para. 2, upon the State concerned to call for action by the Security Council is to some extent the counterpart, in the United Nations legal system, of what under traditional general international law used to be the right to take reprisals against a State which refused to comply with its obligation to make reparation for an internationally wrongful act. In this connexion, it should also be noted that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in resolution 2625 (XXV), of 24 October 1970, proclaims, as a corollary of the principle that States shall refrain in their international relations from the threat or use of force, that States have a duty to refrain from acts of reprisal "involving the use of force". Further, with respect to the British military action at Harib (Yemen Arab Republic) on 28 March 1964, the Security Council, in resolution 188 (1964) of 9 April 1964, condemned the reprisals "as incompatible with the purposes and principles of the United Nations".

483 This is exemplified by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. The universal and unconditional validity of the purposes and principles of the Charter of the United Nations "as the basis of relations among States", irrespective of their size, geographical location, level of development or political, economic and social systems has also been solemnly reaffirmed by other texts, such as the Declaration on the Strengthening of International Security, adopted by the General Assembly in resolution 273 (XXV), of 16 December 1970, which declares that "the breach of these principles cannot be justified in any circumstances whatsoever".
which are also mentioned in the opening article of Chapter VII (Article 39). Intensive efforts have been made within the United Nations to arrive at a definition of the notion of aggression, a process recently crowned with success by the adoption, on 14 December 1974, of the Definition of Aggression established in General Assembly resolution 3314 (XXIX). The definition describes aggression as "the most serious and dangerous form of the illegal use of force" and calls a war of aggression "a crime against ... peace", giving rise to "international responsibility". It enumerates a long list of acts, any of which "qualify as an act of aggression"; and it specifies that the acts enumerated are not exhaustive and that the Security Council may determine that other acts constitute aggression under the provisions of the Charter, inasmuch as "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case".

(26) The link established by the Charter between the possibility of collective enforcement action being taken under the auspices of the Organization and the condition that a "threat to the peace", a "breach of the peace", or an "act of aggression" must exist also explains other developments which have taken place in the United Nations. This link is at the origin of the efforts made by many States to win acceptance for the view that the condition in question is fulfilled even in cases in which the actions complained of are not strictly covered by the traditional idea of the threat or use of force in international relations. The conduct taken into consideration for this purpose is, primarily, the forcible maintenance of colonial domination or the forcible maintenance of a régime of apartheid or racial discrimination within a State. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations echoes Article 1, paragraph 2, of the Charter in mentioning, as an application of "the principle that States shall refrain in their international relations from the threat or use of force", the duty of every State "to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence". The Declaration further lays down, as a specific application of "the principle of equal rights and self-determination of peoples", the duty of every State "to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence". Moreover, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in its resolution 1904 (XVI-II), of 20 November 1963, affirms in article 1 that: "Discrimination between human beings on the ground of race, colour or ethnic origin ... shall be condemned ... as a fact capable of disturbing peace and security among peoples".

(27) As regards the forcible maintenance of colonial domination, the General Assembly, over a ten-year period, formulated a series of resolutions whose tenor is much or less the same, referring in them to the Declaration on the granting of independence to colonial countries and peoples adopted in its resolution 1514 (XV) of 14 December 1960. The Assembly declared that the continuation of colonial rule "threatens international peace and security" or represents a "serious impediment" to the maintenance of international peace and security. After 1970, the Assembly resolves describe "the waging of colonial wars to suppress national liberation movements in southern Africa" as "incompatible with the Charter of the United Nations" and as posing a "threat to international peace and security". The General Assembly invites Member States directly, in increasingly insistent terms, to "provide ... moral and material assistance ... to national liberation movements"; in addition, it recognizes the "legitimacy of the struggle of the colonial peoples ... to exercise their right to self-determination and independence by all the necessary means to which they are entitled, and to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter". The Declaration also proclaims the duty of every State to promote, through joint and separate action, "realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".

485 The essence of the argument advanced by the representatives of the countries in question in various organs of the United Nations is that, on the basis of Article 1, paragraphs 2 and 3, of the Charter, the resort to force by a State in order to keep under a régime of apartheid or colonial domination a people living in the territory of that State or in a territory administered by it must be characterized as a use of force "inconsistent with the Purposes of the United Nations". Accordingly, they consider such a use of force to be prohibited under the final phrase of Article 2, para. 4, of the Charter. The fact remains, however, that this paragraph prohibits the threat or use of force by Members "in their international relations" only. The countries concerned then contend, in some cases, that the peoples subjected to the régimes in question should be regarded as separate subjects of international law before they become independent States, and even before they attain international status as insurgents. These countries further maintain that the resort to force by a State in order to maintain colonial domination or a régime of apartheid should be regarded as an act capable of having dangerous consequences in international relations in the true sense of the term, and consequently as an act covered by the general notion of a "threat to the peace" and therefore justifying the use of enforcement measures.

486 The Declaration adds: "In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter". The Declaration also proclaims the duty of every State to promote, through joint and separate action, "realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".


488 Resolution 2878 (XXVI), of 20 December 1971. This resolution refers to "the continuation of colonialism in all its forms and manifestations", including racism, apartheid and also economic colonialism. Resolutions 2908 (XXVII) of 1972, 3163 (XXVIII) of 1973 and 3328 (XXIX) of 1974 are identical in tenor.

489 Various resolutions, including resolution 2708 (XXV), of 14 December 1970, address the same invitation to the specialized agencies and other organizations within the United Nations system.
means at their disposal". The General Assembly has also adopted a series of resolutions relating to specific cases. In the case of the former Territories under Portuguese administration, for example, the Assembly recommends Member States to break off diplomatic relations with the metropole, close their ports, boycott trade, refrain from giving the Portuguese Government any assistance, prevent the sale or supply of arms, and so forth. In 1967, in resolution 2270 (XXII), the General Assembly strongly condemned the colonial war being waged by the Portuguese Government of the day against the peaceful peoples of the Territories under its domination, a war which the Assembly described as constituting a crime against humanity and "a grave threat to international peace and security". In the case of Namibia, after the termination of South Africa's mandate over the Territory, the General Assembly called upon that State to withdraw from the Territory all its military and police forces, its administration, and so on. The Assembly declared that the continued presence of South African authorities was a flagrant violation of the territorial integrity of Namibia. Besides recognizing the legitimacy of the struggle being waged "by all means" by the people of Namibia against "the illegal occupation of their country", and inviting States and international organizations to assist the Namibian people in their struggle, the General Assembly noted that the situation in that Territory "constitutes a threat to international peace and security". It therefore invited the Security Council to take the measures provided for under Chapter VII of the Charter. Both the Assembly and the Council have invited Member States to take a series of measures to force South Africa to withdraw its administration from the Territory. The International Court of Justice, called upon in its turn to pronounce on the subject, in its advisory opinion of 21 June 1971, affirmed the obligation on South Africa to withdraw its administration from the Territory of Namibia, pointing out that "By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation". The Court also stated that it was for the Security Council to determine the measures to be taken to end the illegal presence of South Africa in Namibia; and it affirmed the duty of all Member States to give assistance in the action which had been taken by the United Nations with regard to that Territory. In the view of the Court, "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring erga omnes the legality of a situation which is maintained in violation of international law". Lastly, there is the case of Southern Rhodesia, which has given rise to the most outspoken pronouncements of all. When the question was referred to the Security Council, the Council did not hesitate to recognize that the Rhodesian situation represented "a threat to international peace and security"; it therefore decided to apply certain measures on the basis of Article 41 of the Charter. Both the Council and the General Assembly have requested Member States to take measures against the Rhodesian régime; in particular the General Assembly has reiterated its customary request for material, moral, political and humanitarian assistance to the people of Zimbabwe in their "legitimate" struggle for freedom and independence.

(28) As regards apartheid and racial discrimination in countries mentioned by name, the General Assembly and the Security Council, from 1960 onwards, adopted resolutions in which the situation in South Africa was described as "endangering" or "seriously disturbing" international peace and security. From 1965 onwards, the General Assembly regularly drew the attention of the Security Council to the fact that the situation in South Africa constituted a "threat", or even a "grave threat", to international peace and security and that economic and other measures of the kind envisaged in Chapter VII of the Charter were essential in order to solve the problem of apartheid. At the same time the General Assembly appealed directly to Member States, first inviting them to adopt measures designed to induce South Africa to abandon its policy of apartheid and urging them to sever diplomatic, consular, economic, political and military relations with that country, and

489 These General Assembly resolutions merely develop the principle laid down in paragraph 1 of the Declaration on the granting of independence to colonial countries and peoples, that "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation".

490 For the recognition of the legitimacy of the struggle waged by "the peoples of the ... Territories under Portuguese domination", or waged by them "by all necessary means at their disposal", see inter alia resolutions 2107 (XX) of 1965, 2270 (XXII) of 1967, 2707 (XXV) of 1970 and 3113 (XXVIII) of 1973. The 1973 resolution was the last to be adopted concerning Portugal, since the change of régime and of policy towards the colonial Territories took place shortly afterwards.

491 See in particular resolution 2107 (XX) mentioned above, resolution 2795 (XXVI) of 1971 and resolution 3113 (XXVIII), also mentioned above.

492 Resolution 2322 (XXII) of 1967.

493 Resolution 3399 (XXX) of 1975. See also resolution 2678 (XXV) of 1970.

494 Resolution 2678 (XXV).


496 Ibid., p. 56.


498 See, inter alia, General Assembly resolutions 2022 (XX) of 1965, 2652 (XXV) of 1970 and 3396 (XXX) of 1975.


501 See resolution 2646 (XXV) of 1970, in which the recommendation also covers "other racist régimes in southern Africa".
later, in addition, requesting them to adopt such enforcement measures as blockading ports and boycotting goods. Furthermore the General Assembly recognized the legitimacy of the struggle of the people oppressed by apartheid, and made increasingly pressing appeals to Member States for political, moral and material support and "greater assistance" to those struggling against apartheid. An indirect allusion to the sanction provided for in Article 6 of the Charter is also to be found in these resolutions. The Security Council, for its part, acknowledged successively that the situation in South Africa "might endanger international peace and security", "is seriously disturbing international peace and security", and "constitutes a potential threat to international peace and security". It has not had direct recourse to the measures provided for by Article 42 of the Charter, but has nevertheless invited Members to declare an "embargo" on supplies of arms, ammunition and military vehicles to South Africa.

(29) Thus an objective examination of State practice in the United Nations enables us to conclude that the forcible maintenance of colonial domination and the application of a coercive policy of apartheid or absolute racial discrimination appear henceforth to be considered within the legal system of the United Nations—and probably in general international law as well—as breaches of an established international obligation to abstain from such practices or to put an end to them. It seems possible to conclude also that offences of this kind, especially if they are persisted in, are regarded as particularly serious and as liable to produce more severe legal consequences than those attaching to internationally wrongful acts of a less serious nature. Admittedly it is not yet possible to discern any real consensus of opinion as to what kind of "action" or "measures" may legitimately be taken to deal with the acts referred to, or upon other delicate points of law, in the Commission's view.

502 At first, the General Assembly stated that the aim of this struggle was the safeguarding of the human rights and fundamental freedoms of the South African people as a whole, without distinction as to race, language or religion (Charter, Article 1, para. 3), and later that it was the exercise of their inalienable right to self-determination (Article 1, para. 2). From 1970 onwards, the resolutions recognized the legitimacy of the struggle of the people of South Africa using "all means at their disposal". In this connexion, see also resolutions 2646 (XXV) of 1970 and 3377 (XXX) of 1975, dealing in general with "the struggle of oppressed peoples to liberate themselves from racism, racial discrimination, apartheid, colonialism and alien domination". The Security Council, in more moderate terms, also recognized the legitimacy of the struggle of the South African people "in pursuance of their human and political rights" (resolutions 282 (1970) and 311 (1972)).

503 Resolution 2646 (XXV) declared that "any State whose official policy or practice is based on racial discrimination, such as apartheid, contravenes the purposes and principles of the Charter of the United Nations and should therefore have no place in the United Nations".


505 For example, the idea that the Charter legitimizes the application by third States of coercive measures involving the use of force against States practising apartheid or maintaining colonial domination over other countries is seriously questioned by a sizable number of States. The same is true of the idea that it legitimates the provision of armed aid by a third State to a people struggling to free itself from alien domination. Some Governments doubt whether the General Assembly—or even the Security Council—has the power to remove by recommendations alone the prohibition of the use of force established by the Charter in all cases, with the exception of self-defence and participation in action undertaken, on its own "decision", by the Security Council. Nor do the ideas of inclusion of the term "self-defence" in the legal definition of "self-defence", as the term is used in Article 51 of the Charter, armed action undertaken by a people to free itself from apartheid or colonial domination. Hence they cannot agree that a possible intervention in the combat, by another State, should be presented as participation in "collective self-defence", again as the term is used in Article 51. Lastly, these same States have great difficulty in agreeing—with all the attendant consequences—to regard the relations between a State and a people under its colonial domination as "international relations", in the sense in which the term is used in Article 2, paragraph 4, at least until that people has acquired the limited international legal capacity which international law attributes to insurrectional movements under certain conditions.

506 The positions adopted by States with regard to conventions concluded for the prevention and punishment of certain "international crimes", such as the Conventions dealing with genocide and apartheid, seem to confirm the conclusions outlined above. In drawing up the Convention on genocide (for reference, see above, foot-note 467), which was adopted unanimously, States did not really intend to place that crime on the same level, from the point of view of the consequences that would attach to it, as an aggraved act of aggression, for example. The provisions of the Convention on apartheid (for reference, see above, foot-note 467), on the other hand, bring to mind the very similar provisions of the Charter concerning the action to be taken under Chapter VII in the case of violations of international peace and security. However, it is precisely because of this similarity that the Convention on apartheid could not be adopted unanimously and has as yet been signed and ratified by only a few States.
need to expand the production of consumer goods in order to keep pace with that increase, and even more in order to satisfy the demands of great masses of humanity for a higher standard of living, have focused world attention on the problems of safeguarding, preserving and, if possible, improving the human environment.

(32) The risks to which the environment is exposed by man armed with his present resources are well known: the pollution, by one means or another, of vast areas of the atmosphere, the sea and the land; the destruction of fauna over huge areas in the oceans, and thus of essential sources of food for whole populations; the transformation of fertile regions into arid and unproductive land; the spread of poisons, bacteria and other chemical agents fatal to man or animals; modifications of weather and climate; and the degradation of groundwater supplies and of the quality of drinking water and irrigation water. These are just examples, for what can happen is beyond imagination. Frequent meetings of scientists and diplomats have been sounding the alarm on this subject for many years, and increasing efforts are being made, in particular, in the United Nations to bring about an obligation upon States to refrain from certain practices and also to see to it that their subjects observe certain prohibitions. The results of these efforts have admittedly been very limited so far. While, in the chemical and bacteriological sphere for example, there has been the adoption by all States of a collective instrument that even provides for the destruction of existing stocks of weapons of that kind, in contrast, in the sphere of nuclear tests, it has so far been possible to impose only a partial ban, and it is accompanied by possibilities for withdrawal from the obligations established, with the result that the ban has not gained unanimous acceptance. Progress is nevertheless in sight, especially as regards the prohibition of action to influence the environment and climate for military and other hostile purposes incompatible with the maintenance of international security, human well-being and health. The United Nations General Assembly has decided to include in the provisional agenda of its thirty-first session an item on the conclusion of a convention on this subject. Furthermore several expressions of State opinion on these various points show that unwritten rules have emerged or are emerging in international custom. Also, the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, proclaims that the protection and improvement of the human environment is a “major” issue which affects the well-being of peoples and economic development “throughout the world” and is “the duty of all Governments”. The Declaration therefore enjoins States to co-operate to develop international law further, particularly as regards protection against the dangers of pollution and other environmental damage. In view of the foregoing, it seems undeniable that the existing rules of general international law on the subject and those which will of necessity be added to them in the future are bound to be regarded to a great extent as “peremptory” rules by the international community as a whole. It seems equally undeniable that the obligations flowing from these rules are intended to safeguard interests so vital to the international community that a serious breach of those obligations cannot fail to be seen by all members of the community as an internationally wrongful act of a particularly serious character, as an “international crime”, a crime no less reprehensible than some of those which are the subject-matter of the legal instruments already mentioned.

(33) To sum up, the Commission considers that, despite the divergencies of opinion that remain on one or another aspect of the matter between different groups of States in the collective organs of the United Nations, a general trend is nevertheless clearly emerging with regard to the subject of the present discussion. It seems undeniable that today’s unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by almost universal disapproval on the part of States towards certain other activities. Contemporary international law has reached the point of condemning outright the practice of certain States in forcibly keeping other peoples under colonial domination or forcibly imposing internal regimes based on discrimination and the most absolute racial segregation, in imperilling human life and dignity in other ways, or in so acting as gravely to endanger the preservation and conservation of the human environment. The international community as a whole, and not merely one or other of its members, now considers that such acts violate principles formally embodied in the Charter and, even outside the scope of the Charter, principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law. There are enough manifestations of the views of States to warrant the conclusion that, in the general opinion, some of these acts genuinely constitute “international crimes”, that is to say, international wrongs which are more serious than others and which, as such, should entail more severe legal consequences. This does not, of course, mean that all these crimes are equal—in other words, that they attain the same degree of seriousness and necessarily entail all the more severe consequences incurred, for example, by the supreme international crime, namely, a war of aggression. It may be added that the records of the discussions in

507 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, annexed to General Assembly resolution 2826 (XXVI), of 16 December 1971.


509 The agenda item is entitled “Convention on the prohibition of military or any other hostile use of environmental modification techniques: report of the Conference of the Committee on Disarmament” (resolution 3475 (XXX), of 11 December 1975).

the Sixth Committee of the General Assembly during its examination of the work of the International Law Commission on the subject of responsibility autoritatively confirm the conclusions set forth above.

(34) To conclude this long investigation into the conviction shown by States regarding the main problem which the present article is called upon to solve, it seems appropriate to add that breaches of the obligations in question are not regarded by States as falling within the category of "international crimes" unless they exhibit a certain degree of seriousness. The Charter itself makes a distinction between "threats to the peace", "breaches of the peace" and "acts of aggression". Even with regard to an act of aggression, article 2 of the "Definition of Aggression" adopted by the General Assembly stipulates that the "gravity" of the act must be taken into account. With regard to internationally wrongful acts represented by the breach of obligations relating to the right of self-determination of peoples, the safeguarding of the human being or the preservation of the environment, the practice of States seems once again to show that such acts are recognized as genuine "international crimes" only if they are in themselves of a particularly serious nature. For evidence of this conviction on the part of Governments with regard, in particular, to the obligations relating to respect for human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and other collective instruments, reference may be made to the language of resolutions adopted by the General Assembly and the Economic and Social Council, which make frequent reference to "systematic", "constant" or "persistent" practices, or to practices involving "massive", "gross" or "flagrant" violations of those rights and freedoms. This, then, is the kind of offence which the General Assembly appears to distinguish from other, less serious, possible violations of obligations existing in the same sphere, and this is the kind of breach which is viewed as an "international crime".

(35) A trend similar to that noted in the attitude of various Governments is to be observed in the opinions of writers of learned works. In order not to encumber this report, the Commission will not refer here to those writers who, although they clearly consider certain international obligations more important than others and any breach of them as a particularly serious internationally wrongful act, do not draw any specific inference from this as regards the regime of responsibility to be applied. On the other hand, the Commission feels that it should include in the list of writers who advocate a distinction should be made on this basis between two categories of internationally wrongful acts, all those who in one way or another attribute different legal consequences to types of internationally wrongful act which are differentiated by reason of the subject-matter of the obligation breached; this is regardless of the fact that sometimes, by contrast with what the Commission has decided to do, they do not include certain of these legal consequences in the global notion of international responsibility.

(36) The idea of making a distinction between different régimes of international responsibility according to the subject-matter of the obligation breached is not new in the history of legal doctrine. A century ago the Swiss jurist J. C. Bluntschli stated it in terms very similar to those used by certain contemporary writers. According to him, when a State has simply failed to fulfil its obligation towards another State, the latter can only require that the obligation be performed belatedly or that the injury suffered be redressed. By way of exception, in cases where the honour or dignity of a State has been impugned, the State may also demand adequate satisfaction. If the wrong consists in an actual encroachment on the legal domain of another State or in undue interference in that State's enjoyment of its property, the mere elimination of the wrongful situation and the restoration of the de jure situation, or compensation, no longer suffice. The injured State may in addition demand satisfaction, punitive damages and, depending on the circumstances, further safeguards against a repetition of the wrong. Finally, if the wrong is of an even more serious nature and leads to a breach of

511 See the summary records of the discussions in the Sixth Committee in 1960 and 1963 on the subject of the ground to be covered by the codification of international responsibility. and of the discussions in 1973, 1974 and 1975 during the examination of the International Law Commission's annual reports.

512 Resolution 3314 (XXIX), annex.


514 Special machinery has even been established under the Commission on Human Rights for the study of situations created by "a consistent pattern of gross violations" of the rights and freedoms in question, in accordance with Economic and Social Council resolution 728 F (XXVIII), of 30 July 1959. See in this connexion decisions 3 (XXIX), of 6 March 1974, and 7 (XXXI), of 24 February 1975, of the Commission on Human Rights. See also resolution 1 (XXXIV), of 13 August 1971, of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

515 In its report on the work of its twenty-fifth session, the Commission stated that it intended the term "international responsibility" to cover: every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations... are centered on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law" (Yearbook... 1973, vol. II, p. 175, document A/9010Rev.1, chap. II, sect. B, para. (10) of the commentary to article 1).

516 Some writers restrict the notion of the international responsibility of the State to subjection to a sanction such as enforce-ment measures; others, who are more numerous, make this notion correspond to that of the obligation to make reparation for the damage caused. It is quite possible that a writer may recognize that reprisals or certain forms of reprisals or even other punitive sanctions may be applied to a State which has breached an international obligation, without thereby contradicting his assertion that international responsibility may be identified with the obligation to make reparation.
the peace by force, the right of the injured State may extend to the right to punish the aggressor. As to the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international wrong, Bluntschli maintains that when a wrong constitutes a danger to the community, not only the injured State but all other States which have the necessary power to safeguard international law are entitled to take action to restore and safeguard law and order. He gives a list of the wrongs in question.517

(37) Bluntschli nevertheless occupies an isolated position in the doctrine of the period extending from the middle of the nineteenth century518 to the outbreak of the Second World War. Although, particularly during the period between the two wars, great advances were made in studies on State responsibility, there is no work which develops ex professo the idea of making a distinction between two or more categories of internationally wrongful acts, on the basis of the criteria we are concerned with here.

(38) It may be asked, however, whether the idea of such a distinction does not derive rather from the manner in which the writers of that period describe the consequences of the internationally wrongful act. On this point, it must be said that the writings of the period generally make no mention of the possibility of seeking in the diversity of subject-matter of the international obligations breached, and the relative importance of this subject-matter to the international community, a criterion for differentiating between the types of reparation which, as ex delito obligations, may be required of the State committing the breach. In the first place, the question does not even arise for those who maintain a priori that general international law does not recognize obligations of this kind, and that an “obligation” to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State.519 This is equally true, however, of those writers—the great majority—who maintain that general international law does attribute to a State committing any internationally wrongful act an ex delito obligation to perform various acts to satisfy the injured State by way of “reparation”, lato sensu, for the act in question; these authors do not really consider the possibility that the subject-matter of the breached obligation should be the criterion for deciding what particular acts the guilty State is required to perform in each specific case and in what circumstances other and more exceptional forms of reparation520 should be required in addition to the ordinary forms. Even the possible obligation—which in the opinion of some writers should in certain cases be a supplementary one, additional to the others521—to pay a sum of money as “exemplary”, “punitive” or “penal damages” in addition to the amount paid as compensation, is attributed to specific aspects of the case concerned, and not to the fact that the State has breached obligations having one particular subject-matter rather than another.

(39) We may next consider whether the writers of this period took the subject-matter of the breached obligation as a basis for making distinctions with regard to the enforcement or other “measures” which the injured State itself or other subjects can legitimately take as sanctions against the State guilty of a wrong. Here again it is clear that those who believe

517 J. C. Bluntschli, Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt (Nördlingen, Beck'schen, 1868), pp. 259 et seq.

518 We have taken as the starting-point for this analysis the publication in 1844 of A. G. Heffter's manual (see below, footnote 520), in which the problem of the international responsibility of the State is systematically considered for the first time.

519 See in particular H. Kelsen, "Unrecht und Unrechtsfolgen im Völkerrecht", Zeitschrift für öffentliches Recht (Vienna), vol. XII, No. 4 (October 1932), pp. 545 et seq.

520 All the international lawyers of this school mention, as ordinary forms of reparation, restitutio in pristinum, reparation by equivalence, and material compensation. Most of them, however, also recognize the right of the injured State to demand satisfaction in certain cases. The notion of “satisfaction” is taken to include a variety of acts such as the adoption by the guilty State of measures to prevent a repetition of the breach, apologies, punishment of the guilty persons, saluting the flag, payment of a symbolic sum of money, and so forth. Some authors describe such acts as a form of redress for “moral damage”, while others go so far as to see them in a penal light. But the important point lies elsewhere, namely in the fact that, in determining the cases in which these “supplementary” acts should be required of the State committing the breach, the criterion taken is not the subject-matter of the breached obligation but the specific circumstances in which the breach was committed, such as the fact that they indicate that the honour and dignity of the injured State were impugned. (See A. G. Heffter, Le droit international public de l'Europe, 3rd ed., trans. by J. Bergson (Berlin, Schroeder, 1857), p. 204; L. Oppenheim, op. cit., p. 205; F. von Liszt, Le droit international, 9th ed. (1913) trans. by G. Gidel (Paris, Pédone, 1921), pp. 202–203; E. M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (New York, 3d ed., 1928), pp. 413 et seq.; A. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", Zeitschrift für Völkerrecht (Breslau, Kern's), supplement 2 to vol. X (1917), pp. 21 et seq., pp. 122 et seq.; K. Strupp, loc. cit., pp. 209 et seq.; C. de Vischer, loc. cit., pp. 118 and 119; A. Decenciere-Ferrandiere, La responsabilité internationale des États à raison des dommages subis par des étrangers (Paris, Rousseau, 1925), pp. 245 et seq.; C. Eagleton, op. cit., pp. 182 et seq.; D. Anzilotti, op. cit., pp. 421 et seq.; A. Roth, Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten (Berlin, Heymann, 1934), pp. 97 et seq.; S. Arató, Die völkerrechtliche Haftung (Pecs, Nyomatoki Táizs Joseph, 1937), pp. 51 et seq.; M. Whiteman, Damages in International Law (Washington, D.C., U.S. Government Printing Office), vols. I–II (1937), vol. III (1943); L. Reitzer, op. cit.; J. Personnaz, op. cit.

that the faculty to take enforcement measures as “sanctions” is the sole consequence attached by general international law to the internationally wrongful act of a State, must necessarily be convinced that this consequence follows from any breach of an international obligation, whatever its subject-matter.522 Yet even the much greater number of writers who believe that general international law requires a State committing a wrong to make reparation, recognize the lawfulness, at least in certain cases, of recourse by the injured State to measures which would otherwise be wrongful, as sanctions applied to an internationally wrongful act of another.523 Does this mean that these authors regard the subject-matter of the breached obligation as the criterion for determining the cases in which recourse to forms of sanction would be lawful? Whatever idea they may have had of the relationship between the two forms of responsibility,524 the answer to this particular question must be in the negative, at least generally speaking. However, different positions gradually appear towards the end of the period we are discussing. Some writers begin to ponder the possible existence of two “forms of delict”, one entailing the obligation to make restitution alone and the other entailing a possibility of punitive action as well;525 others begin to regard aggression as a wrong which is different from others—an internationally wrongful act entitling the injured State to take immediate enforcement action against the State committing the act, without its being required to seek reparation first.526 Although no writer explicitly puts forward the idea that a distinction should be made between breaches of different international obligations, and relates the distinction to the applicability of a certain “measure” as a “sanction”, a distinction between aggression and other internationally wrongful acts nevertheless becomes discernible in this connexion too. In drawing attention to the gradual affirmation of the principle of prohibition of recourse to war, various international lawyers of the period extend this prohibition to the use of force as a “sanction” against an internationally wrongful act,527 but they always make an exception for cases in which the wrongful act is an act of aggression.

(40) As to the other aspect of the consequences of an internationally wrongful act, namely, that of determining what subject of international law is entitled to invoke the responsibility of the State which has committed the act, there was some support during this period for the idea of making a distinction according to the subject-matter of the obligation breached, although it was still confined to a minority. It is logical that the right to demand reparation should be recognized as belonging only to the injured State, but there are some writers who recognize the right of every State to resort to reprisals, embargo and other punitive measures in certain cases.528 In doing so, they are obviously thinking of internationally wrongful acts of some gravity, yet it cannot be said that they establish a real connexion, in a given case, between the subject-matter of the breached obligation and the legitimation of intervention by third States. However, certain writers cross this barrier and state more or less precisely which are the obligations the breach of which may entitle subjects of international law other than the one directly injured to resort to punitive measures.529 Among them are two

522 H. Kelsen, loc. cit., pp. 568 et seq.
523 The question of repressive or, in general, enforcement measures to be applied against a State that has committed an internationally wrongful act is usually treated in a fragmentary manner, especially by the earlier writers. It is raised in discussions dealing specifically with reprisals, embargoes, peaceful blockade and, exceptionally, to take immediate steps in self-defence at the time. See, for instance, C. de Visscher, loc. cit., pp. 179 et seq. and 222; C. de Visscher, loc. cit., pp. 107 et seq. and 116 et seq.; C. Eagleton, The Responsibility of States (op. cit.), pp. 218 and 219; L. Reitzer, op. cit., pp. 25 et seq. See also R. Ago, loc. cit., pp. 524 et seq.; G. Spurdu, “Introduzione allo studio delle funzioni della necessità nel diritto internazionale”, Rivista di diritto internazionale (Padua), XXXVIIth year, 4th series, vol. XXII, fasc. 1-11 (1943), pp. 22 et seq. On the question of reprisals, see P. Lafargue, Les représailles en temps de paix (Paris, Rousseau, 1888); the report of M.N. Politis to the Institute of International Law, “Le régime des représailles en temps de paix”, Annuaire de l'Institut de droit international, 1934 (Brussels, Falk), pp. 1 et seq., and the resolution adopted by the Institute, ibid., pp. 108 et seq.; Y. de la Briere, “Évolution de la doctrine et de la pratique en matière de représailles”, Recueil des cours..., 1928-II (Paris, Hachette, 1929), vol. 22, pp. 241 et seq.
524 Some of these writers consider the two forms of responsibility to be cumulative: in each specific case the State injured by an internationally wrongful act would have the right to demand reparation at the same time the power to impose a penalty. Others consider that the injured State would be free to choose between resort to one or other of these two forms of responsibility; yet others—and they are in the majority—maintain that the injured State must first try to obtain reparation and may resort to sanctions if the latter fails. (For an important discussion on this point, see article 6 of the resolution of the Institute of International Law mentioned in the preceding footnote.) These views take no account of the subject-matter of the breached obligation.
525 Ago, loc. cit., pp. 530 et seq.
526 Reitzer is the writer of this period who devoted most attention to the relationship between reparation and sanction. On the basis of a meticulous analysis of international practice, he concluded that a State which is the victim of aggression is entitled, exceptionally, to take immediate steps in self-defence (op. cit., pp. 91 et seq.). This opinion is widely shared by those who dealt with self-defence at the time. See, for instance, C. de Visscher, loc. cit., pp. 107 et seq.; A. Verdross, “Règles générales du droit international de la paix”, Recueil des cours..., 1929-V (Paris, Hachette, 1931), vol. 30, pp. 481 et seq. and 491; E. Giraud, “La théorie de la légitime défense”, Recueil des cours..., 1934-III (Paris, Sirey, 1934), vol. 49, pp. 691 et seq.
527 See inter alia the report by M. N. Politis, loc. cit., p. 48, and the resolution adopted by the Institute of International Law, article 4 (Annuaire de l'Institut..., op. cit.), p. 709.
528 For example, C. Eagleton, op. cit., pp. 224 and 225.
529 Some writers give very vague indications about this (for instance, W. E. Hall (op. cit., p. 57) refers to cases in which a State “grossly and patently violates international law in a matter of serious importance”, and E. von Ullmann (Völkerrecht (Tubingen, Mohr, 1908), p. 463) speaks of acts of the State which imply negation of the fundamental principles of the international order and...
American writers who were so struck by the outbreak of the First World War that they came out clearly in favour of differentiating between wrongful acts according to the subject-matter of the obligation breached. E. Root in 1915 and A. J. Peaslee in 1916 strongly maintained that international law must evolve in the same way as internal law, and arrive at a distinction between two kinds of wrongs: those affecting only the directly injured State and those which, on the contrary, affect the whole community of States. With regard to this latter category of internationally wrongful acts, Root considers that every State is entitled to punish them, and even bound to do so. Peaslee suggests that organs of the community, which he recommends should be established after the end of the war, should be responsible for the prevention and punishment of such acts. His idea looked more to the future and was thus in line with the proposals tending in general towards the institutionalization of the international community and the development of international organizations. Root's idea, on the other hand, was in the tradition of the nineteenth-century writers and capable of realization within the framework of a non-institutionalized society.

(41) Separate mention must be made of a whole group of writers whose ideas relate more directly to penal law than to international law, and who are clearly in favour of making the distinction in question. They are the supporters of a theory which experienced a certain success in the period between the two world wars—the so-called theory of the penal responsibility of the State. More precisely, reference must be made to the school which includes V. V. Pella, Q. Saldaña, H. Donnedieu de Vabres and others, who urged the adoption of a code listing the most serious breaches of international law and specifying the penalties attaching to them. These range from punitive damages to the occupation of territory and, as a last resort, the loss of independence. All the authors in question make the implementation of their principles dependent upon the establishment of an international criminal court responsible for applying the penalties in question. (42) To sum up, the learned works of the years 1850–1939 show that the doctrine of the time, and especially that of the years 1915–1939, was not systematically focused on solving the problem we are concerned with, but did not entirely overlook it and sometimes even made a useful contribution to the subject. A study of these works reveals above all that authors who were especially aware of the development needs of the international community understood that an answer to the question had to be found outside the traditional framework of an exclusively “civil law” view of international responsibility. Vaguely, perhaps, an idea began to take shape: the idea that there is not just one single type of internationally wrongful act and that therefore there can not be only one kind of responsibility.

(43) During the period following the Second World War, the interest which learned circles devoted to this problem grew in both intensity and scope. Immediately after the end of the hostilities, when the thought of the horrors of all kinds that mankind had just lived through was still painfully present in the minds of all, two authors stand out in adopting similar positions, at the same time but independently of each other: H. Lauterpacht in the United Kingdom and D. B. Levin in the Soviet Union. Both raised the same question: should international law make a distinction between two different categories of internationally wrongful acts of a State according to the gravity of the act in question? The coincidence is significant. Lauterpacht replies in the affirmative: “The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term”. Levin, for his part, stresses the need to distinguish between simple breaches of international law and international “crimes”, which undermine the very foundation and essential principles of international law. Others—and these are the earliest, as we have seen—go so far as to draw up a list of offences punishable by all States. This applies to J. C. Bluntschli, as stated above, and also to A. G. Heffer (op. cit., pp. 204 and 207–208).


533 See Q. Saldaña, “La justice pénale internationale”, Recueil des cours..., 1923–7 (Paris, Hachette, 1927), vol. 10, pp. 221 et seq.; and particularly pp. 296 et seq. V. V. Pella, La criminalité collective des États et le droit pénal de l’avenir, 2nd ed. (Bucharest, Imprimerie de l’Etat, 1926); H. Donnedieu de Vabres, Les principes modernes du droit pénal international (Paris, Sirey, 1928), pp. 418 et seq. See also the proceedings of the International Law Association concerning the establishment of an international criminal court, at the 1922, 1924 and 1926 sessions; those of the Inter-Parliamentary Union concerning wars of aggression, at the 1925 session; those of the 1926 International Congress on Penal Law concerning the establishment of an international penal court; and the drafts prepared on those occasions (Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted by the Secretary-General (United Nations publication, Sales No. 1949.V.8)).

533 L. Oppenheim, International Law: A Treatise, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 339. The author goes on to state that the consequence of an “ordinary” internationally wrongful act consists in the obligation to make reparation for the moral and material wrong, such reparation possibly including punitive damages. Only if the State committing the wrongful act refused to make reparation could the injured State take the necessary measures to enforce the obligation to make reparation. On the other hand, Lauterpacht writes, the consequences are different in the case of breaches which, “by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood and prescribed in the law of civilized countries” (ibid., p. 355). The author gives the example of a mass massacre, on the orders of a government, of aliens residing in the territory of a State, and of the preparation and launching of a war of aggression. In such cases, Lauterpacht concludes, State responsibility is not confined to the obligation to make reparation, but also includes the applicability of coercive measures, such as war or reprisals under traditional international law, or the sanctions provided for in Article 16 of the Covenant of the League of Nations or in Chapter VII of the Charter of the United Nations (ibid., pp. 355–356).
the legal order of international society. Furthermore, at that same time, the eminent United States international jurist P. Jessup revived the question, raised by Root in 1916, of the need to treat wrongs endangering the peace and order of the international community as a breach of the law of all nations. According to Jessup, such conduct infringes a law which exists for the protection of all States; all States therefore are affected if that law is breached or weakened.\(^{535}\)

(44) At the beginning of the 1950s we find a resurgence of that "penal law" school of thought, which had already gained a certain following between the two wars.\(^{536}\) But its ideas met with opposition: from the vast majority of international jurists at the theoretical level, and from States at large at the practical level, partly because the writers in question draw an excessively strict parallel between the treatment to be accorded to wrongs of the State as a subject of international law and the treatment accorded under international penal law to offences of individuals, and partly because of their insistence that an international criminal court should be established to determine the "penal" responsibility of the State in each specific case. The propositions of this school have thus remained a dead letter, and also other writers, out of a desire to avoid becoming entangled with its ideas, have been somewhat reluctant to deal with the issue and to consider seriously the possibility of distinguishing between two different regimes of international responsibility according to the importance to the international community of the breached obligation.\(^{537}\)

(45) Apart from this, the legal literature of the 1950s shows a special interest in the "traditional" aspects of the theory of State responsibility. The studies which appeared in that decade make a valuable contribution to the analysis of the various aspects of the problem of the consequences of internationally wrongful acts; they are particularly concerned with analysing the relationship between reparation and penalty and with examining and differentiating between the different forms of each.\(^{538}\) On the whole, however, they do not seem to relate the possible diversity of such consequences to the breach of certain obligations rather than of others.

(46) However, although in general the writers of the 1950s do not make a theoretical distinction between two separate types of internationally wrongful act depending on the subject-matter of the obligation breached, with each type entailing the application of different regimes of responsibility, a distinction of this kind emerges none the less from their works. They treat a specific breach of the obligation not to use force as a wrongful act that is quite distinct from other such acts. Their view is that the restrictions usually placed on the right to retaliate against a State guilty of an internationally wrongful act cease to apply in cases of aggression, and that the regime of responsibility becomes much more strict. The difference in regime takes three forms: (a) a State that is the victim of aggression is considered as being empowered to take, against the aggressor State, measures which infringe the rights of that State and, exceptionally, that power is not subject to the general

\(^{534}\) D. B. Levin, "Problema avstvstvennosti v nauke mezhdunarodnogo prava", Izvestia Akademii Nauk SSSR, No. 2, 1946, p. 105. The distinction advocated by this author is, however, more a distinction of the nature of the law in force.

\(^{535}\) Jessup’s idea (A Modern Law of Nations: An Introduction (New York, Macmillan, 1948), pp. 11 et seq.) is also de jure condendo, since he says that if the "new" principle that the community has an interest in preventing breaches of international law were to gain acceptance, that law should evolve "in the direction of more extended governmental functions of an organized international community".

\(^{536}\) In 1950, V. V. Pella submitted to the International Law Commission his draft code of offences against the peace and security of mankind (see Yearbook... 1950, vol. II, pp. 315 et seq., document A/CN.4/39). The author had already put forward his proposals in 1946, in his work La guerre-crise et les crimes de guerre (Neuchâtel, Editions de la Baconnière, 1964).

\(^{537}\) A possible exception is D. H. N. Johnson, who forcefully points out that, in view of the existence of the complex machinery provided under the United Nations Charter for dealing with acts of aggression, and in view of the General Assembly’s definition of aggression (in resolution 380 (V)) as the gravest of all crimes against peace and security, it is inconsistent to continue to treat an act of aggression as a mere "illegal" act involving no more than the obligation to provide compensation ("The draft code of offences against the peace and security of mankind", International and Comparative Law Quarterly (London), vol. 4, No. 3 (July, 1955), pp. 445 et seq.). See also K. Yokota, "War as an international crime", Grundprobleme des internationalen Rechts, Festschrift für Jean Spiropoulos (Bonn, Schimmelbusch, 1957), pp. 455 et seq. F. V. García Amador, first Special Rapporteur on State responsibility, also makes a distinction between merely "unlawful" acts involving only the "civil" responsibility of States, and "punishable" acts involving "criminal" responsibility. The transformation of some acts of the State which were previously regarded as merely wrongful or unlawful into punishable acts is, in his view, a result of the transformation which took place after the Second World War. It would seem, however, that in his opinion the "criminal" responsibility of the State is reflected only in the obligation to punish individuals who are organs and have engaged in conduct incompatible with certain international obligations of the State. On this point Garcia Amador’s opinion appears to differ from that of Johnson. See Yearbook... 1954, vol. II, p. 24, document A/CN.4/80, para. 13; "State responsibility in the light of the new trends of international law", American Journal of International Law (Washington (D.C.),) vol. 49, No. 3 (July, 1955), p. 345; "State responsibility—some new problems", Recueil des cours..., 1958-II (Leyden, Sijthoff, 1959), vol. IV, pp. 395 et seq. See also his first report on State responsibility in Yearbook... 1956, vol. II, document A/CN.4/96, in particular pp. 182 et seq. and 211 et seq.

obligation first to seek reparation for the injury suffered,\(^{539}\) (b) it is considered that the measures available to a State that is the victim of an act of aggression extend to the use of armed force in self-defence, although its use is not allowed in other cases of reaction to an internationally wrongful act of another party, even where due reparation has been refused;\(^{540}\) (c) lastly, it is acknowledged that, unlike the position in all other cases of internationally wrongful acts, a third State may assist a State that is the victim of an act of aggression, and in doing so may itself use armed force.\(^{541}\) The literature of this period does not normally envisage any other consequences of aggression being impossible on the guilty State after the aggression has ceased. Nor does it envisage the existence of other obligations whose breach would entail the applicability of a special régime of responsibility.

(47) It was in the 1960s and 1970s that the idea took shape, and was formulated academically, in the writings of international jurists, that different kinds of internationally wrongful acts should be distinguished according to the importance of the subject-matter of the breached obligation. In this connexion, mention must first be made of the position taken by a number of Soviet authors. Tunkin, in a study published in 1962, reached the conclusion that post-war international law had distinguished between two categories of breaches of the law, each entailing distinct forms of responsibility. In the first category he included wrongs which represent a danger to peace, while his second category covered all other breaches of international obligations.\(^{542}\) In 1966, in virtually the same terms, D. B. Levin took up the distinction established by Tunkin between international crimes and simple breaches\(^{543}\) and developed it further. Outstanding among the many contributions to this subject in recent years\(^{544}\) is the chapter on State responsibility in *Kurs mezhdunarodnogo prava*, published in 1969. The authors of this work distinguish between two categories of breaches: those affecting the rights and interests of a particular State and the more serious ones which “violate the fundamental principles of international relations and thus injure the rights and interests of all States”. The latter category comprises violations of peace between peoples and of the freedom of peoples.\(^{545}\) Similar viewpoints are expressed in the works of authors of the German Democratic Republic such as J. Kirsten, B. Gräfrath and P. A. Steinger.\(^{546}\)

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\(^{540}\) As regards the United Nations system—and, in the opinion of many writers, customary international law also—the prevailing view is that the injured State should not be allowed to resort to the use of force even in response to an internationally wrongful act, except in the case of armed aggression. See, for example, H. Wehberg, “L’interdiction du recours à la force — Le principe et les problèmes qu’il soulève” in *Recueil des Cours..., 1951-2* (Leiden, Sijthoff, 1952), vol. 78, p. 72; and with some reservations, D. W. Bowett, *op. cit.*, pp. 12 et seq. For a minority opposing view, see E. Colbert Speyer, *Retaliation in International Law* (New York, King’s Crown Press, 1948), p. 203; J. Stone, *Aggression and World Order, A Critique of United Nations Theories of Aggression* (London, Stevens, 1958), pp. 94 et seq.


\(^{542}\) The study is in the work by G.I. Tunkin referred to in footnote 409. The régime of responsibility applicable to the breach of obligations essential for safeguarding peace is considered to comprise all forms of responsibility, from the obligation to make reparation to the application of the most severe sanctions permissible under international law. The responsibility attendant upon the breach of other international obligations, however, is held to be more limited. Moreover, according to Tunkin, wrongs of the former kind give rise to a legal relationship not only between the State at fault and the State directly injured but also between the State at fault and all other States, and even international organizations. That effect is held to extend to the breach of other obligations as well, such as those guaranteeing the freedom of the high seas and the conservation of the living resources of the sea.


\(^{544}\) These authors maintain that the distinction between simple wrongs and “international crimes” entails consequences in respect of the subjects of the legal relations engendered by responsibility. Besides the State directly injured, other States may require compliance with the rules of international law “in the case of an international crime”. This distinction also entails consequences with regard to the forms of responsibility, since the transgressor is liable to the immediate application of sanctions, including measures of military coercion, whereas, in the case of other wrongs, sanctions cannot be imposed on the wrongdoer unless he has failed to meet the obligation to make reparation. Sanctions themselves are held to be of different kinds in the two cases.

In other countries, the legal literature of this period has developed the ideas put forward in previous years. For instance, it has confirmed in particular the principle that a breach of the prohibition of the use of force is an internationally wrongful act, which because of its exceptional seriousness, must entail the application of a régime of responsibility which is much more severe than the régime attendant upon a breach of other international obligations. It has also confirmed that this difference of régime has the threefold aspect outlined above. Some authors, however, stand apart in openly advocating the systematic adoption of the distinction between an international "delict" and an international "crime". In the opinion of Verzijl, for example, an international crime should be distinguished from a delict in that it not only creates an obligation on the part of the guilty State to restore the status quo ante or to indemnify the victim of the wrong but also entails the application of sanctions by the international community. He states that the term "international crime", first used to describe a war of aggression, was subsequently extended to cover grave breaches of the laws of war, crimes against humanity and similar misdemeanours. Various authors extend the category of international crimes to other cases, but they do so only in order to recognize that the faculty of punishing them is possessed by States other than the State directly injured. D. Schindler, in an interim report to the Institute of International Law on the principle of non-intervention in civil wars, proposed that the perpetration of a colonial régime or a régime of racial discrimination should be regarded as an internationally wrongful act erga omnes and, as such, justifying non-military intervention by third States. In his final report he refers in particular to genocide as an international crime. Brownlie holds that the category of international crimes includes the breach of any obligation flowing from a rule of jus cogens.

Among the "most probable" rules in that category, he mentions those which prohibit wars of aggression, the slave trade, piracy and other crimes against humanity, and the rules which sanction the self-determination of peoples. Thinking along the same lines, some authors have put the question whether, in the event of the breach of particularly important obligations, it might not be necessary to envisage the possibility of an actio popularis.

In conclusion, on the basis of the analysis which has been made of the subject, the Commission feels justified in saying that ideas have moved substantially ahead in the international legal literature of different countries and different legal systems. The opinions which in the older doctrine represented the isolated voices of certain unusually forward-looking thinkers have become increasingly widespread and forceful, to the point where in modern works they represent a solidly established viewpoint. Many men of learning have been impelled in their writings to follow a trend similar to that concurrently discernible in the attitudes of various Governments and their representatives, and they have even helped to influence and consolidate the latter's views.

Because of the relatively new aspects of the question which is the subject of the present article, an examination of the various codification drafts has not provided the Commission with many useful suggestions for resolving it. Most of these drafts were prepared before the Second World War and are generally confined to the specific topic of responsibility for damage caused to foreigners. They therefore concentrate on defining the obligation to make reparation for such damage. The only draft which is both recent and general in scope is the one prepared in 1973 by B. Graf/rath and P. A. Steiniger. The draft provides (in article 6) that "the form and content of international responsibility are governed by the character of the breach". It then makes provision for special régimes of responsibility applicable to various cases of internationally wrongful acts, classified according to the three groups recommended by the authors of the draft.

Having thus, as the foregoing pages indicate, analysed in turn the evolution of international jurisprudence, of State practice and of legal opinion with regard to the subject dealt with in the present article, the members of the Commission arrived unanimously at two conclusions. First, they found that the subject-matter of the international obligation breached has no bearing on the characterization as internationally wrongful of an act of a State which commits such a breach: regardless of the subject-matter and
specific content of the obligation, an act of a State which is not in conformity with what is required of it by that obligation is always and indisputably an internationally wrongful act. Secondly, the Commission recognized that the subject-matter of the international obligation breached has, on the other hand, an undeniable bearing on the definition of the régime of responsibility attaching to the internationally wrongful act constituted by the breach in question. The forms of responsibility applicable to the breach of certain obligations of essential importance for the safeguarding of fundamental interests of the international community naturally differ from those which apply to the breach of obligations of which the subject-matter is different; and the respective subjects of international law permitted to implement (mettre en œuvre) those various forms of responsibility may also be different. The Commission concluded from this that it was necessary to distinguish between two different categories of internationally wrongful act according to the subject-matter of the international obligation breached, and that those categories were bound to differ in their characterization.

(52) Although the Commission thus recognized conclusively that some wrongs are to be regarded as more serious than others, and hence deserve to be characterized accordingly, it did not feel that the task of specifying the respective régimes of international responsibility applicable to the two kinds of internationally wrongful acts thus distinguished came within the scope of the present article, or indeed of the present chapter. This is a question which the Commission will have to settle when it takes up the problem of the content and the different forms of responsibility. The Commission is of course well aware that, having differentiated between internationally wrongful acts on the basis of the degree of importance of the subject-matter of the breached obligation, it will inevitably be compelled to go on and differentiate between the régimes of responsibility applicable. It has already been shown that the distinction in question is necessarily a normative one; it has been pointed out that the only justification for making it in the present draft is to enable the consequences attendant on certain more serious wrongs to be differentiated from those attendant on other breaches of international obligations. However, from the point of view of the general structure of the draft, the two tasks must obviously be accomplished in succession.

(53) For all these reasons the Commission felt that it should resist the temptation to give any indication at the present time, even in the commentary to this article, as to what it thinks should be the régime of responsibility applicable to the most serious internationally wrongful acts, namely, those it has decided to call "international crimes". The temptation is easy to understand, for the Commission's detailed consideration of State practice and learned works has necessarily acquainted it with numerous opinions on this subject, some of them debatable, which have produced different reactions among its members and caused them legitimate concern. However, since the Commission will be obliged, at a later stage in its work on the codification of State responsibility, to indicate its position as to the determination of the different forms of international responsibility which are possible, and the different subjects of international law which are permitted to implement (mettre en œuvre) those forms of responsibility in the various cases postulated, it must be very careful not to take a stand too hastily on such delicate and complex issues. The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (mettre en œuvre) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions. Moreover, we have seen the extent to which State practice and the authors of legal writings bring out the differences in gravity that exist even among the various internationally wrongful acts which are lumped together under the common label of international crimes. The same must undoubtedly be true of other internationally wrongful acts; the idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.

(54) The Commission also recognized that it would be wrong to believe that there is a single basic régime of international responsibility which is applicable to all internationally wrongful acts without distinction, and that all that is required is to add extra consequences to it for wrongful acts constituting international crimes. That may be true for some particular crimes, but there is no gainsaying the possible existence of others with respect to which the applicability of certain specific forms of responsibility would exclude the applicability of the consequences prescribed for other wrongs. The idea that there is some kind of least common denominator in the régime of international responsibility must be discarded. It is therefore inconceivable that the Commission, even if it so wished, could limit its task to establishing in the draft articles a supposedly general régime of responsibility valid for all internationally wrongful acts, leaving it to international custom or particular con-
ventional instruments to lay down the régime, or rather régimes, of responsibility applicable to international “crimes”. It would be unfortunate if the Commission falsely gave the impression that it considers the régime of responsibility prescribed by general international law to be the same for all internationally wrongful acts. General international law now differentiates between various types of internationally wrongful acts and, consequently, between various régimes of international responsibility; accordingly, the codification of general international law entails the definition of those different kinds of wrong and the determination of the corresponding régimes of responsibility. Moreover, it should be remembered that the General Assembly has asked the Commission to codify the whole body of general rules governing international responsibility, regardless of the subject-matter of the obligation breached by the State and of the seriousness of the breach for the international community; and one point which the General Assembly stressed particularly was that priority should be given to the question of responsibility for the breach of the most essential international obligations. The Commission would therefore be disappointing the hopes placed in its work if it prepared a draft convention which made no reference to the régime of responsibility applicable to breaches of obligations of that kind.

(55) The Commission is also convinced that, in codifying the general rules which recognize the existence of different types of internationally wrongful act and which, in pursuance of this recognition, provide for different régimes of international responsibility, it is in no danger of encroaching on the Charter of the United Nations or on the special régime of measures which the Charter provides in regard to certain acts which it particularly sets out to prevent and punish. The Commission ... in no way called upon to interpret or to supplement the Charter by the rules which it formulates, and still less to derogate from the Charter. Its task is to codify general international law. In so far as certain provisions of the Charter are now an integral part of general international law on the subject with which the Commission is concerned, they will be logically and faithfully reflected in its work. Otherwise, precisely because of their “special” nature and also because of the provisions of Article 103, the provisions of the Charter would always prevail over those of a general codification convention. Any concern which may be felt about this question is therefore groundless.

(56) In conclusion, the Commission, recalling the programme of work on the codification of State responsibility which it adopted at its fifteenth session in 1963—in which it affirmed the need to consider whether it was advisable to distinguish between different categories of internationally wrongful acts from the standpoint of the régimes of responsibility applicable to them—and taking as a basis the results of the study thus far, decided, in the present article, which it adopted unanimously on first reading, to establish a distinction between international crimes and international delicts and to state the basic criteria for this distinction. In due course it will proceed to determine the régimes of international responsibility applicable to these different types of internationally wrongful act.

(57) Having given these explanations, the Commission considers it advisable to add the following comments on the various paragraphs of article 19.

(58) Paragraph 1 merely states the principle that the subject-matter of the international obligation breached has no bearing on the characterization as internationally wrongful of an act committed by a State in breach of that obligation. The main purpose of the explicit formulation of this principle, which is the corollary to the principle stated in sub-paragraph (b) of article 3, is to bring out, as a premise and, in a way, as a warning regarding the subsequent provisions of the article, that any act of the State which is not in conformity with what is required of it by any international obligation whatsoever is an internationally wrongful act and engages the responsibility of the State. The fact of distinguishing, among the mass of international obligations of States, those which are considered to be most essential and to safeguard the fundamental interests of the international community, and the fact that breaches of such obligations are treated as specially serious acts and as “international crimes”, should not give the false impression that, in the end only these breaches are significant. The others also have their importance, have a disrupting effect on international life and necessarily have consequences in regard to international responsibility. From this point of view paragraph 1 covers both paragraph 2, on the most serious, and paragraph 4, on the less serious breaches; it brings them together by emphasizing the equally wrongful nature of acts which, under different designations, come within the scope of one or the other of these two paragraphs.

(59) Paragraph 2 deals with the most serious breaches and introduces, with respect to them, the idea of “international crime”. After mature consideration, the Commission chose this designation because it has come into common use in the practice of States and in contemporary learned works and because it is frequently employed in resolutions adopted by organs, first, of the League of Nations and, later, of the United Nations, as well as in important international instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the “Definition of aggression” adopted by the General Assembly (resolutions 2625 (XXV) and 3314 (XXXIX) respectively), and the conventions on genocide, apartheid, etc. Of

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555 For reference, see above, footnote 467.
course, in adopting the designation "international crime", the Commission intends only to refer to "crimes" of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes, for which those instruments require States to punish the guilty persons adequately, in accordance with the rules of their internal law. Once again, the Commission takes this opportunity of stressing that the attribution to the State of an internationally wrongful act characterized as an "international crime" is quite different from the incrimination of certain individuals-organs for actions connected with the commission of an "international crime" of the State, and that the obligation to punish such individual actions does not constitute the form of international responsibility specially applicable to a State committing an "international crime" or, in any case, the sole form of this responsibility.

(60) The Commission had, in theory, a choice between several approaches for designating the international obligations whose content is such that an act committed by a State in breach of one of them is regarded as an "international crime". It considered, however, that it should reject the idea of drawing up a list of these obligations, for that would have had a number of major disadvantages. First, the establishment of such a list—which ought to be complete, and even exhaustive—would be virtually impossible, and the Commission would have been entirely diverted from its present tasks if it had had to undertake work of that kind. Secondly, carrying out that work would have very considerably increased the risk, which the Commission has always tried to avoid, of allowing itself to become involved, under cover of the codification of international responsibility, in defining the content of the obligations whose breach entails international responsibility. As the Commission has emphasized on a number of occasions, in its codifying of international responsibility it should simply take note of the fact that States have certain international obligations, take them for granted and accept them as they have been defined, either by international custom or by written instruments. For the Commission itself to attempt to define these various obligations would mean transforming the codification of State responsibility into codification of the whole of international law. Thirdly and lastly, the preparation of a list of the obligations whose breach—in certain circumstances, at least—would constitute an international crime, would necessarily lead to a "rigid" result reflecting the situation of today and not permitting the rule it is intended to establish to be progressively adapted to the future evolution of international law. Although the breach of some particular obligation is not now considered to be an international crime, a change may take place in the legal conscience of States, and it would be unsatisfactory if the convention adopted today had to be constantly amended to bring it into line with the developments of tomorrow.

(61) The Commission therefore decided to follow the system adopted in the first instance by itself, and subsequently by the United Nations Conference on the Law of Treaties, for determining the "peremptory" norms of international law. This system consists in giving only a basic criterion for determining the obligations in question—a criterion clear enough to permit international practice and jurisprudence to crystallize around it, and at the same time flexible enough not to be an obstacle to development of the legal conscience of States. The criterion formulated in paragraph 2 of article 19 has two aspects. One is the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community; the other, which complements the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a "criminal" nature. At first sight, the text of paragraph 2 may give an impression of tautology. In reality, what it says is no more tautological than the analogous text of article 53 of the Vienna Convention. What the latter article provides is that in order to be "objectively" considered as "peremptory", i.e. as not permitting of any derogation, a norm of international law must be "subjectively" accepted and recognized as such by the international community as a whole. Similarly, paragraph 2 of the article under consideration provides that in order to be "objectively" considered as an "international crime", and as such liable to more severe legal consequences as a result of responsibility, an internationally wrongful act must be "subjectively" recognized as a "crime" by the international community as a whole. Moreover, it is clear what is meant by this reference to the international community as a whole. It certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an "international crime", not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community.

(62) This being so, the Commission considers it important not to be misled by the parallel drawn above between the basic criterion stated in the present article for determining internationally wrongful acts falling within the category of international crimes, and the criterion set out in article 53 of the Vienna Convention for determining the norms of international law which are to be included in the category of peremptory norms. Care must be taken not to carry this parallel further than it really goes. It would be wrong simply to conclude that any breach of an obligation deriving from a peremptory norm of interna-
tional law is an international crime and that only the breach of an obligation having this origin can constitute such a crime. It can be accepted that obligations whose breach is a crime will "normally" be those deriving from rules of *jus cogens*, though this conclusion cannot be absolute. But above all, although it may be true that failure to fulfil an obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime. Too close an assimilation of the two notions may be an attractive simplification, but it does not appear to be conceptually acceptable.

(63) After stating, in paragraph 2 of the article, the basic general criterion to be applied in the specific determination of internationally wrongful acts falling within the category of international crimes, the Commission was faced with an alternative: either to confine the article to the general criterion, or to include additional particulars, in order to facilitate the understanding and application of the criterion. It noted that the authors of the Vienna Convention chose the first solution, and at a certain stage some members of the Commission suggested following that example. On reflection, however, it seemed to the Commission that the problem of differentiating international crimes from other internationally wrongful acts was far more complicated than that of distinguishing between peremptory norms of international law and norms from which derogation is permitted. Consequently, the Commission was finally unanimous in recognizing the advisability of adopting the second solution. It therefore decided to give, through a number of examples, some more concrete indications of how the basic principle would be adapted and applied in practice. This it did in paragraph 3 of the article.

(64) In order to adhere to its intention, the Commission refrained from any attempt itself to define any particular breach of an international obligation as an international crime. It considered that it was not its task to identify certain actions as international crimes or to outline an international criminal code. Wishing to give its own indications an objective basis, it therefore took pains to refer to international law now in force, and more specifically to certain conventional instruments—including, in particular, the United Nations Charter and some other multilateral treaties—which show that breaches of certain international obligations are recognized as international crimes, and to international custom in so far as it shows a similar recognition. It is from these established sources that the examples in paragraph 3 are drawn. The Commission has nevertheless taken the precaution of stating expressly that the content of this paragraph must be read in the light, and having regard to the application, of the basic principle stated in paragraph 2. This means that in order to establish in a concrete case whether the breach of one of the international obligations cited as examples is indeed an international crime and must suffer the consequences thereof, confirmation must always be sought in the basic criterion, and it must be established that the obligation actually breached is really an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as an international crime by that community as a whole. Lastly, it should be noted that the examples given are in no way intended to be exhaustive: that is to say, it must not be concluded that international law now in force does not recognize others. This is what is meant by the words "an international crime may result, *inter alia*, from". Then, it need hardly be said that the reference to international law in force makes it clear that the situation may change in the future. Internationally wrongful acts which are not regarded as crimes by international law today, could obviously be so regarded by the international law of tomorrow.

(65) The technique adopted in drafting the examples in paragraph 3 is as follows: first, a specific field is mentioned in which contemporary international law imposes on States obligations of such a kind that their breach is considered an international crime; then there follow one or more specific examples of obligations existing in this field, which prohibit actions now considered by the international community as a whole to be typical international crimes. By using the words "such as that" the Commission intended to emphasize once again that any obligation referred to is mentioned only as one example among others.

(66) As the examples in paragraph 3 are formulated, the conclusion that an international crime crime has been committed depends in every case on two requirements being met: (a) the obligation in one or other of the spheres mentioned must be "of essential importance" for the pursuit of the fundamental aim characterizing the sphere in question; and (b) the breach of that obligation must be a "serious" breach. It is not difficult to see the reason for this dual requirement. In each of the spheres mentioned there are obligations which are of primary importance in the pursuit of the fundamental aim in question, and others which are of only secondary importance. A breach of one of the latter can obviously not be taken as the basis for accusing a State of an international crime. Moreover, even the breach of an obligation of essential importance may not assume proportions sufficient to warrant it being characterized as a crime. This can be done only if the seriousness of the breach is established. Thus it cannot be concluded that an international crime exists unless these two conditions are met.

(67) The four spheres mentioned respectively in sub-paragraphs (a), (b), (c) and (d) of paragraph 3 are those corresponding to the pursuit of the four fundamental aims of the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being, and the safeguarding and preservation of the human environment. The Commission made its choice in the light of the results of its analysis of
international jurisprudence, State practice and the most authoritative doctrine—an analysis which has been relied on throughout this commentary. The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned. It is mainly among them that are to be found the rules which the contemporary international legal order has elevated to the rank of jus cogens. And it is mainly among the obligations they impose on States that are to be found those obligations whose breach is no longer accepted as an internationally wrongful act like any other. There is no need to emphasize the decisive influence which the Charter of the United Nations has had on this development of international law, especially those provisions of the Charter which set out the purposes and principles of the United Nations.

(68) The maintenance of international peace and security has been the main preoccupation of the international community and its most vital concern for a very long time. It is not surprising that the Commission should have headed its list of examples with the international obligations relating to this fundamental aim. In the legal thinking of States, breaches of these obligations represent the most serious international crimes. As a specific example of an international crime in this sphere, the Commission has chosen the breach of the obligation prohibiting aggression—the most indisputable example, the supreme international crime. The Commission decided unanimously not to attach any adjective to the term "aggression". With regard to the notion of aggression itself, most of the members of the Commission referred to the definition of aggression adopted by consensus in General Assembly resolution 3314 (XXIX). Some members of the Commission, however, thought that the notion of "aggression" could have a broader meaning than that given it by the said definition and could, for example, include "economic" aggression as well as aggression involving the use of armed force.556 The Commission was nevertheless unanimous in recognizing that it was not its task to define the precise notion of aggression, since that was the responsibility of other bodies. Moreover, it stressed that, as mentioned above, the actions it mentioned were only examples.

(69) Having regard to the second of the purposes of the United Nations as set out in the Charter, the Commission gave second place to the sphere of obligations essential for safeguarding the right of self-determination of peoples. In that context, it was unanimous in selecting, as what today is an indisputable example of an international crime, the breach of the obligation prohibiting the establishment or maintenance by force of colonial domination. The expression "by force" should be understood as meaning against the will of the subject population, even if that will is not manifested, or has not yet been manifested, by armed opposition. Some members of the Commission spoke of the possibility of deleting this expression, but did not press the suggestion when it was objected that it might have the effect of unduly extending the scope of the international "crime" referred to.

(70) In the general context of the pursuit of the third of the purposes of the United Nations, namely "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" the Commission thought that, for the purposes of the subject-matter of the present article, it should concentrate its attention on the sphere of obligations for safeguarding the human being. In addition, in order to avoid extending the category of international crimes beyond what is reasonable and to remain in conformity with the provisions of international law now in force, it added the qualification that, for the breach to be characterized as an international crime, it must be "on a widespread scale", that is to say, it must take the form of a large-scale or systematic practice adopted in contempt of the rights and dignity of the human being. As specific examples, it expressly mentioned slavery, genocide and apartheid, but did not fail to note that other manifest breaches might be considered as international crimes in this sphere.

(71) Lastly, within the equally wide framework of concern for the preservation of certain assets which are essential for the progress and survival of humanity, the Commission paid particular attention to recent developments in international law on the subject of the safeguarding and preservation of the human environment. In this sphere, it took as its example a breach of the obligations prohibiting massive pollution of the atmosphere or the seas. Some members expressed reservations regarding the choice of pollution as an example, because they thought that the notion of pollution was not defined as precisely as the other examples mentioned in paragraph 3. Nevertheless, they expressed full agreement with the general provision in sub-paragraph (d).

(72) Paragraph 4 of article 19 seeks to define comprehensively all the internationally wrongful acts which do not come within the special category of "international crimes". Such a definition, which some members of the Commission do not consider absolutely essential, seems particularly necessary and useful to others, especially in view of the use to be made of it later in the draft, in particular for determining the regimes of responsibility applicable to the

different types of internationally wrongful acts. For purposes of this definition, the Commission provisionally adopted the term "international delicts". This designation was commonly used as a synonym for internationally wrongful acts in works on international law written in French, Italian, Spanish and German before the introduction of the category of "international crimes" was contemplated, and it has the added advantage of being habitually employed in several systems of internal law to denote unlawful acts of lesser gravity than those called "crimes". However, the literal equivalent in English, "international delict", is obsolete, and it is difficult to find terminology in the common law systems which corresponds to what is current in the systems of Roman origin. The Commission will therefore revert to this point later.

(73) In conclusion, the Commission wishes to emphasize that it is aware of the exceptional importance of the subject dealt with in this article. In the codification of the law of international responsibility, the adoption of a formulation which expressly recognizes the distinction between international crimes and international delicts is a step comparable to that achieved by the explicit recognition of the category of rules of jus cogens in the codification of the law of treaties. The Commission is therefore convinced that the representatives of Governments will devote very special attention to this article when discussing its report.

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.
Commentary

(1) The breach by a State of any international obligation incumbent upon it always constitutes an internationally wrongful act which may engage the international responsibility of the State that breaches the obligation. However, the obligations prescribed by international law are not all identical. On the contrary, they present substantive differences which have diverse consequences as regards determination of the conditions in which they are breached and as regards the characterization of the acts of the State committed in breach of them. In the context of article 19 of the draft, the Commission has already found it necessary to distinguish between international "crimes" and international "delicts", on the basis of the degree of importance of the subject-matter of the international obligation breached for safeguarding the fundamental interests of the international community as a whole. As has been seen, the need for such a distinction derives from the fact that, in contemporary international law, different régimes of responsibility are attached to "international crimes" and "international delicts", as regards both the consequences of the internationally wrongful act for the State which committed it and the subjects authorized to "implement" those consequences. However, international obligations not only express duties pertaining to different sectors of inter-State relations and to matters of varying importance for the international community; they are also differently structured as regards determination of the ways and means by which the State is supposed to discharge them. For example, there are international obligations which require the State to perform or to refrain from a specifically determined action. There are other cases in which the international obligation only requires the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses. Obligations of the first kind are sometimes called obligations "of conduct" or "of means", and those of the second kind obligations "of result". 22

(2) Questions of terminology aside, 23 it is obvious that international obligations have different structures and impose their requirements on States in ways which are not always the same. In so far as it proves necessary for the purposes of the present articles, account must therefore be taken of these differences in the nature of international obligations. Admittedly, draft article 16 already states the general principle that there is a breach of an international obligation by a State when an "act" of that State is not in conformity with what is required of it by that obligation, but it does not say how it may be concluded that there exists an "act of the State" which is "not in conformity with what is required of it" by the obligation in question, when the structure of that obligation is of one kind rather than another. Now it is precisely in this respect that the nature of the obligation has a decisive effect for, in international law as in private law, the breach of an obligation formally requiring the use of specifically determined means is not occasioned in the same way as the breach of an obligation which leaves the subject free to choose between various means. In other words, in order to determine whether a certain conduct of the State constitutes a breach of an international obligation incumbent upon it, it is necessary to know whether the obligation is in the nature of an obligation "of conduct" or "of means" or, on the contrary, an obligation "of result".

(3) In view of these considerations, the Commission thought it necessary to make a distinction in this chapter of the draft between the breach of international obligations "of conduct" or "of means" and the breach of obligations "of result". It may be asked, and some members of the Commission did ask, whether the adoption of such a distinction is not likely to cause some uncertainty, since in their opinion it is not always easy in practice to identify a given obligation as one "of conduct" or "of means", or one "of result". For example, in certain countries of the Council of Europe, the question has arisen whether the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms 24 does or does not impose on the parties thereto an obligation "of conduct", namely, the obligation to enact certain legislation. It may also be that, within a system of rules governing an institution of international law, there are obligations "of conduct" or "of means" alongside other obligations which have the characteristics of an obligation "of result". For example, the general rules governing the right of innocent passage through the territorial sea, set out in article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone 25 are formulated in terms of obligations "of result" rather than "of conduct" or "of means". But this does not prevent the same article from stating an obligation "of conduct" or "of means" in the particular case of the innocent passage of submarines through the territorial sea, these vessels being required to navigate on the surface and to show their flag.

22 This terminology, which originates in systems of internal law, more particularly those deriving from Roman law, is also frequently employed in international law. It should be pointed out, however, that, while there is no doubt that international law recognizes obligations in both the above-mentioned categories, there would be some risk of confusion in seeking to liken the distinction and the related characterizations made in international law too closely to those which are familiar in private law systems and which are logically influenced by the characteristics of these other legal systems. In other words, while in most cases an obligation which is one "of conduct" or "of means" in international law is of the same kind in civil law, this is not always the case; and the same applies to obligations "of result".

23 The distinction between these two types of obligation in international law was first stated explicitly by D. Donati, who made it a general principle (D. Donati, Diritto internazionale nel diritto costituzionale (Turin, UTET, 1906), vol. I, p. 343 et seq.). This distinction had already been implicitly made by H. Triepel, when he emphasized the difference between directly ordered internal law and internationally necessary internal law (H. Triepel, Völkerrecht und Landesrecht (Leipzig, Hirschfeld, 1899), p. 299). It also follows from the passage from D. Anzilotti quoted in foot-note 27 below.


(4) There are, indeed, cases in which problems of interpretation may arise. However, if in such a case an international dispute arises as to whether an international obligation is of one type rather than another, it will clearly be for the competent international law tribunals to settle the question. In the opinion of the Commission, the possible existence of specific problems of interpretation in certain cases, which are, moreover, marginal, is not in itself a sufficient reason to omit from the draft articles the distinction between the two types of the international obligation mentioned, since that distinction is of fundamental importance in determining how the breach of an international obligation is committed in any particular instance. The normative and practical importance of the distinction between obligations "of conduct" or "of means" and obligations "of result" for the codification of the general rules governing international responsibility will appear, particularly, during the consideration of the various problems relating to the determination of the time and duration of the breach of an international obligation, i.e. what is called the *tempus commissi delicti*, which the Commission intends to take up in connexion with the last article of chapter III of the draft.

(5) To recognize the existence of two different types of international obligation according to their nature, and the importance of distinguishing between them in determining when and how the breach of each of these types of international obligation occurs, does not mean that it is necessary to specify, in the present draft articles, criteria for establishing the cases in which international law must impose on States obligations "of conduct" or "of means" and those in which it must confine itself to imposing obligations "of result". It is at the stage of formation of the "primary" rules of international law that this legal system makes, as it were, an ideal choice between the cases in which it must confine itself to requiring a State to achieve a particular concrete result, while respecting its sovereign freedom to choose the means of doing so, and the cases in which the object in view leads it to require the State to adopt a particular course of conduct. What must be emphasized at the present stage is that the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or only requires it to achieve a certain result, while leaving it free to choose the means of doing so.

(6) Article 20 of the draft is concerned only with the breach of international obligations whose fulfilment requires the use by the State of specifically determined means. Here, therefore, it is necessary to establish the conditions in which there is a breach of an international obligation requiring the State to take action which the obligation specifically determines or to refrain from such action. Obligations of this type are frequently encountered in international law where the action required of the State has to be taken at the level of direct relations between States. Obligations "of result", on the other hand, the breach of which is the subject of article 21 of the draft, predominate where the State is required to bring about a certain situation within its system of internal law. In such cases, international law naturally respects the freedom of the State and confines itself to informing the State of the result to be achieved, leaving it free to choose the means to be used for that purpose. Nevertheless, in this case too, it sometimes happens that international law enforces, as it were, into the sphere of the State, to require the adoption of a particular course of conduct by some branch of the State machinery. Needless to say, obligations "of conduct" or "of means" are more frequently provided for by conventional international law than by customary law.

(7) The particular course of conduct which certain international obligations require of the State may be active conduct or conduct of omission. It may relate to different branches of State activity. For example, international obligations sometimes require an action or an omission by legislative or, more frequently, normative organs of the State—action consisting in adopting or abrogating a specific rule, whatever its form or denomination may be (law, decree, regulation, etc.), or, conversely, in not adopting or not abrogating certain specific rules. However, there are also international obligations which provide that the particular action or omission required of the State shall be undertaken by executive or judicial organs. The required action or omission may, moreover, be of a legal as well as of a purely physical nature.

(8) The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result, including the obligations called obligations "of conduct" or "of means". Conversely, every international obligation, even if it is of the type called an obligation "of result", requires of the obligated State a certain course of conduct. What distinguishes the first type of obligation from the second is not that obligations "of conduct" or "of means" do not have a particular ob-

26 This distinction is not, moreover, the only one to be taken into consideration for the purpose of determining the conditions in which the breach of an international obligation takes place. In the context of a later article in this chapter of the draft, the Commission intends to take account of the difference between the case in which the breach of an international obligation is revealed by the mere conduct of the State and the case in which the breach only occurs when there is added to the conduct of the State an external event which it was, precisely, required to prevent (wrongful act constituted by an event).

27 Attention was drawn to this characteristic of international obligations by D. Anzilotti ("La responsabilité internationale des États à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, No. 1 (January–February 1906), p. 26). "It is for this reason", he adds, "that in most cases the State carries out fewer acts prescribed by international law than acts which it has itself freely chosen as being the most appropriate for the performance of its duty towards other States" [translation by the Secretariat]. See also, by the same author, *Teoria generale della responsabilità dello Stato nel diritto internazionale* reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. 1, p. 117.
ject or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of international obligations "of result". This is the essential distinguishing criterion for characterizing an international obligation as an obligation "of conduct" or "of means". It is not sufficient, for example, for an obligation to provide, as does Article 33 of the Charter of the United Nations, that States shall settle their international disputes by "peaceful means", for it to be characterized forthwith as an obligation "of conduct" or "of means". In practice, as the same Article indicates, States remain free to choose the "peaceful means" which they consider most appropriate for settling the dispute between them. Moreover, the specific determination of the required action, which identifies an international obligation as an obligation "of conduct" or "of means", may vary in its degree of precision. For example, an international obligation may specify that the State shall enact "a law", or it may require the State to adopt "legislative measures". In the latter situation, the obligation, while remaining an obligation "of conduct" or "of means", nevertheless leaves the State some latitude, enabling it to proceed either by enacting a law proper or by some other normative means peculiar to its legal system. The content of the normative act required may also sometimes be defined in detail and sometimes simply indicated in a much more summary fashion. Obviously, there is a difference between the international obligations imposed on States parties by "uniform law" conventions, for example, and those specified in the Geneva Conventions of 12 August 1949 for the protection of war victims, concerning the repression of abuses and infractions committed in breach of those Conventions, namely, that:

The High Contracting Parties undertake to enact any legislation necessary to "provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

And yet there is no doubt that, in the first case as in the second, we are concerned with international obligations "of conduct" or "of means", since the action required of the State is always specifically determined as being the adoption of "rules".

(9) The fact that international obligations which are defined as obligations "of conduct" or "of means" require of the State specifically determined actions or omissions by some part of the State machinery—or, in other words, the fact that these obligations enter, as it were, into the sphere of the domestic jurisdiction of States to tell them how they must discharge the obligation in question—does not mean that the fulfilment of obligations of this kind produces effects only in the internal domain of the State. On the contrary, as has been noted above, obligations of this nature are to be found mainly in the sphere of direct inter-State relations. Thus, an obligation "of conduct" or "of means", such as one requiring that the armed forces or police forces of a country should not enter the territory of another country without its consent, is intended to produce its effects, not in the internal domain of the State, but entirely in the sphere of direct inter-State relations. The same applies, for example, to the obligation "of conduct" or "of means" concerning the procedure for the innocent passage of submarines through the territorial sea of a foreign State. In general, it should be noted that the sphere in which an international obligation "of conduct" or "of means" produces its effects depends, in the last analysis, on the international legal interests which the obligation is intended to protect. International obligations "of conduct" or "of means" may exist in any sector of international law; they do not belong to any particular sector of international law, even though they are, in fact, more common in some sectors than in others. In any case, the fact that the effects of the obligation manifest themselves within the State or directly at the inter-State level has no bearing on the question when and how a breach of this type of international obligation occurs. In both cases, the breach is established in the same way.

(10) The so-called "uniform law" international conventions offer one of the most typical examples of obligations requiring specifically determined action by "legislative" organs of the State. As has been noted, these obligations are not confined to providing that the State must take legislative action; they also specify the precise content of the legislation required. As a general rule, the State is bound by these obligations to reproduce in its legislation the actual text of the uniform law annexed to the international convention in question. For example, article 1, paragraph 1, of the Convention relating to a uniform law on the international sale of goods (The Hague, 1964) provides that:

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

The Hague Conventions on Private International Law, some of the international labour conventions, some agreements on international sanitary regulations, the provisions drawn up by certain international organizations and agencies, etc. contain many similar formulas. A classic example is to be found in article 24 of the Convention instituting the definitive Statute of the Danube, which was signed at Paris on 23 July 1921 and laid down expressly that the Danube Commission should draw up navigation and police regulations and that:

Each State shall bring these regulations into force in its own territory by a legislative or administrative act ...
(11) Examples of international obligations requiring specific legislative action may also be found in international conventions having other purposes. For example, article 10, paragraph 1, of the State Treaty for the re-establishment of an independent and democratic Austria (Vienna, 15 May 1955) requires Austria "to codify and give effect to the principles set out in Articles 6, 8 and 9" of the Treaty. Conversely, the same paragraph requires Austria "to repeal or amend all legislative and administrative measures adopted between 1st March, 1933 and 30th April, 1945, which conflict with the principles set forth in Articles 6, 8 and 9" of the Treaty. Article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination provides that:

Each State Party shall take effective measures ... to amend, repeal or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. Similarly, under article 3 (a) of the 1960 Convention against discrimination in education, States undertake to "abolish any statutory provisions and any administrative instructions ... which involve discrimination in education."

(12) In addition to international obligations requiring specifically determined action by legislative organs, international law also knows obligations that require specifically determined action by the executive organs of the State. Examples which may be mentioned are the specific obligations to deliver arms and other objects, to deliver or scuttle ships and to dismantle fortifications, which appear so frequently in peace treaties. For example, article 115 of the Treaty of Versailles provides for the destruction of the fortifications, military establishments and harbours of the Island of Heligoland "by German labour and at the expense of Germany." In articles 145, 195 and other articles of part V of the Treaty of Versailles, in article 40, 41 and 42 of the Treaty of Peace with Italy, of 10 February 1947 and the Annexes to the 1961 Vienna Convention on Diplomatic Relations or to refrain from subjecting certain specially protected individuals to arrest or detention (see, for example, article 29 of the same Convention). General international law imposes on the police forces and the armed forces of all countries an obligation not to enter the territory of another country without its consent, not to make arrests there, etc. International law also forbids the aircraft of a State to enter the air space of another State without its consent. Peace treaties sometimes even impose the specific obligation not to maintain or assemble armed forces in a specified region of a State's own territory. A well-known example of this type of obligation is article 43 of the Treaty of Versailles, which forbade Germany to maintain or assemble armed forces or execute military manoeuvres on the left bank of the Rhine river.

(13) Lastly, there are international obligations requiring specifically determined action which must be carried out by the judicial organs of the State. Typical examples of international obligations requiring specifically determined action by judicial organs are to be found in the provisions of peace treaties which, like the Annex XVII, section A, to the 1947 Treaty of Peace with Italy, require the competent authorities to revise certain decisions and orders of prize courts. Other examples are provided by some international conventions on jurisdiction, the recognition of foreign decisions and legal assistance; such examples include article 2, paragraph 1, and articles 31 and 32 of the European Communities Convention of 27 September 1968, on jurisdiction and the enforcement of civil and commercial judgments.

(14) As indicated above, the particular course of conduct required of a State by an international obligation may also be one of omission. Once again, the conduct in question may be required of the legislative organs of the State as well as of the executive or judicial organs. An example of an international obligation specifically requiring the State not to rescind certain laws is to be found in article 10 of the Austrian State Treaty mentioned above. By the provisions of this article, Austria undertakes to maintain the laws already adopted for the liquidation of the remnants of the Nazi regime, as well as the law of 3 April 1919 concerning the House of Hapsburg-Lorraine.

(15) Conduct of omission by executive organs is also specifically required by some international obligations. There are many international obligations which require the administrative authorities, particularly the police, to refrain from entering certain premises which enjoy special protection, such as the premises of a diplomatic or consular mission or an international organization (see, for example, article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations or to refrain from subjecting certain specially protected individuals to arrest or detention (see, for example, article 29 of the same Convention). General international law imposes on the police forces and the armed forces of all countries an obligation not to enter the territory of another country without its consent, not to make arrests there, etc. International law also forbids the aircraft of a State to enter the air space of another State without its consent. Peace treaties sometimes even impose the specific obligation not to maintain or assemble armed forces in a specified region of a State's own territory. A well-known example of this type of obligation is article 43 of the Treaty of Versailles, which forbade Germany to maintain or assemble armed forces or execute military manoeuvres on the left bank of the Rhine river.

33 Ibid., vol. 660, p. 195.
34 Ibid., vol. 429, p. 93.
37 Commission of the European Communities, Conventions concluded by the Member States of the European Communities pursuant to the European Communities Treaty, 220, Supplement to Bulletin No. 2—1969 of the European Communities.
38 See para. 7.
39 See para. 11 above.
of the Rhine or to the west of a line 50 kilometres from the river on the right bank.\footnote{41}

(16) In other cases, it is the judicial organs of the State which are specifically required by the international obligation not to exercise their jurisdiction in respect of foreign States, certain of their organs or certain categories of disputes, etc. Thus, for example, article 43, paragraph 1, of the 1963 Vienna Convention on Consular Relations forbids the judicial authorities of the receiving State to exercise their jurisdiction over consular officers in respect of acts performed in the exercise of consular functions.\footnote{42} Article II, paragraph 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) requires the court of a contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, to refrain from any exercise of jurisdiction and to refer the parties to arbitration if one of them so requests.\footnote{43} Other international conventions provide for the obligation to suspend certain hearings during parallel proceedings in another State.

(17) Normally, international conventions state explicitly the particular course of conduct they require of a given branch of the State machinery. Occasionally, however, there are conventions which do not expressly lay down, or mention only in part, the requirement of a particular course of conduct, but this requirement may nevertheless be deduced from the context of the convention. This is the case, for example, as regards articles 1 and 2 of ILO Convention No. 55, concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen,\footnote{44} and article 2 of ILO Convention No. 123, concerning the Minimum Age for Admission to Employment Underground in Mines.\footnote{45} The forms addressed to States concerning observance of the provisions of these conventions confirm that they require certain "legislative" action by the States parties to the conventions in question.\footnote{46} The characterization of a convention obligation as an obligation "of conduct" or "of means", rather than as an obligation "of result", may therefore be the result of an interpretation. It goes without saying that, in the case of customary international obligations, such a characterization is possible only as a sequel to the normal process whereby the existence and subject-matter of any customary rule are established in international law.

(18) In the cases just considered, which, despite their diversity, are all characterized by the fact that the international obligation in question requires of the State a particular course of conduct in the form of an action or omission, the implications of this characteristic of the obligation for the determination of the existence of a possible breach are clear. It may always prove difficult, in any particular case, to determine what in fact was the conduct of the State organs, and questions may always arise regarding the verification of the exact content of the obligation incumbent on the State. On the other hand, in the opinion of the Commission, there can be no doubt about the conclusion that, where the action or omission found to have occurred is in fact not in conformity with the conduct specifically required of the organ responsible for the action or omission, there is a direct breach of the obligation in question, without any other condition being required for such a finding. This finding cannot be influenced by the fact that the non-conformity of the conduct adopted with the conduct which should have been adopted did or did not have consequences that were actually harmful. If, for example, as in the case of article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on 16 December 1966,\footnote{47} an international convention imposes on a State an obligation to recognize that the employment of children and young persons "in work harmful to their morals or health or dangerous to life or likely to impair their normal development should be punishable by law", this obligation is breached simply by the fact that a law providing for punishment of such practices has not been enacted, even if no specific instance of the employment of children in such work has been found in the country concerned. Similarly, if, as in the case of article 2, paragraph 1(c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,\footnote{48} a convention obliges a State to rescind legislative provisions which have the effect of creating such discrimination, this obligation is breached simply by the fact that the provisions in question have not officially been rescinded, even if they would never actually have been applied or no longer could be.

(19) State practice and international jurisprudence confirm the validity of the above conclusion. It follows from this practice and jurisprudence that, where the international obligation requires from the State a particular course of conduct in the form of an action

\footnote{41} For reference, see foot-note 35 above.
\footnote{43} ibid., vol. 330, p. 3.
\footnote{45} ibid., p. 1117.
\footnote{46} For example, the form relating to ILO Convention No. 55 contains the following injunction: "Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation...". In reply to a question put on the subject by the Government of the United States, the ILO replied, on 13 November 1950, that "the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law". The reference to constitutional practice clearly related to those cases in which, by virtue of that practice, the ratification of a convention automatically incorporates the provisions of the convention into "the law of the land", thus in fact giving the instrument of ratification the force of a domestic legislative enactment. See The International Labour Code, 1951 (Geneva, ILO, 1952), vol. 1, pp. 863 et seq.
\footnote{47} Resolution 2200 A (XXI), annex.
\footnote{48} See foot-note 33 above.
or omission on the part of one of its organs, the conduct of a State organ which is not in conformity with that required of it by the obligation in question is sufficient to constitute a breach of the obligation. The most accurate formulation of this principle was given by the Swiss Government in its reply to point III, No. 1, of the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), which included the following passage:

"Does the State become responsible in the following circumstances: "Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?"

It was in connection with the second question that the Swiss Government expressed the views stated above. 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 (document C.75.M.69.1929 V), pp. 25 and 29.

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of diplomatic agents. In all these cases, the basic principle applied has been the same, namely, that the adoption by any administrative or judicial authority of conduct different from that specifically required by the international obligation has been considered as directly constituting a breach of that obligation.

(22) The positions taken by the authors of learned works dealing with the question examined here coincide with those which derive from the logic of the relevant principles and which State practice and international jurisprudence confirm. Triepe expressly deduced from the distinction he had made concerning the possible influence of international law on internal law that where a rule of international law or a treaty imposes on the State the duty to have a particular law, the non-adoption or the abrogation of that law constitutes a breach of international law or of the treaty; this obtains even if, despite the non-adoption or the abrogation of the internationally required internal law, the State is in a position "effectively to carry out everything which can or should be carried out under the law" and intends to do so. More recently, several writers have studied the question in greater detail and have shown the effect which the nature of an international obligation necessarily has on the determination of the existence of a breach of the obligation. These writers have stressed, in particular, that where the obligation requires a State to adopt conduct (in the form of an action or omission) which must necessarily be carried out in certain ways and by specific bodies, any conduct adopted by the State which is not in conformity with that specifically required constitutes as such a direct breach of the existing international legal obligation, so that, if all the other requisite conditions are fulfilled, an internationally wrongful act exists.

(23) In the light of the above considerations, the Commission is of the opinion that, where an international obligation requires the adoption of a particular course of conduct by a given branch of the State machinery, the obligation will be fulfilled if the conduct specifically required by the obligation is adopted; if not, it must be held that the obligation has been breached. Article 20 therefore provides that there is a breach of an State of an international obligation requiring it to adopt a particular course of conduct when the conduct in fact adopted by that State is not in conformity with that required by the obligation. The principle whereby, in international law, the breach of an obligation "of conduct" or "of means" occurs, by virtue of the non-conformity of the conduct adopted with the conduct required by the obligation, is thus clearly affirmed.

(24) The Commission considered it advisable to refer in the text of the article to a "particular" course of conduct in order to make it clear that what holds of international obligation is referred to in the article, since, for an international obligation to be characterized as an obligation "of conduct" or "of means", it is not enough for the obligation to require of the State a course of conduct determined in some unspecified manner. The determination must, on the contrary, be extremely precise, in other words, the obligation must determine in a "particular" manner what is required of a given branch of the State machinery. The Commission also thought it better to use the comprehensive term "course of conduct", rather than the twofold expression "action or omission", since there are cases, such as that of an obligation requiring the State to refrain from a specifically determined "practice", in which the course of conduct adopted by the State in breach of the obligation consists of a "series" of actions of the same kind rather than of one separate action. Lastly, the Commission decided that the phrase "when the conduct of that State is not in conformity with that required of it by that obligation"—which closely follows the wording of draft article 16—is the most suitable formula for indicating when a breach of an obligation "of conduct" or "of means" may be held to occur. This wording was found preferable to others, such as "simply by virtue of the adoption of a course of conduct different from that specifically required", because in the Commission's view it expresses more accurately the idea that the conduct adopted may fail to correspond absolutely, as it were, to the conduct required by the obligation, without the being any real ground for asserting that the obligation has been breached. The action or omission of the State might, for example, even go beyond the requirements of the obligation. In a case of that kind, if the requirements of the obligation were fully satisfied by the conduct in fact adopted by the State, it would certainly not be possible to infer a breach of the obligation.

**Article 21**

**Break 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 required of it by that obligation.

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56 H. Triepe, op. cit., p. 299.
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.

Commentary

(1) The purpose of article 21 is to establish how to determine if there has been a breach of an international obligation which merely requires the State to ensure a particular situation—a specified result—and leaves it free to do so by means of its own choice. Such obligations, called obligations "of result", are much more common in international law than in internal law, by reason of the specific nature of the subjects of the law of nations. As the commentary to article 20 makes clear, the commands of international law in many cases, especially where they have to be enforced through the State's internal system, stop short at the outer boundaries of the State machinery. Often, out of respect for the internal freedom of the State, international obligations of this nature merely require it to achieve the result they seek, without specifying the acts or omissions by which that result is to be achieved.

(2) International obligations "of result" thus do not require a particular course of conduct on the part of the State or, in other words, a course of conduct on the part of specified State organs. This being said, it is always possible, within the wide and varied range of international obligations "of result", to make further distinctions according to the different degrees of permissiveness of these obligations in regard to the achievement of the result they require. This permissiveness may, first of all, take the form of an initial freedom of choice. In some cases, the international obligation gives no indication whatsoever of the means the State may use to achieve the required result, but in others the obligation, although not expressly requiring recourse to a particular means, indicates a preference for a certain means as the most likely to achieve the result required of the State. For present purposes, that distinction is of no consequence. In both cases, although the freedom left to the State relates only to the initial choice of the means to be used, it is obvious that, once that choice has been made, either the result required by the obligation will have been achieved or there will have been a final breach of that obligation.

(3) However, the permissiveness as to means, which is characteristic of international obligations "of result", sometimes extends to giving the State an opportunity to apply a remedy a posteriori to the effects of an initial course of conduct which has led to a situation incompatible with the result required by the obligation. It is thus possible that international law may require only a final result, not only leaving the State free to choose the means it will use initially but also allowing it, if it has not achieved the result by the first means chosen, to resort to other means to that end. Under all obligations belonging to this second group of obligations "of result", the State which initially adopted a course of conduct consisting in acts or omissions incompatible with the result required of it is allowed a fresh opportunity to discharge its obligation. In other words, under certain conditions and in so far as the required result has not been rendered permanently unattainable by the initial conduct, such obligations allow the State to remedy the situation temporarily created and to ensure the same result, albeit belatedly, by adopting as an exceptional measure a different course of conduct capable of obliterating the consequences of the initial conduct.

(4) In the cases mentioned, the possibility of applying a remedy a posteriori to the adverse effects of a State's initial conduct is coupled with initial freedom in the choice of means. But that is not always so. In other cases, the opportunity of still achieving a result in conformity with that required by the international obligation by remedying, through different means, the incompatible result temporarily brought about is not accorded to the State solely where it has had initial freedom to choose between various normal means of discharging the obligation. The State may be given that opportunity even where it had no such initial freedom of choice. In such a case, it is, precisely, the faculty of subsequently making good, by different conduct, the consequences of the initial action or omission which marks the latitude allowed to the State; it is this subsequent faculty which, even if the content of the obligation has left the matter in doubt, places the obligation among those "of result", not among those "of conduct" or "of means".

(5) Then, there are even international obligations "of result" so liberal that they allow the State not only to achieve the result they require by remedying, through different conduct, the temporarily unacceptable consequences of the result they require. This power to remedy a posteriori, in such cases, places the obligation among those "of conduct" or "of means".

58 It is rather rare for rules—even treaty rules—which lay international obligations upon the State to mention explicitly that it is open to the State, in certain circumstances, to remedy ex post facto a situation that may have been created initially by an action or omission by its organs running counter to the internationally required result. The question whether a given obligation may or may not be fulfilled, exceptionally, by some other course of conduct, where the conduct initially adopted has failed to produce the required result, will normally be decided by interpreting the relevant clause according to the provisions of the treaty as a whole, in accordance with its ratio and spirit, or in the light of the applicable rules of customary international law.
(6) In seeking examples, the first case to consider is that in which all that the obligation provides for is initial freedom to choose the means of discharging it. Sometimes the text of the treaty itself, in imposing certain obligations, expressly states that it is left to the State to choose the means of achieving their purpose. Article 14 of the Treaty establishing the European Coal and Steel Community, for example, provides that:

Recommendations shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives.59

Similarly, the third paragraph of article 189 of the Treaty establishing the European Economic Community provides that:

Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.60

Again, the full freedom of choice enjoyed by the State sometimes derives from the fact that the international obligation generally requires the States bound by it to take "all appropriate measures" to achieve a given result, without giving any indication of what the appropriate measures may be. For example, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, provides in article 2, paragraph 1, that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.61

Similarly, with regard to the protection of the representative organs of other States, the 1961 Vienna Convention on Diplomatic Relations provides in article 22, paragraph 2, that:

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

Article 29 of the same Convention provides that the receiving State ... shall take all appropriate steps to prevent any attack on [a diplomatic agent's] person, freedom or dignity." Almost identical language is to be found in article 31, paragraph 3, and article 40 of the 1963 Vienna Convention on Consular Relations;62 in article 25, paragraph 2, and article 29 of the 1969 Convention on Special Missions;63 and in article 23, paragraph 2 (a), and article 28 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.64

(7) In perhaps a larger number of cases, the freedom of choice accorded to the State is implicit in the fact that the international obligation only specifies the result to be achieved, the text imposing the obligation making no reference at all to the means of achieving it. Examples are to be found in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms65 and in certain international labour conventions. Many other texts contain provisions of the same kind. For example, treaty provisions binding States to extend most-favoured-nation treatment to other States in an agreed field of relations are normally confined to stating the object to be achieved, without specifying the means to be employed to achieve it. The situation referred to here is normal for international obligations of customary origin, as well as international treaty obligations concerning the protection of aliens,66 the performance and the breach of which have certain additional special aspects, which are dealt with in article 22 of the draft.

(8) There is also no lack in international law of obligations which, although not requiring recourse to a specified means, nevertheless indicate a preference for one means or another. By way of example, it will suffice to refer to article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which provides that:

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights and freedoms defined in Section I of this Convention.

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

64 For reference, see foot-note 24 above.

Article 1 of the Convention provides that:

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

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

67 For example, the Memorial of the Italian Government in the Phosphates in Morocco case (Preliminary Objections) states that:

"The Protecting Power has the choice of these means; it may choose whatever means it deems most appropriate for the organization of the public authorities of the Protectorate, but they must be calculated to assure aliens of treatment in conformity with international conventions and acquired rights." [Translation by the Secretariat. See Répertoire des décisions et des documents de la procédure écrite et orale de la Cour Permanente de Justice Internationale et de la Cour Internationale de Justice, published under the direction of Paul Guggenheim, Série I, Cour permanente de justice internationale, vol. 5, Droit international et droit interne, by Krystyna Marek (Geneva, Droz, 1961), p. 679.

66 General Assembly resolution 2200 (XXI), annex.

60 Ibid., vol. 298, p. 3.
61 For reference, see footnote 33 above.
62 Idem., footnote 40.
63 Idem., footnote 42.
64 General Assembly resolution 2530 (XXIV), annex.
There can be no doubt that, in these cases, legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purposes of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means if it so desires, provided that those means also enable it to achieve in concreto the full realization of the individual rights provided for by the Covenant. All these examples, like those cited in previous paragraphs of this commentary, are of cases in which the obligation leaves the State at least an initial freedom of choice of the means to be used to achieve the result required by the obligation.

(9) Other examples illustrate the case of an international obligation which the State may, in exceptional circumstances, still discharge by resorting to different means of achieving the required result if the course of conduct initially adopted has failed. The first cases of this kind which should be mentioned are those in which this further degree of permissiveness is merely an addition to the normal initial freedom of choice of the means to be used to fulfil the obligation. Such initial freedom of choice, as we have seen, is characteristic of, for example, the majority of international obligations concerning the protection of human rights. When the International Covenant on Civil and Political Rights provides that "Everyone shall be free to leave any country, including his own" (article 12, paragraph 2), that "Everyone shall have the right to recognition everywhere as a person before law" (article 16), or that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests" (article 22, paragraph 1), the first conclusion to be drawn from the very object of these provisions and from their formulation is that the State is free to adopt whatever measures it deems most appropriate, in its own particular case, to guarantee these freedoms and rights to individuals. In the extreme case, it may refrain from adopting any measures at all, provided that the result is achieved in practice, i.e. that any man or woman who wishes to leave the country is in fact free to go, that he or she is not denied recognition as a person before the law, that his or her freedom of association is not obstructed, and so on. But the Covenant as a whole points to another conclusion. Assuming, for example, that the State has chosen to fulfil its obligations by the administrative means, an adverse decision concerning the right of an individual taken by the first authority called upon to rule in this case does not normally make it definitively impossible for the State to achieve the result internationally required of it. That result may be considered to have been achieved even if a higher authority has had to intervene and set aside the first authority's decision, and only this subsequent action has secured, for the individual, recognition of the right he sought to exercise.

(10) In the absence of any express provision on the subject, this conclusion might follow from the context of the agreement, its spirit, its object and purpose or, lastly, from the customary rules in the context of which the agreement is to be interpreted. Let us take, as another example, article III, paragraph 1, of GATT, which reads:

The contracting parties recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production.

Paragraph 2 of the same article provides that:

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

These provisions are not accompanied by any clause providing expressly for the conclusion stated above. But their purpose, the reason for their existence, is to prevent domestic products from ultimately enjoying protection in practice at the expense of like foreign products. What is required of the State party to the Agreement is that it should ensure, in the final result, that foreign products are not placed at a disadvantage on the domestic market because their price is burdened by heavier taxation than domestic products. Hence, the provisions cited cannot be interpreted as requiring absolute prevention of any act, even provisional, by which a foreign product is wrongly taxed. If, at a given moment, one of these products becomes subject to a tariff different from that applicable to a like national product and if the duty is improperly collected, the result referred to by the obligations set out in the articles cited will also be achieved if the State takes steps to cancel or duly reduce the discriminatory taxation and refund the amounts wrongly collected. The desired purpose of equality of treatment of foreign and domestic prod-

69 Ibid.
70 If any doubt should persist as to the soundness of this conclusion, the fact that the Covenant contains a clause concerning the exhaustion of domestic remedies (article 41, paragraph 1 (c)) would suffice to remove it. A similar conclusion naturally holds good for all obligations imposed by conventions which contain an explicit clause of this kind, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (article 26) [for reference, see footnote 24 above] and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (article 11, paragraph 3, and article 14, paragraph 7(a) [for reference, see footnote 33 above]. The effect of this clause is, precisely, to prevent the establishment of final failure to achieve the result required of the State by the obligation which the clause accompanies, so long as it is still possible to obtain that result by one of the other means at the State's disposal. It would, however, be wrong to believe that the conclusion stated is justified only in cases covered by the specific provisions of article 22 of the present draft, where the agreement from which certain obligations derive contains a clause expressly providing that the State cannot be charged at the international level with not having fulfilled its obligations so long as the available local remedies have not been exhausted.
71 GATT, Basic Instruments and Selected Documents, vol. IV (Sales No. GATT/1969-1).
ucts will thus also be achieved. In other fields, let us consider one of the many agreements providing for judicial assistance between States or for the extradition of persons guilty of certain crimes, or the conventions which require the punishment of those responsible for the practice of slavery or apartheid, of the perpetrators of an act of genocide, terrorism and so on. It is obvious that an omission on the part of a first administrative or judicial authority, which has refused the agreed assistance or due extradition or has failed to apply the prescribed punishment, does not necessarily represent a final breach of the obligations in question. The result required by those obligations will still be deemed to have been achieved if a higher authority intervenes to remedy the effects of the conduct of the first State authority to intervene in the case.

(11) The examples given above of international obligations which allow the State to remedy by subsequent conduct consequences not in conformity with the obligation resulting from an initial course of conduct all relate to obligations prescribed by international conventions. Needless to say, however, equally valid examples can be found among international obligations of customary origin: for example, the customary obligation which requires a State to arrest and punish persons guilty of assaulting a foreign official in its territory or of attacking the premises of a diplomatic mission, or persons who by their writings have insulted a foreign Head of State. It would obviously be going too far to say that these obligations will forthwith be regarded as unfulfilled if, for example, the guilty parties are allowed to escape by members of the local police force or acquitted by a court of first instance. The result required by these customary international obligations is that justice should ultimately overtake the guilty persons, whether with the aid of the local police or of the central police taking over when the local police have failed, and that they should be duly punished, even if only by a court of second or third instance. In other words, the result required by the obligation will still be considered to have been achieved, even if an initial measure incompatible with that result has been corrected by a later measure capable of obliterating the consequences of the first.

(12) International obligations which require only the achievement of a certain result may take an even more permissive form than that of leaving the State free initial choice of the means of achieving the required result, or that of allowing the State to reach that result subsequently by completely obliterating, through new conduct, the consequences of an initial course of conduct incompatible with the achievement of the result. There are cases in which, when the initial conduct has made the main required result henceforth unattainable, the international obligation allows the State to consider itself discharged by achieving an alternative result. Let us take for example the obligation of customary international law which requires the State to exercise a certain vigilance to prevent unlawful attacks against the person or property of foreigners. If, in a specific case, the State has been unable to prevent an attack of this kind, it can still discharge its obligation by offering compensation for the damage suffered by the foreigner who was attacked. A similar conclusion may be reached in regard to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that “No one shall be subjected to arbitrary arrest or detention”. The obligation here set out should be read in conjunction with paragraphs 4 and 5 of the same article, which provide respectively that:

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

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

The juxtaposition of provisions shows that the State can consider that it has acted in conformity with its international duties even if, having failed to achieve the main result required by the obligation stated in article 9, it has nevertheless achieved the alternative result of making reparation for the injury caused to the person who suffered wrongful arrest or detention.

(13) Having established the existence of a wide range of international obligations “of result”, we have now to examine how, in the various hypothetical cases described, the breach of such an obligation

72 The international obligation referred to here should be compared from this point of view with, for example, the obligation stated in article 34 of the Vienna Convention on Diplomatic Relations, which provides that “A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, ...” (for reference, see foot-note 40 above). Here the ratio of the obligation is quite different. What the Convention requires is that, in the fundamental interests of the unhindered exercise of the functions entrusted to him, the diplomatic agent shall not be hampered in his activity by the application of fiscal measures, just as he must not be hampered by the application of police measures, judicial measures, etc. Unlike the obligation considered in the text, this is one of the obligations which require the State to adopt a specific conduct of forbearance. It is one of the obligations dealt with in article 20: the State cannot consider that it has correctly performed its international duty merely on the grounds that it has subsequently refunded to the diplomatic agent the sums unjustly demanded of him, or that it has released a diplomatic agent who was improperly arrested, etc.

73 See paras. 9-10.

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

75 In addition, as noted above (see foot-note 70), the Covenant contains in article 41, paragraph 1(c), a general provision making the exhaustion of domestic remedies a condition for consideration by the Committee on Human Rights of "communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant". Now any domestic remedy may put an end to arbitrary arrest or detention or provide reparation for injury suffered, but it certainly cannot prevent the arbitrary arrest or detention from having taken place. Reparation for the injury caused is clearly only an alternative result, achieved instead of the main required result of preventing arbitrary arrest or detention.
is determined in international law. This task is far less simple than in the case of the obligations "of conduct" or "of means" dealt with in article 20, where the existence of a breach is shown by simply comparing the conduct in fact adopted by the State with the conduct it was specifically required to adopt in the case in point. In the case of the international obligations considered in the present article, it is necessary, instead, to compare the result required by the international obligation with the result finally attained in practice through the course or courses of conduct adopted by the State. However, in order to determine how the existence of a breach of an obligation "of result" is established in international law, we must look once again to State practice and international judicial decisions on the subject and to the opinions expressed on it by learned writers.

(14) In this connexion, the positions adopted by States as to the possibility of concluding that an international obligation has been breached by the permissible or non-performance of a legislative act prove once again to be particularly enlightening. For example, certain States which, like Switzerland and Poland, expressed their opinion on the matter in their replies to point 11, No. 1, of the request for information addressed to them by the Preparatory Committee of the 1930 Codification Conference, specifically pointed out that, in the case where an international obligation merely required the State to ensure a given result by whatever conduct it chose, the enactment or non-enactment of a law having a specific content was only one means among others of achieving a result which alone was decisive for the purpose of concluding that the obligation had been breached. The replies of the Swiss and Polish Governments also confirm that, so long as the State has not failed to achieve in concreto the result required by an international obligation, the fact that it has not taken a certain measure which would have seemed especially suitable for that purpose—in particular, that it has not enacted a law—cannot be held against it as a breach of that obligation.  

(15) Other statements of position drawn from international practice also confirm the soundness of the conclusion that, if the internationally required result is achieved by the State, it matters little whether the State has arrived at this result by enacting a law or by any other means. Mention may be made, in this connection, of the letter dated 18 October 1929 sent by Albert Thomas, the Director of the ILO, to the Government of the Irish Free State, in reply to that Government's question whether, since a rest period of 24 hours was already granted to industrial workers in Irish practice, the enactment of a law was specifically necessary in order to give effect to the requirements of articles 2, 3 and 4 of Convention No. 14 concerning the Application of the Weekly Rest in Industrial Undertakings. While pointing out that the course most usually adopted to secure the effective application of the Convention was that of passing legislation, the letter from the Director of the ILO emphasized that Ireland was free to follow whatever method seemed most appropriate in its particular case, provided only that that method would in fact ensure effective application of the provisions of the Convention.  

(16) Learned writers have also concentrated their attention on the problem as it arises in relation to the taking of, or failure to take, legislative action. They state very emphatically that, in their view, no State in which the rights of other States are prejudiced shall be held to be in breach of an international obligation where the result acknowledged as having been attained by the State or by any other means is such as to give assurance that the legal rights of other States are not prejudiced or in danger of being prejudiced.  

76 As stated above (paragraph 19) of the commentary to article 20, the Swiss Government emphasized the need to qualify its reply to the question whether international responsibility was engaged by the failure of a State "to enact legislation necessary for the purpose of implementing" its obligations. It replied in the affirmative only as regards the case in which an international agreement expressly required the parties to take specific legislative measures. It observed that in the other cases "it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations", which constitutes the breach of the obligation. (League of Nations, op. cit., pp. 25 and 29.)  

The Polish Government, in its reply, distinguished between the "entirely exceptional and very rare case of a State which has assumed an international undertaking to enact provisions before the expiry of a certain period" and "all other cases". It indicated that only in the first case did the fact that the provisions had not been enacted within that period constitute an offence, whereas in the other cases "the mere fact of not enacting legislation does not involve international responsibility." (ibid., pp. 26-29.)  

77 In the Swiss Government's reply we read that "... even in the absence of a law by which the State could immediately fulfill its obligations, we will not be confronted with a fact or act contrary to international law unless some circumstance arises by which the rights of other States are prejudiced." (ibid., p. 29.) In the continuation of the Polish Government's reply, it is stated that responsibility "... ensues only if the State authorities or tribunals refuse, in the absence of relevant municipal provisions, to give effect to rights arising out of international undertakings. Until this has occurred, there is nothing to show that such provisions are required, that the authorities and tribunals, for example, will give decisions incompatible with the international undertakings of the State; it should be left to the State to decide whether the promulgation of a special law, decree or circular is necessary." (ibid.) The reply of the British Government to the same point in its request for information made by the Preparatory Committee of the 1930 Conference gave examples of obligations for the fulfillment of which the adoption of legislative measures constituted the appropriate and probably essential means. But it clearly brought out that, in view of the nature of the obligations, which required only the achievement of a certain result, failure to adopt such legislative measures should not be regarded as in itself a breach of the obligations. The breach would be established only if, probably through lack of appropriate provisions, the State showed itself unable in practice to achieve the result required by its obligations.  

78 Mr. A. Thomas' letter stated:  

"The Convention leaves considerable latitude to the Government which ratify it ... A Government is therefore free to apply under the Convention any system which meets with its approval, and the existing practice in the Irish Free State would undoubtedly fulfill the requirements of the Convention ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention's effective application ... The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory in industrial undertakings ... It would, however, suffice that legislation should be adopted which would be confined to giving the force of law to the existing practice ... It is for the Government of the Irish Free State to appreciate which of these methods is the best adapted to its requirements. Any of them would ... secure the effective fulfilment of the Convention." (ILO, Official Bulletin, vol. XIV No. 3, 31 December 1929, pp. 125-126.) See also The International Labour Code 1951 (op. cit.), pp. 277-278, note 464.
which has in fact ensured the result required of it by an international obligation can be accused of breach- ing that obligation on the ground that it achieved the result without enacting a law, and, more generally, that failure to take legislative action does not in itself warrant the conclusion that the obligation has been breached, unless it can be affirmed that the State has specifically failed to ensure the result in question. Some writers have explicitly stated that these principles are merely the necessary consequence of a distinction between obligations requiring the State to adopt a particular course of conduct and obligations which merely require it to achieve a particular result.\(^{80}\)

(17) As to the question whether the adoption by the State of a measure which would seem to obstruct the achievement of the result required by the international obligation would not in itself suffice to show that the obligation had been breached, State practice does not provide many explicit statements of position. The replies from Governments to point III, No. 1, of the request for information by the Preparatory Committee of the 1930 Conference were inevitably influenced on this point by the form in which the question was put. Many countries accordingly confined themselves to answering in the affirmative, without giving any information as to the extent of the agreement they were expressing. It would be quite wrong, however, to believe that by such answers the Governments concerned meant to express the conviction that, in the event of legislative action by the State, its international responsibility would immediately and in all cases be engaged by the promulgation of the law. On the contrary, the reply of the South African Government, for example,\(^{81}\) shows that it regarded the request submitted to it as referring to the application, not the promulgation, of the law. The British and Swiss Governments, indeed, explicitly stated that, in their view, the mere fact of the adoption of a measure, such as the promulgation of a law, which constituted an obstacle to the fulfilment of the obligation, would not in itself warrant the conclusion that there was a breach of an international obligation.\(^{82}\) The view expressed by these two Governments, like the request for information to which they were replying, related only to responsibility for the breach of obligations concerning the treatment of foreigners, which are in fact obligations requiring only the achievement of a particular result. If their replies had related to the breach of obligations relating to any sphere in general, they would no doubt have been more qualified.\(^{83}\) It can therefore be accepted that the codification work of 1929-1930 does not provide sufficient evidence to establish with certainty what States considered, at that time, to be the answer to the question raised in this paragraph. Nevertheless, the results of that work are certainly not incompatible with the conclusion that, where an international obligation requires only the achievement of a specific result by the State, it cannot be held that this obligation has been breached merely because the State has enacted a law which may be an obstacle to the attainment of the required result.

(18) In reality, the difficulties experienced in this connexion by certain learned writers seem to be due to the fact that they have not always borne in mind the distinction to be made between the different types of obligation, but have considered, indiscriminately in regard to all obligations, the question whether the enactment of a law “contrary to international law” is in itself a breach of its obligation by the State, or whether the breach only occurs later, when the law is applied in practice. It is therefore logical that those among such writers who had mainly in mind obligations specifically requiring the State to enact or not to enact a certain law should have reached the conclusion that the breach occurs when the law is promulgated\(^{84}\) and that, conversely, those who were thinking mainly of obligations requiring only the achievement of a specific result should have reached the conclusion that the breach occurs only when the law is applied to a specific case.\(^{85}\) However, most writers have found it necessary to make a distinction between different situations and have maintained that either conclusion could be justified, depending on the content of the obligation\(^{86}\) and the

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\(^{80}\) See, e.g., Bilge, op. cit., pp. 103-104; and Vitta, op. cit., pp. 95 et seq.

\(^{81}\) The fact that the Preparatory Committee proposed as a “basis of discussion”, in the light of the replies received, a text which affirms that “A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation incompatible with its international obligations” (basis No. 2) (ibid., p. 30, and Yearbook... 1956, vol. II, p. 223, document A/CN.4/496, annex 2) does not prove that, in the Committee’s view, responsibility would always arise from the mere enactment of the “incompatible” legislative provisions. This also applies to article 6, which was adopted on first reading by the Third Committee of the Conference, and which reproduces the text of basis No. 2.

\(^{82}\) This applies, for example, to U. Scheuner, who nevertheless qualifies this assertion by the words “as a general rule” (“L’influence du droit interne sur la formation du droit international”, Recueil des cours... 1939-1941 (Paris, Sirey, 1947), vol. II, pp. 121 et seq.).


\(^{84}\) B. Cheng, for example, observes that the answer to the question raised here “depends upon what is in fact prohibited by the particular rule of international law and upon whether the municipal law actually contravenes it or merely enables some other organ of the State to do so” (General Principles of Law as applied by International Courts and Tribunals (London, Stevens, 1953), pp. 174-175).
circumstances of the particular case. 87 Nevertheless, the criteria put forward on either side for establishing in which specific cases the mere fact of having passed a law with a particular content constitutes a breach of an international obligation, and in which cases the opposite conclusion is warranted, vary and do not always seem pertinent. 88 The writers who have based their solution of the problem on the distinction between the breach of obligations "of conduct" or "of means" and the breach of obligations "of result" are no doubt those who have provided the valid criterion for deciding the question. 89

(19) In connexion with this question, it is interesting to note the positions taken by the Governments of the United States and Great Britain in the controversy which arose between the two countries in 1912-1913 concerning Tolls on the Panama Canal. In 1912, the United States Congress passed an Act regulating tolls on the Canal on the basis of criteria considered by Great Britain to be incompatible with the provisions of article III, paragraph 1, of the Hay-Pauncefote Treaty of 18 November 1901, which provided for equality of treatment for the flags of all nations parties to the Treaty without discrimination. 90

Invoking article 1 of the Arbitration Treaty of 1908, the Government in London therefore proposed that the question should be submitted to arbitration. The United States Government did not go into the substance of the matter, but opposed the British proposal. 91 In the end, there was no arbitration in this case since the United States agreed to amend the law which had given rise to the exchange of notes. But it is nevertheless interesting to consider the positions taken by the two Governments. The United States view was consistent with the principle that the conclusion that there has been a breach of an obligation requiring a State to achieve a particular result in concreto cannot be reached on the ground that the State has taken a legislative or other measure which has not yet had the effect of creating a specific situation definitively incompatible with the desired result, even if such a measure introduces an obstacle to the attainment of that result. The British view, on the other hand, seemed to contradict that principle. 92

It may, however, be noted that the measure taken by the United States Government in this case amounted, not to imposing higher tolls on British vessels than those levied on United States vessels, but to exempting United States vessels from the tolls which continued to be levied on the vessels of other nations. It could therefore be maintained with some justification that the situation which resulted for British vessels was indeed a discriminatory situation in concreto, which was unlawful under the Treaty; hence President Wilson's prompt action to change the situation by the 1914 Act of Congress. Moreover, the purpose of the British protest and proposal for arbitration seems to have been to prevent an internationally wrongful act from occurring rather than to invoke the consequences of a wrongful act already committed. 93

Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by the Treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that Treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration. 94 Instructions of Secretary of State Knox to the United States Chargé d'affaires in London, dated 17 January 1912 (G. H. Hackworth, op. cit., 1961, vol. VI, p. 59.)

92 The British Government expressed itself in the following terms: "... international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a conclusive instance has been taken, which in the present instance would, according to your argument, seem to mean until tolls have been levied on British vessels, that is to say, from vessels owned by citizens of the United States have been exempted. . . . the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States, and when, in further directing the President to fix those tolls within certain limits, it distinguished between the vessels of citizens of the United States and other vessels, was in itself, and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote Treaty for the equal treatment of the vessels of all nations." (Note from the British Ambassador at Washington to United States Chargé d'affaires in State Knox, dated 28 February 1913.) (A. D. McNair, The Law of Treaties, 2nd ed. (Oxford, Clarendon Press, 1961), pp. 548-549.)

93 As stated in Lord McNair's comment on the British Note: "... the British Note did not go so far as to allege that a violation
(20) A selection of international judicial decisions, mention may be made of the decision reached on 27 June 1933 by the United States–Panama General Claims Commission, conducted under the Claims Convention of 28 July 1926, in the Mariposa Development Company case. It stated that:

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

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

In the case submitted to the Commission, the intended result was clearly respect for the property of foreigners. In the Commission's view, it could not be maintained a priori that the result had not been achieved, merely because a law had been enacted which would permit future confiscations of property belonging to foreigners. It could not be held that there had been failure to achieve a result, and consequent breach of an obligation, unless there had been actual interference with the property of a foreigner. As the Commission pointed out, the only case in which, from another standpoint, the required result could be regarded as frustrated as soon as the law authorizing expropriation was enacted would be that in which the enactment of the law seriously reduced the commercial value of the foreigner's property. Otherwise, in the Commission's view, a breach would occur when the foreigner was deprived of his property in concreto, not when a measure had been adopted merely making such deprivation possible in abstracto.

(21) In other international judicial decisions, acceptance of this principle is implicit. This is so, for example, where the Permanent Court of International Justice, called upon to rule on whether a particular law constituted a breach of an international obligation or not—an obligation requiring the achievement of a particular result by the State, not the adoption of a particular course of conduct—refers to the application of this law, not to its enactment. In its very well-known judgment of 25 May 1926, in the case concerning Certain German Interests in Polish Upper Silesia (the merits), the Court stated that:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case ... The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention. 96

The European Court of Human Rights appears to endorse the same criterion in its judgment of 27 March 1962 in the De Becker case. 97 Very similar statements of position may also be noted in a series of decisions of the European Commission on Human Rights. 98

(22) To sum up, our analysis of State practice, international judicial decisions and the positions taken by learned writers confirms that, in the case of international obligations requiring the State to achieve a result in concreto but leaving it free to do so by means of its own choice, the fact that a State bound by such an obligation has adopted a measure or, in particular, enacted a law constituting in abstracto an obstacle to the achievement of the required result, is not yet a breach or even the beginning of a breach of the obligation in question. 99 There will be a breach only if the State is found to have failed in concreto to achieve the result required by the obligation.

96 PCU, series A, No. 7, p. 19. In the advisory opinion of 4 February 1932 concerning the Treatment of Polish nationals in Danzig (ibid., series A/B, No. 44 p. 24) the Court also considered that: "The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig ..." 97 The Court states in its judgment that: "...the Court is not called upon, under articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention ..." (Yearbook... of the European Convention on Human Rights, 1962 (The Hague), vol. 3, 1963, pp. 334 and 336).

98 The decisions on applications No. 290/57 against Ireland and No. 867/60 against Norway contain the following statement: "...the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organization or group of individuals and only in so far as its application is alleged to constitute a violation of the Convention in regard to the applicant, person, organization or group in question; ..." (Yearbook of the European Convention on Human Rights, 1960 (The Hague), vol. 3, 1961, p. 221; Yearbook of the European Convention on Human Rights, 1961 (The Hague), vol. 4, 1962, p. 253).

99 Except, of course, in cases such as that referred to by the General Claims Commission in the Mariposa Development Company case, where the law in question would itself create a specific situation totally incompatible with the internationally required result.
This analysis also shows—as do logic and common sense—that the State, having failed to achieve the result required by an international obligation of this kind, cannot escape the charge of not having fulfilled its obligation by claiming that it did nevertheless adopt measures by which it hoped to achieve the result required of it. What matters is that the result required by the obligation should in fact be achieved; if it is not, a breach has been committed, whatever measures are taken by the State. We have seen for example that article 2, paragraph 1, of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination provides that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. 100

Now it is obvious that, if the administrative authorities of a State party to the Convention in fact commit acts of racial discrimination, the State will not escape the consequence of being charged with a breach of the Convention by taking refuge behind some law which it may have enacted prohibiting such acts. 101 It is not sufficient to enact a law because, if a practice contrary to the obligation is continued in, the result intended by the obligation is not achieved in concreto.

It should also be made clear that, in cases in which an international obligation leaves the State only an initial freedom of choice of the means to be used to achieve the result required by that obligation, if, through the active or omission conduct it adopts in taking one of the courses open to it, the State arrives at a situation incompatible with the result required by its international obligation, it thus forfeits the chance to fulfill its obligation. It is not allowed to remedy the effects of its conduct ex post facto or to change the situation it has created by recourse to other means. This limitation on the discretion given to the State for the fulfilment of its obligation may be expressly imposed by the text of the instrument establishing the obligation, but it is more often implicit in the very nature of the result required by the international obligation, which is such that the mere creation of a situation incompatible with that result makes it definitively unattainable.

Thus, for example, article 22, paragraph 2 of the Vienna Convention on Diplomatic Relations requires the receiving State "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity". 102 As to international obligations of customary origin relating to the status of foreigners in general, let us also consider the case of the obligation requiring the State to establish a minimum security system to protect foreigners against attacks due, for example, to an outbreak of xenophobia. There can be no doubt that both these obligations are confined to prescribing for the State the result to be achieved, and that the State has some initial freedom in choosing the means of establishing the required system of protection. However, when, irrespective of the means chosen for providing protection, its manifest inadequacy leads to an invasion of the premises of an embassy, the lynching of a foreigner or the massacre of nationals of a particular country by a mob, it can only be concluded that the State has failed irremediably in its task and that there is no further possibility of using other means to restore a situation compatible ab initio with the result required by the international obligation. It must then be recognized that the result to be achieved by the State has not been and will not be achieved, and that the State has thus committed a breach of its obligation.

To sum up, for the purposes of establishing the fulfilment or breach of an international obligation "of result", characterized by the initial freedom of choice of the State as to the means to be employed to obtain the required result, what counts is whether that result has or has not in fact been achieved by the State. The fact that the State has not taken the measure which theoretically would have seemed most likely to lead to the result required by the obligation is not in itself sufficient to warrant the conclusion that the State has breached the obligation. The same conclusion applies where the State has adopted a measure which is likely in principle to obstruct the achievement of the result required by the obligation, but which does not in itself create a specific situation incompatible with that result. On the other hand, where it is found that the situation created in concreto by the State, by taking one or other of the courses between which it had the initial choice, is incompatible with the result required by the obligation, the State will obviously not be able to claim that it has discharged its obligation through, for example, the adoption of measures by which it hoped to achieve the result required by the international obligation.

Obligations which leave the State only an initial freedom of choice as to the means of achieving the result they require of it form only a smallish group, however, within the general category of international obligations "of result". As has been seen, there are many international obligations "of result" which give the State a degree of discretion with regard to their fulfilment that goes beyond a mere initial freedom of choice. So long as the required result has not become finally unattainable for the sole reason that the initial course of conduct adopted by the State failed to achieve it, international law does not gen-

100 See paragraph (6) above.
101 It should also be noted that, even where an obligation specifically requires the State to enact a law with a certain content, the obligation is usually accompanied by an obligation to apply that law. The fact of having enacted the prescribed law then constitutes fulfilment of the first obligation, but any failure to apply that law in practice constitutes a breach of the second obligation. See, in this connexion, the position stated at the end of the passage from the report of the Ghana-Portugal Inquiry Commission cited above (paragraph (20) of the commentary to article 20) regarding violation of ILO Convention No. 105 concerning the Abolition of Forced Labour.
102 For reference, see foot-note 40 above.
erally speaking, deprive a State whose organ has created a situation incompatible with the result required by an international obligation of the possibility of still achieving the required result through a new course of conduct by State organs which would obliterate that situation and replace it by another, compatible ab initio with that result. In this case, the possibility of subsequent action open to the State is added to, and supplements, its initial freedom of choice; and the latitude left to the State with regard to the fulfilment of its obligation is defined in its entirety. The possibility of remedying a posteriori the consequences of an initial course of conduct incompatible with the result required by an international obligation may also exist even in cases where, originally, the particular nature of the result to be achieved did not permit of a real choice between different means of action, since the result could at first be achieved in only one way.

(28) In regard to the cases described, however, one reservation must be made concerning the determination of the conditions for recognizing the existence of a breach of an international obligation. It may well be that, at the international level, there is nothing to prevent the State from still fulfilling its obligation by remedying ex post facto, by a new course of conduct, a situation which is incompatible with the internationally required result and which was created by its initial conduct. But it is also possible that the State may encounter in its own system of internal law an obstacle to the use of this opportunity. This applies in particular where the situation incompatible with the internationally required result has been created by means whose effects cannot be cancelled. For example, if the situation has been created by the enactment and effective application of a law, there will in most cases be no hope of finding in the internal legal system any means of changing this situation retroactively and thus still achieving the result to which those measures ran counter. It would be otherwise only if the machinery of the State included a judicial authority empowered to declare legislative acts null and void and to cancel their effects retroactively. The obligation imposed by some treaties to respect the property of foreigners is a typical example of an obligation which requires the State to achieve a certain result but leaves it complete latitude as to the means of doing so. But if the State passes a law providing for uncompensated expropriation of certain classes of foreigners or certain kinds of property belonging to them, and applies that law to the property of individuals covered by such a treaty, it cannot reasonably be expected that the obligation imposed by the treaty can still be fulfilled since it is hard to see what organs or authorities would have the power to fulfill it. The same conclusion applies in cases where the action that has created a situation incompatible with the required result takes the form of a measure by the executive power which can be neither rescinded nor amended by another State organ, or that of a judicial decision against which there is no appeal or again that of an administrative or judicial measure which has merely correctly applied a mandatory legislative provision.

(29) It should be made clear that the impossibility of rectifying the adverse consequences of the initial course of conduct by a new course of conduct which cancels them may be due, not only to a real lack of means to that end under the internal legal system, but also to the fact that the availability of such means is a pure formality because, at least in the case in point, they hold out no real prospect of achieving the required result. In all these cases, the impediment which makes it impossible to remedy the situation created by the action or omission of the first organ to intervene thus has the same paralysing effects as the impediment which arises when the initial action or omission of the State has made it impossible de facto to achieve the result required by the international obligation. In both these cases, the State has no real means of cancelling the consequences of its initial conduct. Hence it can only be concluded that the result which the international obligation required the State to achieve has not been and will not be achieved. The existence of a breach of the obligation will thus inevitably be established.

(30) Thus, if the situation created by the initial conduct of an organ of the State and incompatible with the result required by an international obligation is not in itself to constitute a complete and final breach of that obligation, three conditions must be met: (a) the obligation itself must in principle leave the State the necessary latitude to pursue the achievement of the required result, even after a situation incompatible with that result has been created by an action or omission of one of its organs; (b) the required result must not have become finally unattainable in fact by reason of that action or omission; and (c) the internal legal system must not place any formal or real obstacles in the way of subsequent efforts to fulfill the obligation in spite of everything. If all these conditions are satisfied, it clearly cannot yet be concluded that the State has finally failed to achieve the result which can legitimately be expected of it. The fact that the organ which first intervened in the case created, by its action or omission, a situation incompatible with the required result is only a beginning or adumbration of a breach of the international obligation, since the State has not yet exhausted all its available means of action to achieve that result. Moreover, even this adumbration will come to nothing if the State can seize the opportunity still open to it fully to achieve the required result by new conduct which eliminates entirely and ab initio the incompatible situation created by its previous conduct.

(31) Many examples could be given here. To mention only the necessary minimum, let us suppose that, contrary to the requirements of the international conventions on human rights, the police authorities of a State deny certain persons freedom to reside in the place of their choice, freedom of association, freedom to profess their religion, or the like. In each of these cases, the State can still, if it wishes, create
a situation compatible with the internationally required result, provided that the country has a higher administrative authority or an administrative or civil court, which is competent and materially able to revoke the prohibition of residence or association or to remove the obstacles to the practice of the chosen religion. Or again, let us suppose that, contrary to a well-established international customary obligation, a court acquits persons known to have committed a crime against the representative of a foreign Government or against some foreigner. The State will still be able to fulfil its obligations, provided that there is a higher authority able to reverse the decision impugned and thus create a situation compatible in every respect with the internationally required result.

(32) In this case, the initial conduct of a State organ which has created a situation incompatible with the internationally required result becomes a breach of the international obligation only if the State, despite the possibility open to it, refrains from correcting that situation or confirms it by further action. It will be on the grounds of this later action or omission that the existence of the breach will be finally established and the responsibility of the State automatically engaged. However, since the course of conduct first adopted will not have been cancelled but, on the contrary, completed by the State's subsequent conduct, the breach will finally be brought about by a "complex" act made up of all the successive actions or omissions of the State in the case in question.

(33) Lastly, as we have seen, there are international obligations "of result" characterized by an even greater degree of permissiveness as regards the latitude left to the State for their fulfilment. By reason of their nature, purpose and field of application, these obligations permit that, where the initial conduct of the State bound by the obligation has not only created a situation incompatible with the result required by the international obligation but has also made the attainment of that result materially impossible, the State may still have a last opportunity of discharging its international duties. It is allowed, as an exception, to produce an alternative result instead of that originally required—a result which is thus different from that aimed at by the obligation, but in a way equivalent to it. The conclusion as to the recognition of a breach of one of these obligations is self-evident. For example, a State cannot be charged with a final breach of the obligation to exercise vigilance to prevent unlawful attacks against the person and property of foreigners, or of the obligation to protect every person against arbitrary arrest or detention, merely because it has not been able to prevent the commission of such misdeeds. If the State is to be found guilty of such a breach, it must have failed to achieve not only the priority result but also the alternative result: that is to say, it must have failed to ensure that the victims of these misdeeds receive full and complete compensation for the injury sustained. It is this second failure which, added to the first, transforms it into a complete and final breach. And, as in the case previously considered, the breach is constituted by a "complex" act of the State.

(34) The conclusion which follows from the arguments advanced in paragraphs (27) to (33) above seems equally obvious. Where an international obligation permits a State whose initial conduct has led to a situation incompatible with the result required by the obligation to rectify the situation, either by achieving through new conduct the result originally required or by achieving an equivalent result in its place, a breach of the obligation finally occurs only if, in addition, the State has failed to take the subsequent opportunity of rectifying the incompatible situation created by its initial conduct.

(35) In the light of the foregoing considerations, there is, in the Commission's view, no doubt that, for the purpose of establishing how an international obligation which can be characterized in general terms as an obligation "of result" is breached, what counts is the result actually achieved by the State as compared with the result required by the obligation. If the two results coincide, the obligation has been fulfilled; otherwise it must be concluded that the obligation has been breached. In other words, a comparison of the result achieved with the result which the State ought to have achieved is the only general and basic criterion for establishing whether an obligation "of result" has been breached. The existence of a breach of an obligation of this kind is thus determined in international law in a completely different way from that followed in the case of an obligation "of conduct" or "of means" where, as indicated in connexion with article 20, the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State. Having reached this conclusion, the Commission also agreed upon the need to draw a distinction, in formulating the relevant rule, between, on the one hand, the application of such a general criterion in the case of

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103 The concept of a "complex" act of the State has been illustrated by the Commission in article 18, paragraph 5, of its draft articles and in paragraph (23) of the commentary thereto (Yearbook... 1976, vol. II (Part Two), pp. 74 and 94, document A/31/10, chap. III, sect. B, subsect. 2).

104 In such a case, "compensation" is merely an alternative result provided for by the "primary" obligation in question. Such compensation has nothing to do with the "reparation" of an internationally wrongful act. On the contrary, its specific purpose is to avert any breach of the primary obligation and the commission of an internationally wrongful act.
tional obligations characterized by the fact that they leave the State initial freedom of choice of the means to be used to achieve the internationally required result and, on the other, the application of the same criterion in the case of international obligations permitting the State to rectify a situation which is incompatible with the required result and which has been created by an initial course of conduct, by means of subsequent conduct achieving that result or an equivalent result.

(36) For the first of these two cases, paragraph 1 of the article provides that 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 within the latitude allowed it, the State does not achieve the result required by that obligation. For the second case, paragraph 2 of the article provides that, 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 still be achieved by subsequent conduct of the State, there is a breach of the obligation only if the new conduct of the State does not achieve the required result either.

(37) The result which the State has to achieve in the case of paragraph 1 as well as in that of paragraph 2 must, of course, be the “specified result” required of the State by the international obligation or, where this is allowed, the “equivalent result” provided for by that obligation and nothing else. Hence, the precise content of the “primary” obligation in question must always be kept in mind.

**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.

**Commentary**

(1) Article 21 of the draft states the basic rules defining the conditions in which it may be considered that a breach of an international obligation “of result” has been committed, whether in cases where the State only has freedom of choice of means at the outset or in cases where the State, having created by its conduct a situation incompatible with the result required by the obligation, has the faculty to remedy that situation and still fulfil its obligation by subsequent conduct. Article 22 is concerned to establish, in the last-mentioned cases, the specific conditions of a breach of obligations “of result” falling within a given category, namely, obligations which are designed to protect individuals, natural or juridical persons, and which, at the international level, formulate certain requirements and establish certain guarantees concerning the treatment to be accorded by States, at the internal level, to the persons in question and to their property. For the purpose of determining whether a breach of an obligation in this category has been committed, a further condition is then added to the conditions generally required for a breach of the other international obligations “of result”.

(2) To be able to conclude that there is a breach of an international obligation “of result” concerning the treatment of individuals, and particularly foreign individuals, it is first necessary to establish that the individuals who consider themselves injured through being placed in a situation incompatible with the internationally required result have not succeeded, even after exhausting all the remedies available to them at the internal level, in getting the situation duly rectified; for it is only if these remedies fail that the result sought by the international obligation will become definitively unattainable by reason of the act of the State. If, for various reasons, individuals who should and could set the necessary machinery in motion neglect to do so, the State cannot normally be blamed for having failed to take the initiative to obliterate the concrete situation created by initial conduct attributable to it and militating against the achievement of the internationally required result—provided, of course, that the State itself is not responsible for the inaction of the individuals.

(3) If the individuals concerned take no action, the situation created by the initial conduct of the State running counter to the internationally desired result cannot be rectified by subsequent action of the State capable of replacing that situation by one in conformity with the result required by the obligation. However, the fact that there has been no corrective action cannot, of course, be attributed to the State, but only to lack of the required initiative on the part of those on whom it was incumbent to take it. The case here is quite different from that in which, despite the necessary initiative having been taken by the individuals concerned to obtain redress, the situation created by the initial conduct is confirmed by a new course of conduct of the State, which is likewise incompatible with the internationally required result. Thus, in the case of the international obligations considered here, the initiative of the individuals concerned appears to be a prior and necessary condition which must have been fulfilled before it can be concluded that there has been a breach of its obligation by the State. Failure to fulfil this condition therefore has the effect of excluding the wrongfulness of the failure to achieve the internationally required result. In this case, therefore, no international responsibility can arise for the State. That is what is meant by stating the condition known as the “exhaustion of local remedies”.

*/* Yearbook... 1977, vol. II (Part Two), pp. 30-50.
(4) This additional condition, which must be satisfied before a breach of an international obligation "of result" concerning the treatment accorded to individuals can be established, is justified, in the final analysis, by the object and the very nature of such an obligation and by the characterization it receives by reason of the fact that individuals are the direct beneficiaries of its provisions. For where the result the State is required to achieve is prescribed mainly in the interests of individuals and affects their situation in the internal legal order of the State on which the obligation is laid, it is normal that the collaboration of the persons concerned should be enlisted to ensure that the State complies with the provisions established in their interests by the international obligation. It is only natural that, in the event of difficulties, it should be incumbent on such persons to seek State action to rectify any effects of an initial action or omission by an organ of the State machinery which is attributable to the State and runs counter to the achievement of the result required by the international obligation. Conversely, where the result to be achieved is required in the direct interest of another State, it can only be the State on which the obligation rests, if it still has the means to remedy, through internal action, the effects of initial conduct incompatible with its result, which can be required to initiate the action by which it can still fulfil its obligation. It would be unreasonable to require another State, a subject of international law, to initiate such action at the level of the internal legal order of the State.

(a) Exhaustion of local remedies, a principle of general international law

(5) The principle establishing the condition known as the "exhaustion of local remedies" is expressly stated in a growing number of international conventions: for example, in establishment and other treaties which prescribe the treatment to be accorded to natural or juridical persons of one of the contracting States in the territory of the other; in international treaties having as their general or particular object to guarantee all individuals, without distinction as to nationality, the enjoyment of certain basic rights of the human person; in treaties regulating recourse by States to international arbitral or judicial tribunals following offences committed in one of the above-mentioned fields, etc. However, the confirmation and development of this principle in treaty law should not obscure the fact that the principle of the exhaustion of local remedies has its roots in international custom, and that it was recognized by custom long before being formulated in written instruments of a conventional nature. It is, first and foremost, a general principle of unwritten law.

(6) As has just been said, the principle of the exhaustion of local remedies is really one of those which command recognition as the logical consequence of the nature of international obligations whose purpose and specific object is the protection of individuals. It is true that many conventions state and confirm the principle and specify its scope and effect as regards the obligations for which they provide. The principle may thus be extended or restricted, and its application to certain treaty obligations may even be excluded. But treaty law does all this precisely on the assumption that the requirement of the exhaustion of local remedies existed previously, as a principle of general application, albeit subject to derogation, and as a principle which has its roots in custom or, better still, in the very logic of the principle of fulfilment of a certain type of international obligation and is therefore certainly not of purely conventional origin. There are even some international treaties, multilateral and bilateral, which expressly refer to the principle of the exhaustion of local remedies as a general principle of international law. Article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms, for example, refers to the exhaustion of local remedies "according to the generally recognised rules of international law". So far as bilateral instruments are concerned, article V of the General Claims Convention between the United States and Mexico, of 8 September 1923, speaks of "the general principle of international law that the legal remedies must be exhausted".

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

International arbitration case-law clearly follows this line. In his award in the British Property in Spanish Morocco case, rendered in 1925, Max Huber, the arbitrator, held the requirement of the exhaustion of local remedies to be "a recognized principle of international law", in its
decisions of 1930 in the Mexican Union Railway case, the British/Mexican Claims Commission stated that the principle in question was "one of the recognized rules of international law"; in its award of 1956 in the Ambatielos Claim case the Greece/United Kingdom Commission of Arbitration described the requirement of the full utilization of local remedies as a rule "well established in international law"; and, in its decision of 1958, the tribunal set up by Switzerland and the Federal Republic of Germany for the Agreement on German External Debts affirmed that: "There can be no doubt that the rule of exhaustion of local remedies ... is ... a generally accepted rule of international law". International jurisprudence is thus unanimous in recognizing the existence of the principle of the exhaustion of local remedies in general international law, independently of any special provisions embodied in treaty instruments. At the same time, it is a fact that all the specific cases considered by international courts in which they indicated that they recognized this principle are cases involving the breach or alleged breach of international obligations concerning the treatment accorded by a State in its territory to aliens or their property.

(8) There are just as many statements of position on the matter to be found in State practice, and States are virtually unanimous in recognizing the general character of the principle of the exhaustion of local remedies. This is clear from an examination of the opinions expressed by representatives of Governments in the course of codification work concerning the responsibility of States for damage caused in their territory to the person or property of aliens. It also emerges from the convictions expressed by Governments in disputes involving the breach of an international obligation relating to the treatment of nationals of another State. During the attempt at codification in 1930, no Government expressed the slightest doubt that the rule which it was sought to codify was first and foremost a rule of general international law. The scope of the rule had been determined in advance by the limits of the subject-matter of the Codification Conference. The replies of Governments to the request for information addressed to them by the Preparatory Committee, the statements by delegations in the Third Committee of the Conference and the proposals made during its deliberations, and the text of article 4, paragraph 1, approved on first reading at the close of the discussions, were all based on a fundamental conviction that the principle of the exhaustion of local remedies existed as a rule of general international law. The limitations placed on the principle in the text adopted, as well as those proposed by certain representatives, were grounded in the same conviction.

(9) With regard to the positions taken by Governments in the many cases in which the problem of the non-exhaustion of local remedies arose in a particular dispute, the most interesting feature is the convergence of views, not only of respondent Governments but also of claimant Governments, concerning recognition of the principle in question as a general rule of international law. The inevitable divergences related only to the problem of the applicability of the principle in the particular circumstances of a specific case. In any event, it was never maintained that the requirement of the prior exhaustion of local remedies could be invoked only if specifically provided for in a convention. To mention only the most explicit statements before the Permanent Court of International Justice or the International Court of Justice, in the case concerning the Administration of the Prince von Pless, the Polish Government expressed the view, which was never challenged by the German Government, that it regarded the requirement of the exhaustion of local remedies as "a generally accepted principle of international relations"; in the Losing-er & Co. case, the Yugoslav Government referred to a "universally admitted rule" and the Swiss Government stated that it was not unaware of that "rule of international law"; in the Phosphates in Morocco case, the French Government affirmed that it was "a well-established rule of international law" and the Italian Government stated that it "did not intend to challenge the existence of that rule"; in the Panevezys-Saldutiskis Railway case, the Lithuanian Government maintained, without opposition from the Estonian Government, that "The rule of the exhaustion of local remedies is ... firmly established in the positive international law of our time"; in the Anglo-Iranian Oil Company case, the Iranian Government referred to the "prior exhaustion of local remedies" as a condition to be met "in accordance with general

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112 Ibid., vol. XII (Sales No. 63.V.3), pp. 118–119.
114 Point XII of the request for information addressed to Governments by the Preparatory Committee of the Conference reads as follows: "Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?". (League of Nations, op. cit., p. 136.)
115 For the replies of Governments, see ibid., p. 136 et seq., and Supplement to vol. III (C.75(c).M.69(a).1929 V), pp. 4 and 23.
116 Basis for Discussion No. 27, drafted by the Committee on the basis of these replies, is reproduced below in paragraph (18).
International law", and the British Government recognized that it was "in general a condition". In the Interhandel case, the United States invoked the "well-established principle of international law requiring the exhaustion of local remedies" and the Swiss Government replied that it in no way contested that assertion. Finally, in the case of the Aerial Incident of 27 July 1955, the Bulgarian Government emphasized the "incontestable" nature of the "rule of the prior exhaustion of local remedies", without being challenged on that point by the Governments of the United States and Israel. Similar positions were implicit in many other cases.

(10) The positions taken by Governments parties to disputes referred to other international tribunals are equally conclusive. For example, it is clear from the arbitral award in the Central Rhodope Forests case (merits) that the Bulgarian Government based its argument on "the well-known principle of international law of prior exhaustion of local judicial remedies" and that the Greek Government did not challenge the applicability of that principle to the case. There was one occasion when the existence of the rule as part of general international law was contested, and that was the initial challenge by the Finnish Government in the Finnish Vessels case, which was referred to the Council of the League of Nations in 1931. When the British Government reiterated that the rule was an undisputed principle of international law, however, the Helsinki Government accepted that view and agreed to refer to arbitration the question whether, in the case in point, local remedies had been exhausted.

(11) Significant positions have been taken by Governments on other occasions. A particularly interesting example is that taken by the Swiss Government during the 1967 debate in the Federal Assembly on approval of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States. Commenting on article 26 of the Convention, the Federal Council referred to the exhaustion of local remedies as a general principle of international law. Moreover, the practice of certain Governments, particularly the United States and Canadian Governments, of considering themselves as precluded from taking over claims by their nationals unless the latter have exhausted the local remedies, attests to their firm belief in the existence of the principle as one of general application.

(12) The character of the principle as one of general international law is also recognized by virtually all learned writers who have considered the question. With rare exceptions, they cast no doubt on the view that exhaustion of local remedies is part of general international law. It is as a principle applicable under general international law that the condition of the exhaustion of local remedies was taken into consideration in the resolution adopted in 1956 by the Institute of International Law. And it was on the same understanding that the principle stating this condition was included in the codification drafts on the international responsibility of States for injury caused in their territory to the persons or property of aliens, adopted under the auspices of international organizations or by private learned associations.

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122 I.C.J. Pleadings, Anglo-Iranian Oil Company, pp. 291 (translation by the Secretariat) and 155.
123 Ibid., Interhandel, pp. 315 and 402.
125 In only one case has a Government expressed any doubts concerning the existence of the principle as a general rule; this was the Belgian Government, in the Borchgrave case (P.C.I.J., Series C, No. 83, p. 65). However, the Belgian Government later took a clearly positive attitude, in the case concerning the Electricity Company of Sofia (ibid., No. 88, p. 37) and in the case concerning the Barcelona Traction (I.C.J., Pleadings, Barcelona Trac- tion, Light and Power Company Limited (New application: 1962), vol. I, pp. 215 et seq.).
127 Ibid., p. 1482.
130 C. G. Ténékiédès, a significant position, see the Annuaire de droit international, 1934, vol. XIV (1934), pp. 514 et seq., but later changed his opinion ("Les jugements nationaux 'manifestement injustes' en visages comme sources de la responsabilité internationale des États").
131 Revue générale de droit international public (Paris), 3rd series, vol. XIII, No. 4 (July-August 1939), p. 376. W. Friedmann, in his article "Épuisement des voies de recours internes comme condition préalable de l'instance internationale", Revue de droit international et de législation comparée (Brussels, 3rd series, vol. XIV (1933)), pp. 514 et seq., denied the existence of the principle of exhaustion of local remedies in general international law, but this article now seems ou of date. J. H. W. Verzijl, in his "La question à l'Institut de International Law entitled "La râle de l'épuisement des recours internes" (Annuaire de l'Institut de droit international, 1954 (Basel), vol. 45-1, pp. 5 et seq. and in particular pp. 22-23) showed that the rule was a principle of general international law, but greatly restricted its scope. In his opinion, it would be justified only in the event of a denial of justice in the true sense. In other cases, the possibility open to the State of avoiding international responsibility by referring a foreigner who has suffered injury to its national courts can be explained only "on grounds of expediency". G. Strozzi has very recently expressed the view that, except in a few cases, the principle of exhaustion of local remedies derives only from treaties. The only value which he attributes to the principle, about which he expresses very restrictive ideas in general, is as a condition for the institution of proceedings before an international tribunal (Interventi statali e interessi privati nell'ordinamento internazionale: la funzione del previo esaurimento dei ricor- ri interni (Milan, Giuffre, 1977)).
132 See Annuaire de l'institut de droit international, 1956 (Basel), vol. 46, p. 364.
The principle is also included in drafts on the international responsibility of States for wrongful acts generally.\(^\text{135}\) (b) Relationship between the principle and the determination of the existence of a breach of an international obligation relating to the treatment of private individuals.

(13) As regards the explanation and justification of the principle of general international law establishing the requirement of the exhaustion of local remedies, there is no clearly dominant opinion to be found among the authors of works on international law. Those who have dealt with this subject have frequently taken different viewpoints in considering and expounding the significance of the principle. Differences of opinion have accordingly emerged, in particular between those who regard the principle in question simply as a "practical" rule or a purely procedural one,\(^\text{135}\) relating to the implementation (mise en œuvre) of international responsibility, and those who consider that the main proposition of the principle expresses a "substantive rule" concerning the genesis of international responsibility, but at the same time do not deny the procedural aspects as a logical corollary of the main proposition.\(^\text{136}\) Nor can it be overlooked that there is a third school of thought, according to which the rule concerns the origin of responsibility in cases where the breach of the international obligation derives exclusively from the action of judicial organs which have failed in their duty to provide a private individual with the internationally required judicial protection against injuries sustained in breach of purely internal law. In other cases, however, the rule only concerns the procedures for the implementation (mise en œuvre) of responsibility.\(^\text{137}\) To speak of schools of thought is scarcely appropriate, since the arguments advanced for or against a...
particular thesis vary so greatly from one author to another that writers sometimes arrive at similar conclusions from virtually opposite directions. It is mainly these theoretical differences which account for the inconsistent results reached on this subject by the Institute of International Law in 1927, 1954 and 1956. \(^{138}\) The same differences are reflected in the codification drafts on the international responsibility of States prepared by jurists and learned organizations. \(^{139}\)

(14) A careful examination shows these differences of learned opinion to be of theoretical rather than practical interest. Above all, they are more apparent than real. Furthermore, they are attributable in some cases to the fact that the question has been approached from a narrow viewpoint, or that the specific framework within which the problem has been considered has suggested conclusions which would probably not have been reached if the analysis had been carried out in a broader context. For no one denies that the principle of recourse to local remedies by private individuals who consider themselves injured by measures or decisions not in conformity with the treatment which international law requires them to be accorded makes such recourse, in the last resort, a condition for the implementation (mise en œuvre) of responsibility. That is so whether such implementation takes the form of the submission of a claim through diplomatic channels or the lodging of an appeal to an international judicial or arbitral body. It is thus quite clear that the principle has a real effect on the possibility of recourse to the procedures for implementation of responsibility. However, this does not warrant the conclusion that the principle itself is merely a "rule of practice" or a "rule of procedure", as some maintain, even though they disagree as to whether this "rule" should apply to diplomatic protection in general or only to the procedure for instituting proceedings before an international tribunal. Before having, as it does, obvious consequences in regard to the procedure for claims, the principle of the exhaustion of local remedies necessarily operates at the level of the actual mechanism of fulfillment of an international obligation and, consequently, at the level of determination of the existence of a breach of an international obligation.

(15) It should be recalled that the fact of establishing that a State has committed, for example, a breach of an obligation laid on it by a treaty to accord a certain treatment to a national of another State, and has thus infringed the right of the other State that its national shall be accorded the treatment provided for in the treaty, is tantamount to saying that the first State has incurred, if all conditions for this are satisfied, an international responsibility towards the second State. And generation of an international responsibility is equivalent, in the example we have taken, to the creation of a new right of the injured State: the right to reparation for infringement of the right accorded to it by the treaty. But it would be difficult to conceive that this new right, attributed to the injured State by the international legal order, should depend on the result of proceedings instituted by a private individual at the internal level, which may lead to the restoration of the right of that individual, but not to the restoration of a right which belongs to the State at the international level and has been infringed at that level. If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred. At this moment, therefore, the international responsibility, which, in our case, is reflected precisely in the right of the State to reparation of the injury suffered by it, has not yet arisen. In other words, the finding that the right of the State to demand reparation exists only after the final rejection of the claims of the private individuals concerned inevitably leads to the conclusion that the breach of the international concern inevitably leads to the conclusion that the breach of the international obligation has not been completed before those remedies are exhausted, that is to say, before the negative effects of the new conduct of the State in regard to those remedies have been added to those of the initial conduct adopted by the State in the case in point, thereby rendering the

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\(^{138}\) Annuaire de l’Institut de droit international. 1927 (Brussels), vol. 33-I, pp. 455 et seq. and vol. 33-III, pp. 81 et seq.; Annuaire de l’Institut de droit international. 1954 (Basel), vol. 45-I, pp. 5 et seq.; Annuaire de l’Institut de droit international, 1956 (Basel), vol. 46, pp. 1 et seq. and 265 et seq.

\(^{139}\) Articles 6, 7 and 8 of the draft prepared in 1929 by the Harvard Law School, under the influence of E. M. Borchard, present the exhaustion of local remedies very clearly as a requirement for the genesis of State responsibility (Yearbook... 1929, vol. II p. 229, document A/CN.4/96, annex 9). The same can be said of article IX of the draft prepared by G. O. Murdock and approved in 1965 by the Inter-American Juridical Committee as reflecting the views of the United States (Yearbook... 1969, vol. II, p. 154, document A/CN.4/217 and Add.l, annex XV).

result required by the international obligation definitively impossible of achievement.

(16) In view of the uncertainty which prevails in legal doctrine, it seems evident that one should turn rather to international jurisprudence and State practice in order to determine how the principle of the "exhaustion of local remedies" should be understood, justified and interpreted as regards both its precise scope and that of its corollaries. And in the light of the foregoing considerations, it will not be surprising to find that an examination of State practice and international jurisprudence shows, on the whole, that the principle that the exhaustion of local remedies is a prerequisite operates, first, at the level of the determination of the fulfilment or breach of international obligations relating to the treatment accorded by the State to private individuals and, hence, at the level of the generation of international responsibility, even before it has any effects at the level of implementation (mise en œuvre) of this responsibility.

(17) With regard to the positions taken by States, it seems desirable first to consider the general opinions they have expressed in the abstract, without relation to the specific disputes in which these States have been involved. The question whether the exhaustion of local remedies is, if certain other conditions exist, a sine qua non for the generation of international responsibility or simply for the implementation of this responsibility through the diplomatic channel or by legal proceedings was considered at the Conference for the Codification of International Law (The Hague, 1930). The terms of the request for information addressed to Governments by the Preparatory Committee of the Conference were not very clear on this point. The choice of the wording seems to reflect a concern not to prejudice the question. It is not surprising, therefore, that the replies from Governments are not always formulated in such a way as to give a clear idea of their opinion on the question. It is evident, however, that Austria, Belgium, Bulgaria, Czechoslovakia, Germany and Poland considered that international responsibility did not come into being until after the unsuccessful exhaustion of local remedies. On the other hand, Great Britain seems to have expressed the opinion that only the enforcement of an already established responsibility was subject to the exhaustion of local remedies.

(18) In the light of the replies, the Preparatory Committee of the Conference formulated the following basis for discussion:

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

This text seems to have been drafted to provoke discussion, and it certainly did. During the discussion at the Conference, some representatives, namely, those of Egypt, Spain, Mexico, Colombia and Romania, expressed the opinion that the exhaustion of local remedies was a prerequisite for the generation of responsibility. Other, though fewer, representatives, like those of Italy and Germany, expressed a contrary opinion without, however, taking up such a clear and well-substantiated position. The representatives of the United States and Norway were of the opinion that the exhaustion of local remedies was sometimes a prerequisite for responsibility and sometimes a prerequisite for its implementation.

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

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

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141 Basis No. 27 (ibid., p. 139).
142 The discussion on this basis for discussion is to be found in League of Nations, Acts of the Conference ... (op. cit.), pp. 63 et seq. and 162 et seq.
143 Ibid., pp. 64-65, 72, 76 and 78. It is particularly interesting to read the views on this subject expressed by the delegate of Romania, whose statement of position was distinguished by the clarity and precision of the ideas expressed and language used.
144 The responsibility of the State arises from the disregard of an international obligation. It is therefore proportionate or subordinate to the measure of the non-fulfilment of that obligation. So long, however, as some organ of the State is in a position to fulfil the obligation, its non-fulfilment is not proved. Accordingly, the condition for the coming into being of such responsibility—namely, the evidence of non-fulfilment—does not exist...
145 Consequently, it is quite correct to say that responsibility itself comes into being only after it has become patent that there has been no fulfilment—i.e. that the international requirement of obligation has not been met...
146 Ibid., pp. 74-75 and 79-80. It should be noted that, in its reply to the request for information, Germany supported the view that responsibility does not come into being until after all local remedies have been exhausted.
147 Ibid., pp. 73-74 and 76.
148 Ibid., p. 236. Several delegations acquiesced in that solution in the belief that the problem was of no major practical consequence. See the statements by the representatives of Greece (ibid., pp. 66-67), Belgium (p. 69), Great Britain (pp. 69-71), United States (pp. 73-74), Mexico (pp. 72-73), Colombia (p. 78), and Germany (pp. 79-80). The participants in the Conference do not seem to have weighed all the consequences which the adoption of one
The formula thus finally adopted was deliberately ambiguous and, indeed, proponents of each of the theories disputed in the discussion subsequently relied on it in support of their own point of view. Consequently, no clear and final conclusions can be drawn from the work of the 1930 Codification Conference on this point. That does not prevent us from noting, however, that the majority of representatives of Governments who expressed their views on the subject considered that the exhaustion of local remedies, in cases where that is provided for, amounts to fulfillment of a condition for the breach of an international obligation to occur and thus for international responsibility to come into being, not merely a condition justifying the initiation of procedure for the implementation of an already existing responsibility.

(20) With regard to the more significant positions taken up on other occasions by State organs or international tribunals, particularly in the case of disputes over concrete cases, a preliminary remark is called for. Only statements flatly denying that the principle of exhaustion of local remedies can affect the formation of international responsibility would lend real support to the opinion that this principle is of a "purely practical and procedural" character. It would, therefore, be wrong to regard as evidence of the validity of this opinion the fact that, in various cases, international courts, in their decisions, and Governments, in the positions they have adopted, have relied on the exhaustion of local remedies as a condition for the exercise of diplomatic protection of certain persons or of the faculty to submit claims on their behalf to an international tribunal. It must be remembered that the aim of the State invoking failure to employ local remedies against a claim asserted against it before an international court is mainly to block consideration of the substance of the claim by a plea of inadmissibility. And conversely, the aim of the State submitting the claim, when it contests the existence of such failure or its effect in the case in point, is precisely to remove the preliminary obstacle thus placed in the way of consideration of the substance of its claim. Thus both States take into consideration the principle of the exhaustion of local remedies from the point of view of its effect, not on the formation of responsibility, but on the admissibility of the claim. The distinction now generally made between the procedure relating to preliminary objections and that relating to substance also means that the international court called on to pronounce on the question of the possible effect of the exhaustion of local remedies on the generation of the international responsibility of the State. For example, decision No. 21 of February 1930 of the British-Mexican Claims Commission, set up by the Convention of 19 November 1926, in the case of the Mexican Union Railway, contains the statement that:... the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question. 150

(21) All that can be taken into account, therefore, in support of the argument that the exhaustion of local remedies is only a condition for the exercise of diplomatic and legal protection, are statements of position clearly to this effect. Now, it must be said that such statements are very hard to find and, in view of the circumstances in which they are encountered, far less conclusive than those supporting the opposite thesis. On the other hand, there are statements by Governments and international tribunals stating explicitly that the exhaustion of local remedies is a condition for the generation of international responsibility on occasions when they were actually faced with the question of the possible effect of the exhaustion of local remedies on the generation of the international responsibility of the State. For example, decision No. 21 of February 1930 of the British-Mexican Claims Commission, set up by the Convention of 19 November 1926, in the case of the Mexican Union Railway, contains the statement that:... the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question. 150

(22) On the occasion of the proceedings instituted by Germany before the Permanent Court of International Justice in the case concerning the Administration of the Prince von Pless, the Polish Government raised a preliminary objection in which, after opposing the action of the German Government, which amounted to bringing a claim "to an international

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Footnote 148 continued.

point of view rather than another might have on such matters as the determination of the moment at which an internationally wrongful act is committed and the duration of the commission of the act. The practical implications of the reply to these questions may be decisive as regards such important points as knowing whether the dispute arising out of a particular act is or is not one which an international tribunal is competent to judge, or knowing from what moment any damage caused should be taken into consideration for the purposes of assessing the amount of reparation.

149 It is moreover a fact that, in many cases, the condition of prior exhaustion of local remedies is simultaneously invoked at two levels: directly, as a condition for the existence of international responsibility and indirectly only as a condition for the legitimate assertion of an international claim. This is the case every time that the internationally wrongful act complained of in the claim is a denial of justice to a private person who has previously suffered only injustice in breach of internal law. The use of local remedies is thus presented both as the condition for the existence of a denial of justice—a clear example of an internationally wrongful act—and as the condition for the submission of a claim to international responsibility generated by this wrongful act. Obviously, the second aspect presupposes the first, from which it logically derives.

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

(23) Interpretation of the arbitral award in the Finnish Vessels case is less easy. The British Government, in its memorandum to the Council of the League of Nations, had invoked the principle of the exhaustion of local remedies for the purpose of blocking the submission by the Finnish Government of the diplomatic protest it had made to the British Government. Invocation of the principle for that purpose in no way excluded the possibility of invoking it for other purposes also, particularly that of challenging the existence, in a specific case, of a completed breach of an international obligation and thus of international responsibility already established against the respondent State. The Finnish Government, on the other hand, had questioned the very existence of the principle which Great Britain regarded as unchallenged. As a result of the discussion before the Council, the parties submitted the following concrete question to arbitration: "Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?" 152

(24) This was the question that the Arbitrator, A. Bagge, had to decide, and he began by noting that the Finnish Government did not claim that the breach of international law alleged by it was represented by the rejection by the British courts of the claim by the Finnish shipowners, but by the "initial breach of international law" 153 constituted, in its view, by the seizure and use without payment of the vessels belonging to them. Having said this, the Arbitrator concentrated on determining what points of law and fact should be submitted by the claimants to the municipal courts in a case of that kind. He commented that, where "an initial breach of international law" was alleged, the sole raison d'être of the principle of the exhaustion of local remedies was to enable the municipal courts, up to the last competent instance, to inquire into and decide all questions of law and of fact alleged by the claimant State in international proceedings to prove that a breach had occurred. The purpose of this was to afford the respondent State the opportunity of doing justice "in their own, ordinary way". Without entering here into the substance of the question, we note first that, by the very fact of taking into consideration the possibility that the principle requiring the exhaustion of local remedies was applicable to cases where the claimant alleges an "initial breach" of international law, the Arbitrator seemed to be inclining towards the idea that the principle in question did not state a condition for the generation of responsibility, 154 but only a condition for recourse to a claims procedure. Nevertheless, immediately afterwards, the Arbitrator declared that he was aware of the fact that, in learned works, at the conferences of the Institut de Droit International and, especially at the 1930 Codification Conference, the proposition had been advanced:

that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for the international claim may be a failure of the local courts of law to fulfil the requirements of international law, or the basis is an initial breach of international law.

and he finally concluded that:

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contents of fact or propositions of law should be considered under the local remedies rule. 155

Arbitrator Bagge thus maintained a sort of neutrality between the two approaches to the requirement of the exhaustion of local remedies, since both led to the same conclusion on the point he had to decide. It would thus be quite arbitrary to regard his considerations as a clear, reasoned stand in favour of rejection of the theory that, in cases where the principle of the exhaustion of local remedies comes into play, such exhaustion is a condition for the genesis of international responsibility.

(25) The two theories as to the function attributed to the exhaustion of local remedies by the principle which states that condition came face to face in the Phosphates in Morocco case between Italy and France. In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision of the Mines Department dated

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and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the rights acquired by the Italian company Miniere e Fosfati. The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification". The question thus arose whether the internationally wrongful act of which the Italian Government was complaining could or could not be regarded as a "fact subsequent" to the critical date. The Italian Government contended that the breach of an international obligation initiated by the decision of 1925 only became a completed breach following certain acts subsequent to 1931, in particular a note of 28 January 1933 from the French Ministry for Foreign Affairs to the Italian Embassy and a letter of the same date sent by the same Ministry to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice which had followed the decision of the Department of Mines, against which the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress in accordance with the terms of article 8 of the dahir of 12 August 1913. The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means. On the basis of these facts, the Italian Government clearly opted for the thesis that an internationally wrongful act, though begun by initial State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have resorted without success to all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into being.

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

Here, therefore, the rule of the exhaustion of local remedies is no more than a rule of procedure. The international responsibility is already in being; but it cannot be enforced through the diplomatic channel or by recourse to an international tribunal or appeal to the Permanent Court of International Justice unless local remedies have first been exhausted.

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

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

(28) According to the Court, the decision taken in 1925 by the Department of Mines, against which there was in fact no legal or other redress, was, by that very fact, a definitive breach of the international obligation to grant Italian nationals full equality of treatment in respect of mining concessions. Consequently, the Court did not accept that the "unlawful international act" attributed to France by the Italian Government had culminated in an alleged "denial of justice" in the form of the French Government's note of 28 January 1933, which merely confirmed at the diplomatic level that there was no redress against the decision of 1925. Nor did it accept that the request by the individuals to the French Government, to make available to them extraordinary legal means not provided for by law, could be regarded as a "local remedy" within the meaning of the principle. Finally, the Court did not concede that the "unlawful international act", alleged by the Italian Government to have commenced in 1925, had been dependent upon the note of 1933 for its completion. This point of view although it necessarily leads to the rejection of the Italian application, does not constitute a rejection of the opinion put forward by the Italian Government as a general principle, concerning the effect of local remedies—where they are available on the
establishment of the definitive nature of a breach of an international obligation and, as a consequence, on the genesis of international responsibility.

(29) After the Phosphates in Morocco case, neither the Permanent Court of International Justice nor, subsequently, the International Court of Justice had any further occasion to pronounce on the question under discussion here. The other hand, the European Commission of Human Rights has several times had occasion to pronounce on the principle of exhaustion of local remedies. In the case-law of the European Commission, we find from time to time affirmations of the need to allow the State “an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done...”. Here, the Commission is obviously referring to the wrong done to the individual and is not claiming that such a wrong in itself constitutes a definitive breach of an international obligation. Such affirmations therefore form part of the series already considered which, while they illustrate the effect of failure to resort to local remedies on the admissibility of an international claim, are certainly not intended to deny the effect of such failure on the creation of international responsibility. Moreover, the justice of this observation is, if need be, further borne out by the Commission itself, which, in its decision of 10 June 1958 on Application No. 235/58, stated that: “...the responsibility of a State under the Human Rights Convention does not exist until, in conformity with Article 26, all domestic remedies have been used...” Although the above statement was made in regard to a particularly clear case of the application of the principle in question, it is couched in terms which obviously cover all possible cases of application of article 26 of the Convention, in which the rule requiring the exhaustion of local remedies is set out in the most general terms. There cannot, therefore, be the slightest doubt that this decision may be regarded as a general interpretation of the principle of the exhaustion of local remedies as essentially laying down a condition for the generation of the international responsibility of the State.

(30) Before concluding the analysis of the positions adopted by official representatives of States as well as by tribunals and other international courts on the point in question, it may be useful to note the views expressed in separate or dissenting opinions by judges of the International Court of Justice and its predecessor, the Permanent Court of International Justice. These opinions are all the more interesting because the Court itself did not take a direct and clear stand on the matter in the cases to which they are related. Some of the opinions can be interpreted in different ways. The separate opinion of Judge Tanaka in the case of the Barcelona Traction, Light and Power Company, Limited (second phase) stresses the idea that the local remedies rule possesses a procedural character in that it states a condition for the State to be able to espouse, before an international tribunal, the claim of the person it seeks to protect. But the fact that Judge Tanaka mentioned the procedural aspect which the principle in question assumes in relation to the exercise of diplomatic and judicial protection does not seem to indicate that he intended to exclude the substantive aspect which the principle assumes in relation to the genesis of international responsibility. Clear opinions, all to the effect that the principle of the exhaustion of local remedies lays down a condition for the generation of the international responsibility of the State, were expressed by three other judges, namely Judge Hudson in his dissenting opinion in the Panevezys-Saldutiskis Railway case, Judge Cordoba in his separate opin-

164 The Court cannot be regarded as having taken a position on the question in the course of its judgment of 21 March 1959 in the Interhandel case, after stating that the exhaustion of local remedies must have been disregarded in another State in violation of international law; generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law; it goes on to say: “Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress by its own means, within the framework of its own domestic legal system” (I.C.J. Reports 1959, p. 143). It is quite clear that the term “violation” used by the Court was intended to refer to the violation of the individual’s rights under internal law and not to a violation of the State’s rights under international law. The principle so succinctly stated by the Court is therefore perfectly compatible with the idea that a violation by a State of its international obligation, justifying an appeal to an international tribunal, is only completed upon the State’s refusal of redress, within the framework of its domestic legal system, for the injury caused by its initial conduct to the rights of an individual.


166 See para. (14) above.


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

169 See, for example, the dissenting opinion of Judge Armand-Ugon in the Interhandel case, in which it is stated that: “...the purpose of the local remedies rule is simply to allow the national tribunals in the first stage of the case to examine the international responsibility of the defendant State as presented in the Application; that examination would of course have to be made by a national court.” (I.C.J. Reports 1959, pp. 88-89.)

170 Judge Tanaka expressed himself as follows: “...there can be no doubt that the local remedies rule possesses a procedural character in that it requires the person who is to be protected by his government to exhaust local remedies which are available to him in the State concerned, before his government espouses the claim before an international tribunal.” (I.C.J. Reports 1970, p. 143.)

171 Judge Hudson wrote: “...it is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such a person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such person is a national. Until the available means of local redress have been exhausted, no international responsibility can arise.” (P.C.I.J. Series A/B, No. 76, p. 47.)
The obligation to make reparation which devolves on a State in consequence of an internationally wrongful act relates to reparation for the failure of the State to fulfill its own obligations towards another State. The reparation which may be requested and obtained by a State injured in its right to the fulfillment of international obligations concerning the treatment to be accorded to individuals who are its nationals is one thing; the reparation which one of those individuals, whose enjoyment of his rights has been impaired by the conduct of organs of a State acting in a manner contrary to the result required by an international obligation, may request and obtain from a national tribunal of that State, is another. Such reparations have different bases and are at different levels. Even if the amount of the reparation claimed by the State at the international level coincided materially with that of the reparation claimed by the individual at the national level, and even if the former was actually assessed on the basis of the latter, the difference in nature between the two reparations would still remain.

(32) Apart from these considerations of principle, the objection examined here obviously does not take account of the complex situation brought about for the State by the breach of an international obligation in cases where the requirement that local remedies be exhausted comes into play. When the individual injured by conduct of a State incompatible with the result required by an international obligation seeks a remedy by using and exhausting unsuccessfully the means of redress available to him under internal law, the breach of the international obligation is not constituted solely by the last stage in the process of its perpetration, any more than it is constituted solely by the first stage. It results from the whole series of successive acts of State conduct, from the first which sets it in motion to the last which completes it and renders it final; so that the injury suffered by the individual, which may eventually be proved as a criterion for assessing the amount of reparation which the State in its capacity as diplomatic or judicial protector may demand, is that caused to the individual by the aggregate of State conduct conflicting with the internationally required result. Even if the only basis adopted in fact was the injury caused by the original conduct, that would be because the subsequent conduct had added nothing to that injury, not because the process of commission of the internationally wrongful act had been completed with the first stage. Conversely, even if only the last act was considered as constituting the breach of the international obligation and, consequently, as being the source of international responsibility, there is no reason why its reparation which the State might claim for this breach should be established on the basis of the injury caused to the individual by the last act. In view of the criteria of justice and equity which normally govern the error of relying on the criteria used in specific cases to determine the amount of reparation due, to draw conclusions concerning determination of the act to be attributed to the State as a source of responsibility (Yearbook... 1975; vol. II, pp. 72-73, document A/10010/Rev.1, chap. II, sect. B, subsect. 2, art. 11, paras. 9-10 of the commentary).
ern the determination of the amount of reparation for internationally wrongful acts, it may be permissible to take as a basis for this purpose the injury caused by the first act, without excluding those cases in which it is only subsequent acts that are incompatible with the requirements of an international obligation, as when the internationally wrongful act attributed to the State is exclusively a denial of justice. In that case, an estimate has to be made of the extent to which the determination of the reparation due for the breach of an international obligation is independent of the determination of the “damage” and, especially, of the economic damage directly caused by the breach itself.

(33) Other objections do not seem well founded either. For example, there is the objection that the moment when the breach of an international obligation is completed and when, as a result, international responsibility is established necessarily coincides with the moment when the dispute between the States involved originates. Whatever concept of “international dispute” one may adopt, international practice clearly shows that legal disputes may well arise before the perpetration of an internationally wrongful act, and even without any such act occurring. To link the question of the genesis of the dispute with that of the existence of international responsibility already fully established, and then to draw from the fact that disputes arising before the exhaustion of local remedies the conclusion that such exhaustion has nothing to do with the generation of responsibility is an extremely hazardous procedure. Again, we cannot agree that the theory that the exhaustion of local remedies is a substantive condition for the generation of international responsibility is invalidated by the fact that international tribunals normally deal with that point when considering preliminary objections. That question of substance can be raised as preliminary objection is not an issue, especially as that now appears to be the prevailing opinion in the International Court of Justice itself. However, even for those who take a different view, the conclusion must be that the parties cannot invoke, and the Court cannot consider, failure to exhaust local remedies as a preliminary objection, and that such failure must be examined as a question of substance and nothing else.

(34) Finally, the objection that a purely “declaratory” judgment might be pronounced even before local remedies have been exhausted would seem to be based on a theoretical rather than a practical possibility, since it has never actually occurred. Moreover, while it is quite possible to imagine a purely declaratory judgment that seeks to establish, before any consideration of a breach and the resulting responsibility, the existence of an international obligation incumbent on a State and the context and scope of that obligation, it is also possible to imagine a judgment of that kind being pronounced for the purpose of establishing that an initial course of conduct adopted by a State towards a private person conflicts with the result required by the obligation incumbent upon it.

(35) Thus an examination of the assertions made concerning an alleged incompatibility between the—likewise alleged—conclusions some would draw from certain premises and the conclusions which follow from the inherent logic of the principles and from an analysis of the positions taken by Governments and international judges in no way warrants any change in the conclusions reached.

(c) Sphere of application of the principle

(36) As we saw above, the principle of the exhaustion of local remedies is a principle of general international law which has been affirmed in the law of nations concurrently with the development in that law of rules concerning the status of aliens. The question now arises whether general international law itself does not, today at any rate, make exceptions to the applicability of this principle to determination of the question whether international obligations concerning the treatment of foreign natural or juridical persons have been fulfilled or breached. Again, it may be asked whether the requirement of exhaustion of local remedies by the individuals concerned should not apply also to determination of the fulfilment or breach of international obligations concerning persons other than those for whom the principle has traditionally been affirmed, in particular, national natural or juridical persons. These questions are, of course, worth asking only in regard to general international law, for States can always avail themselves of the possibility of restricting or extending the scope of the principle by means of bilateral or even multilateral treaties.

(37) With regard to the first point, two different cases regularly raise the question whether the exhaustion of local remedies by the individuals concerned does or does not constitute a prior condition for a State to find that there has been a complete breach by another State of an international obligation concerning the treatment to be accorded to its nationals, and hence to be able to assert the international responsibility incurred by the other State. The first case is that in which an initial course of conduct by organs of the State has created a situation held to be incompatible with the result required by an international obligation and injurious to certain persons as nationals of a particular foreign country. It is a fact that, in a situation brought about by the conduct of a State organ which injures a person through his having the nationality of a State which is the object
of a particular discriminatory intention, the State of which that person is a national sometimes reacts by affirming the responsibility of the State in whose territory the act occurred, without waiting for the victim to apply to the local courts.177 Also pertinent to this subject is a sentence from Denmark's reply to the request for information made by the Preparatory Committee for the 1930 Codification Conference. In accepting the proposition that the right to invoke State responsibility under international law should be subject to the exhaustion by those concerned of the remedies available to them under the internal law of the State whose responsibility is alleged, the Danish Government adds: "It is understood, however, that the national authorities must not allow the matter to drag on unconscionably and there must be no obvious neglect of the foreigner's right because he is a foreigner or a national of some foreign State. However, it would be reading too much into this remark to ascribe to it an intention clearly to affirm the existence in general international law of an "exception" to the general condition of the exhaustion of local remedies. Like the attitude of some States in certain cases, it applies to a normal and reasonable application of the principle. In other words, it may be that, in certain specific cases where the injury due to the action or omission of a State organ occurred in a general atmosphere of hostility towards the nationals of some foreign country, the State of which the injured persons were nationals did not wait, before intervening, until those persons had had recourse to the local remedies. The reason for that, however, is that, in the specific cases in question, the State of nationality of the injured persons realized that the situation in which its nationals were placed was beyond remedy at the level of internal law. It was convinced that it was impossible in the circumstances to secure redress by effective local remedies of a situation created by the "illegal attitude of the other State." It would thus appear that there is no reason to make an exception to the normal application of the principle of the exhaustion of local remedies in this case, since this principle applies only, as we shall have occasion to show once more, to remedies which are "effective" and really available.

(38) The second of the two cases mentioned in the previous paragraph is that in which the injury to the rights of foreign individuals has been inflicted outside the territory of the State or to the detriment of persons either not resident in the State or not having any voluntary link with that State. The principle of the exhaustion of local remedies is, indeed, most often defined with reference to a situation injurious to foreigners which has arisen in the State's territory. Such situations are certainly the most common, and this explains the formulation of the definitions. It is open to question, however, whether this would warrant an immediate inference that the principle of the exhaustion of local remedies would not apply in the case of injury caused by a State to foreign individuals outside its territory. Neither State practice nor international judicial decisions provide any explicit statements of position concerning the applicability or non-applicability of the condition of the exhaustion of local remedies to cases in which injury to foreign individuals or to their property has been caused outside the territory of the State, for example, on the high seas.180 In the legal literature, some writers have rejected the view that the principle of the exhaustion of local remedies is applicable in cases of injury caused by State organs to aliens or their property outside the territory of that State.181 The codification drafts whose scope was not limited in advance to international responsibility for injury caused by the State in its own territory to foreign individuals or


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

179 It was difficult in these cases for the respondent State itself seriously to challenge the ineffectiveness of the available remedies. See Gaja, op. cit., p. 79, on the possibility of explaining the few cases that have occurred in practice otherwise than by recognizing the alleged exception.

180 In cases of the seizure of ships, especially private fishing vessels, on the high seas, the flag State has sometimes demanded immediate release of the vessel or compensation. That is what happened in the I'm Alone case between Canada and the United States, tried by a court of arbitration in 1933 (United Nations, Reports of International Arbitral Awards, vol. III (op. cit.), pp. 1609 et seq.). In other cases, however, the flag State has refrained from intervening immediately (see the cases cited by Law, op. cit., pp. 103 et seq., and by Gaja, op. cit., pp. 90 et seq.). Practice in regard to fishing captures seems to support the idea of the applicability of the principle of the exhaustion of local remedies (see Reuter, op. cit., pp. 161 et seq., and Gaja, op. cit., p. 91, note 17).

181 In cases of aircraft shot down over the high seas, compensation has often been claimed and obtained without prior exhaustion of local remedies but by amicable settlement. Moreover, the private character of the aircraft shot down was often open to question. Instances of injury to aliens in the territory of another State are sometimes illustrated by reference to the case of the Consolidated Mining and Smelting Company at Trail, British Columbia ("Trail Smelter case") (United States v. Canada; for the arbitration court's award, see United Nations, Reports of International Arbitral Awards, vol. III (op. cit.), pp. 1907 et seq.), in which the fumes from a foundry situated in Canada had caused damage in United States territory. However, the international obligation claimed to be breached was that of respect for the territory of another State rather than that of the treatment of individual aliens. Lastly, it should be remembered that, in many cases, non-application of the principle of the exhaustion of local remedies was due only to the absence of remedies really available to those concerned.
their property do not contain clauses excluding the application of the principle where the injury caused to such individuals was inflicted outside the territory of the State responsible for the offence.

(39) One criterion for determining whether the principle of the exhaustion of local remedies should or should not apply in cases of injury caused by a State to the person or property of foreign individuals outside its territory might be the availability or non-availability of effective remedies to the individuals concerned. It is, indeed, sometimes difficult for an injured alien to avail himself of such remedies when the damage to his property was inflicted outside the territory of the State which committed the injurious acts. In some of the decisions in specific cases, apparently based on the notion of non-applicability of the principle of the exhaustion of local remedies to cases of injury caused outside the territory of the State, the decisive factor seems really to have been the degree of effectiveness of the local remedies in the case in point and, in particular, the "availability" or otherwise of those remedies to the persons concerned. However, the question takes on a different aspect where local remedies exist and are genuinely available to those concerned. In such a situation, there seems in principle to be no reason why the State should be prevented from discharging its obligation by taking, upon the application by those concerned, the necessary steps to rectify the situation created by the initial conduct of its organs, solely on the ground that that initial conduct was adopted outside its frontiers. Even if the principle of the exhaustion of local remedies is regarded only as a purely "technical" rule, it is certainly open to question whether the location of the individual's property at the time when the damage was sustained should be decisive in determining whether or not his home State must wait until he has exhausted local remedies before being able to intervene with diplomatic protection.

(40) The Commission considered this question at length, and some members proposed that the words "within its jurisdiction" should be inserted in the text of article 22, after the words "an international obligation concerning the treatment to be accorded". Without imposing too rigid a limitation, the insertion of those words might have the effect of avoiding the application of the principle in cases where the State commits an act going beyond the limits of its territorial or other competence. Other members of the Commission, however, maintained that the adoption of the word "jurisdiction" might raise very difficult problems of interpretation. In the circumstances, the Commission preferred not to make the proposed insertion, at least for the time being, and to leave the problem of the applicability of the principle of the exhaustion of local remedies to cases of injury caused by a State to aliens outside its territory, and to similar cases, to be solved by State practice according to the best criteria available.

(41) Among such similar cases, specific mention should be made of that of injury caused to aliens not resident in the territory of the State causing the injury. Here, again, the applicability of the principle of the exhaustion of local remedies is linked to a territorial element which really has no direct connexion with the ratio of the principle. The view that the principle in question is not applicable to cases of injury caused to non-resident aliens was upheld in practice by the French Government in the case of Certain Norwegian Loans, in order to release French nationals who were holders of Norwegian bonds, but resident in France, from the obligation to resort to the remedies provided for by Norwegian law. The Norwegian Government strongly contested that view and maintained that there was no precedent to be found in practice for the limitation attributed to the rule by the French Government. The Court did not have occasion to give any ruling on this point. In other well-known specific instances, the requirement of the exhaustion of local remedies has been applied to causes of injury caused to non-resident aliens. For example, in the Finnish Vessels case and the Ambatielos Claim case, the individuals injured were not resident in the territory of the State responsible for the alleged injury. Nevertheless, neither of the claimants—the Finnish Government in the first case and the Greek Government in the second—invoiced that circumstance to establish non-applicability of the principle. Moreover, article 4 of the draft adopted on first reading by the Third Committee of the 1930 Hague Conference made no distinction between resident and non-resident aliens. The same applies to all the other codification drafts adopted under the auspices of international organizations and drafts of private origin. Lastly, most writers reject the idea of a distinction on this basis. It should be noted that the French Government's reply of 20 February 1957 states that: "Although the rule under consideration is sometimes formulated in terms of the 'prior exhaustion of domestic remedies', so also, and perhaps more often, appears with such terms as 'exhaustion of local remedies' and 'local redress', ... suggesting a nuance affecting the very substance of this rule and its justification. "... the only explanation of this rule lies in the requirement that a foreigner in dispute with the State under whose sovereignty he has chosen to live may not have his case transferred to the international level without having first exhausted all local means of settlement." [Translation by the Secretariat] (I.C.J. Pleadings, Certain Norwegian Loans, vol. I, p. 408.)

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183 ibid., pp. 452 et seq.

184 However, Judge Reid in his dissenting opinion remarked that: "France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way." (I.C.J. Reports 1957, p. 97.)


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

(42) The idea of an exception would exempt from the requirement of the exhaustion of local remedies only aliens with any voluntary link with the State whose remedies should be used is very close in spirit to the idea of an exception for non-resident aliens, but is more restricted in scope and therefore seems less likely to have harmful consequences. This idea was developed before the International Court of Justice by the Government of Israel, in connexion with damage caused to Israeli nationals by the Bulgarian anti-aircraft defence, which had shot down an Israeli civil aircraft that had entered Bulgarian air space by mistake. The Bulgarian Government disputed the existence of the limitation. The United States, some of whose nationals had also been injured by the action of the Bulgarian authorities, claimed that the principle was not applicable in that case, but did not invoke the exception put forward by the Government of Israel. The Court did not have occasion to rule on this question, but the idea of introducing this exception subsequently found a few supporters among writers. It was also specific cases of injury to aliens simply in transit, over land or by air, that the territory of a State, or by virtue of his having made contract with the government of that State, such as the cases involving foreign bondholders; and other organs of a State called upon to perform functions in the territory of another State, and to organs of the Commission had in mind when they proposed, to leave it to practice to settle cases such as those discussed in this paragraph.

(43) As pointed out above, it is also necessary to consider whether the traditional area in which the principle of the exhaustion of local remedies was formed has not been widened in contemporary international law. The question is, in fact, whether one should not nowadays apply to other sectors of international obligations as well the requirement that persons interested in the fulfilment by the State of International obligations concerning them must use and exhaust the available local remedies before the State can be accused of having breached one of those obligations and before it can thus be claimed that the State has an international responsibility and may be called upon to discharge it. There can of course be no question of extending the applicability of the principle to cases of injury suffered by persons acting in the country as organs of the foreign State to which they belong. This needs to be said, however, because it has sometimes been claimed that the requirement of exhaustion of local remedies is not applicable to aliens enjoying "special international protection" in the country. The 1956 resolution of the Institute of International Law, for example, provides that the rule of the exhaustion of local remedies does not apply "if the injuries to persons acting in the country as organs of the foreign State to which they belong."

Such formulations could be misleading, and be thought to imply some sort of exception to an otherwise normal application of the principle, owing to the fact that certain foreigners—including diplomatic agents, consular agents and Heads of State—enjoy greater protection in the territory of the country than foreigners in general. In reality, however, the principle known as "the exhaustion of local remedies" has become established in general international law concurrently with the formation of international obligations laying down the treatment to be accorded by the State to foreign natural or juridical persons. Having regard to the specific object of these obligations and to the fact that private individuals are the beneficiaries of their fulfilment, it seemed normal that these same individuals should have to set in motion the machinery that enables the State to rectify, if necessary, any adverse consequences of the initial conduct of its organs and thus still achieve the result which might have been jeopardized by that initial conduct.

(44) In other words, the requirement of the exhaustion of local remedies is meaningful only in relation to the performance or breach of obligations concerning the treatment to be accorded to "private individuals"—Foreign Heads of State, diplomatic agents, consular agents, members of special missions of a foreign State and the like are not "individuals"; they are State organs—they are the foreign State itself. Their case is therefore outside the scope of the possible application of the principle of the exhaustion of local remedies. If they suffer injury

187 In his oral argument, the agent of the Government of Israel said:

"There are a number of important limitations to the application in practice of this rule. In my submission... it is essential, before the rule can be applied, that a link should exist between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien... has created... a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there... or by virtue of his having made contract with the government of that State, such as the cases involving foreign bondholders, and there may be other instances." (U.C.J., Pleadings, Aerial Incident of 27 July 1955, pp. 531-532.)

188 Ibid., p. 565.

189 Ibid., pp. 301, 326 et seq.

190 Meron (loc. cit., pp. 94 et seq.), Jimenez de Arechaga (loc. cit., p. 583), and Chapez (op. cit., pp. 88 et seq.) have expressed themselves in this sense. Law (op. cit., p. 104) links the exception advocated to the case of absence of voluntary submission by the alien to local law and jurisdiction. Contra, Gaya, op. cit., p. 89.

191 See para. (40).
which affects them in their official capacity, there is no question of requiring them to use local remedies. On the other hand, the use of such remedies is not excluded, at least under certain conditions, in a specific case in which the persons in question complain of State action contrary to an international obligation which has allegedly affected them in their private capacity as mere "private individuals". On this particular point too, however, the Commission agreed not to include special provisions in the text of article 22, but to leave the appropriate solution to emerge more clearly of itself in the practice of international life.

(45) An extension of the traditional field of application of the principle of the exhaustion of local remedies may result automatically from the growing participation of public capital in private companies. It is useful to bear this development in mind when delimiting the concrete situations in which the use of local remedies must be taken into account. The fact that this requirement has been established in connexion with international obligations concerning the treatment to be accorded by the State to foreign individuals must not lead us, in this context, to assign the same meaning to the word "individual" today as it had a century ago. A foreign company financed partly or even mainly by public capital is required, in certain circumstances, to employ local remedies in just the same way as a purely private joint-stock company. Moreover, the participation of public capital has never been put forward as a ground for the non-applicability of the principle of the exhaustion of local remedies to any given juridical person. For example, the United Kingdom Government made no such claim in the Anglo-Iranian Oil Company case while, in the dispute concerning the Aerial Incident of 27 July 1955, counsel for the Bulgarian Government observed, in support of the applicability of the principle in the case in question, that:

... and even if it is proved that El Al is a company ... in which the State of Israel holds a vast majority of the shares, I would say that this changes nothing in the case.

In the case of foreign juridical persons of a predominantly, if not exclusively, public character, it would seem that, in this context, the main consideration should be, not the more or less public character attributed to the juridical person in the legal order to which it belongs, but the fact that its activity in the territory of the foreign State is carried on in the same areas as the usual activities of private juridical persons.

(46) There remains the question of possible extension of the application of the principle of the exhaustion of local remedies from its traditional sphere of application in regard to the treatment to be accorded to foreign individuals to that of the treatment a State undertakes to accord to national individuals. The problem is relatively new because States have only recently recognized—and so far only to a limited degree—that international law lays duties upon them in this regard. The principal conventions relating to the protection of human rights always expressly impose the requirement of prior exhaustion of local remedies by the persons concerned. This is understandable for States are already disinclined to allow frequent intervention by other States when the purpose is to protect nationals of those other States, and they will naturally be even more unwilling when the purpose of the intervention is to protect their own nationals. Without in any way disregarding the existence of a few customary international rules on the subject, and without ruling out the possibility—even the likelihood—that such rules will increase in number, we are bound to conclude that, today, the international obligations of the State in regard to the treatment of its own nationals are almost exclusively of a conventional nature and that, in the instruments imposing them, the requirement of the exhaustion of local remedies by the persons concerned is nearly always expressly stated. That having been said, and without in any way prejudging the possible future development of general international law, the Commission considered that it might be premature at the present stage to extend the requirement stated in article 22, as a general principle, to the determination of the breach of international obligations concerning the treatment to be accorded to nationals.

Foot-note (44 continued.)

of subjects of international law other than States, such as the Holy See or international organizations. On this point, it is interesting to note the individual opinion given by Judge Amevedo in connexion with the advisory opinion in the case of Reparation for injuries suffered in the service of the United Nations:

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

Let us imagine that a foreign diplomat owns private property in the receiving country, for example a country house which he has bought with a view to eventual retirement or for private profit. And let us suppose that he is the victim of an act of confiscation committed by a local authority contrary to the provisions of a treaty requiring that the real property of nationals of his country should be respected. He will obviously have to use the local remedies before it can be concluded that the international responsibility of the receiving State is engaged and that action may be taken accordingly. In this case, the fact that the diplomatic agent enjoys complete exemption from local jurisdiction cannot be invoked. That exemption forbids a diplomat to appear before the courts as a defendant, but in no way prevents him from applying to them as a plaintiff.


197 Various writers incline—somewhat tentatively, it is true—to the view that the requirement of the exhaustion of local remedies will gradually be extended to cases of injury caused to foreign public entities—including States—provided that, in the cases in question, they have acted jure negotii or jure gestionis. For references, see Gaja, op. cit., p. 83, note 6.

198 This is true of the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 26) (for reference, see footnote 24 above); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11, para. 3, and art. 14, para. 7(a)); the 1951 Convention on Civil and Political Rights (art. 41, para. 1(c)); the 1966 International Covenant on Civil and Political Rights (art. 5, para. 20(b)); the Optional Protocol thereto (art. 5, para. 20(b)).
(d) Local remedies must be open to individuals and must be effective

(47) Needless to say, the requirement of the exhaustion of local remedies by the individuals concerned presupposes that there are remedies open to those individuals under the internal legal system of the State in question.\(^9\) If the measure initially taken by a State organ, whether it be a legislative, administrative, judicial or other measure, does not admit of any remedy, the possibility of using other means to redress the situation created by that measure is ruled out.\(^9\) In such a case, the breach by the State of its international obligation is complete ab initio and nothing is left for the possibility of impairing the resultant international responsibility. The only reservation to be made relates to the case in which the absence of remedies open to the individual is due to his own negligence, for example, failure to lodge his appeal within the prescribed time-limit.\(^8\) Even in such a case, however, it will be necessary to verify whether, for example, the time allowed for recourse to a remedy is not unduly short, particularly if the injured alien is not resident in the territory of the State and it is thus materially impossible for him to take action in time. Such situations can in practice be treated as cases in which there is really no remedy at all.

(48) It is generally recognized in principle that the mere existence of remedies does not automatically impose a mandatory requirement that the individuals concerned make use of them. However, there is less unanimity about the cases in which it is permissible not to meet that requirement. The remedies vary considerably in form from one legal system to another, and the international law can do, therefore, is to provide some guidance in principle, which must be adapted to each specific case. In any event, the real reason for the existence of the principle of the exhaustion of local remedies must always be kept in mind: it is to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation. From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a real prospect of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored. This idea is summed up in the general conclusion requiring (a) that the usable remedies must be effective, and (b) that they must be genuinely available in the case in point.\(^2\)

(49) From the positive standpoint, this conclusion means: (a) that all available remedies capable of redressing the situation complained of must be used, whether they be judicial or administrative, ordinary or extraordinary, of the first, second or third degree; and (b) that, generally speaking, all legal grounds calculated to secure a favourable decision must be advanced. The same applies to procedures and other formal remedies.\(^3\) In a word, the claimant must show that he wants to win the case, not merely to lodge an appeal in order to meet the requirement of formal exhaustion of local remedies. He must prove his genuine intention to establish the prerequisites for action by the State at the international level. It should be emphasized that, if, in the internal proceedings, the individual deliberately omits to use an essential argument which might have won him the case, and that deliberate omission is later revealed by the use of that argument before an international court, the individual runs the risk that the court may find that the requirement of the exhaustion of local remedies has not been duly met.

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\(^9\) See paragraph (28) of the commentary to article 21 in regard to cases in which the State encounters, in its own system of internal law, an insurmountable obstacle to using the opportunity of still fulfilling its obligation by remediying ex post facto, by the adoption of different conduct, a situation created by its initial conduct which is incompatible with the internationally required result. The Commission particularly noted the following passage in the arbitral award in the Ambatielos Claim case: "The ineffectiveness of local remedies may result clearly from the municipal law itself. This is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance, the possibility of impressing the resultant no redress can be obtained. In such a case there is no doubt that local remedies are ineffective." The Commission also mentioned the cases in which local remedies "would have proved to be obviously futile." (United Nations, Reports of International Arbitral Awards, vol. XII, p. 119.)

\(^8\) See the observation made by the United States Secretary of State Fish on 29 May 1873 to the effect that: "...a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust." (J. B. Moore, A Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, p. 677.) For an analysis of State practice, international judicial decisions and the opinions of writers on this point, see Gaja, op. cit., pp. 123 et seq., note 29, and p. 85, note 9.

\(^2\) Appeals to the highest judicial authority (court of cassation, supreme court) are of course included, along with such special remedies as application for review, appeal against the judges and appeal to the constitutional court where such a court exists and is accessible to individuals. One doubtful point remains: that of "petitions for redress" not based on a precise legal claim. These were mentioned in the Phosphates in Morocco case. The general requirement that the available remedies should be "effective" must obviously be accompanied by a requirement that those remedies should be genuinely available and usable. Inability to use local remedies may be due to an objective situation (such as the fact that the injured individual's residence is distant from the territory of the State or that he has no voluntary link with the State), which makes it impossible in practice for him to use those remedies, and not to an inherent defect of the existing system of remedies.

\(^3\) The question of using all procedural means was discussed, in particular, in the Ambatielos Claim case (see United Nations, Reports of International Arbitral Awards, vol. XII (op. cit.), pp. 119-120). The Arbitral Commission followed the opinion of the United Kingdom Government, according to which the complainant should have availed himself of all such procedural facilities in the way of calling witnesses, procuring documentation, etc. as the local system provides. The Commission, however, stressed that this criterion should not be regarded as of absolute application.
(50) From the negative standpoint, the conclusion also means: (a) that a remedy should not be used unless it holds out real—even if uncertain—prospects of success. In other words, the individual concerned is under no obligation to waste his time attacking, before a domestic court, a State measure which is, in fact, final. He cannot be required to use a remedy which would be a mere formality, as, for example, where it is clear from the outset that the law which the court will have to apply can lead only to rejection of the appeal in case of appeal against a measure in conformity with a law which cannot be set aside; of a court bound by a previous judgment rejecting a similar appeal or by a well-established body of unfavourable precedent; of proven partiality of the court, etc.; (b) that a remedy should not be used unless the success it may bring is not a merely formal success, but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is really equivalent. 204

(51) The exhaustive use of available local remedies may prove fruitful where it is carried out, and thus lead to acceptance of the individual’s claim. On the other hand, it may prove fruitless and lead to rejection of the claim. If the claim is accepted, the effect of such acceptance is the achievement of the result required by the international obligation or, if necessary, the achievement of another result equivalent to it, especially from the economic point of view. If the claim is rejected, the breach of the obligation begun by the State conduct against which the claim was made is consequently completed by the rejection, and international responsibility is generated for the State. A purely ostensible acceptance of the claim, which, for example, would not lead to the internationally required result in a case where that result was still attainable, or which would lead to an alternative result that was not equivalent, would obviously be tantamount to rejection.

(e) Conclusions

(52) In view of all the foregoing considerations, the Commission considers that the principle establishing the requirement of the exhaustion of local remedies is well founded in general international law and suitably placed in the chapter of the draft devoted to analysing the objective element of the internationally wrongful act, in other words, to settling the various questions that relate to the determination of the breach of an international obligation. It would be wrong, of course, to deal in this context with certain technical and procedural aspects which the principle obviously presents as well, and even more so to deny, by the formulation of the substantive requirement which the principle represents first and foremost, the parallel effect of the principle itself on the diplomatic or international judicial procedures relating to the “implementation” (mise en œuvre) of international responsibility, which will be the subject of part 3 of the draft. Furthermore, consideration of the various aspects of the principle of the exhaustion of local remedies must not go beyond the actual purpose of the draft articles now in course of preparation, namely, the codification of the general rules governing the international responsibility of States for internationally wrongful acts. In other words, for the reasons repeatedly mentioned by the Commission, consideration in the draft of the principle of the exhaustion of local remedies and its various aspects must at all costs stop short of an examination of the content of “primary” rules of international law, such as those relating to the treatment of aliens, efforts to define which proved fatal to earlier attempts at codification of the topic of international responsibility.

(53) It is particularly necessary to consider here the principle of the exhaustion of local remedies because, in the broad context of international obligations which require the State, not to adopt a particular course of conduct (article 20), but to achieve a specific result (article 21), a special category of obligations has to be distinguished: those specifically intended to ensure that, within the internal order of the State, a given treatment is guaranteed to aliens, whether natural or juridical persons, and their property. The very fact of this characterization means that an additional condition must be added, as already noted, to the other conditions normally required for establishing the fulfilment or breach of an obligation “as a result”. The raison d’être of this additional condition is that the object and purpose of the international obligations falling within the special category mentioned are that the State shall ensure, at the national level, a particular situation for private individuals, in other words, for subjects of internal law. It is these “private individuals” who are the beneficiaries of the international obligations, and the situation which affords them protection must obtain at the level of the internal law of the State in which they are active.

(54) The effect of these considerations as regards the fulfilment of international obligations in this special category, and consequently as regards any breach of them, is easy to understand. As has been said from the beginning of this commentary, the co-operation of the private individuals concerned is essential if they are to benefit from the treatment internationally prescribed for them: first, co-operation in seeking the application of such treatment to their specific case; second, co-operation in securing that this treatment is again accorded to them, by remediating, if
necessary, any adverse effects of the initial conduct of the State. The purpose of the principle establishing the requirement of the exhaustion of local remedies is to enunciate what is of primary importance, namely, that there can be no breach, or at least no definitive breach, of an international obligation in the category here considered unless the individuals who complain of having been placed in a situation incompatible with the result required by the international obligation have tried to obtain redress by any means available under the internal law of the State bound by the obligation which can still achieve the result internationally required of it. In short, it is in the light of the principle of the exhaustion of local remedies that, in the cases here considered, it will be possible to determine whether the State has fulfilled its obligation or, on the contrary, has breached it by failing definitively to achieve the result internationally required by the obligation. It is self-evident that this conclusion is only an application to the international obligations here considered of the fundamental principle for the determination of the breach of obligations “of result”, which is expressed in draft article 21, paragraph 2.

(55) Admittedly, and the Commission is the first to acknowledge this, there are not exclusively advantages in the fact that general international law requires private individuals injured by an action or omission of a State organ to seek redress of the situation injurious to them by applying to the domestic courts to obtain a new course of State conduct that corrects the initial conduct. There are not exclusively advantages in the fact that a very large proportion of international obligations concerning the treatment to be accorded to private individuals ultimately allow the State to achieve the result required of it by stages. Nor are there exclusively advantages in the fact that such obligations allow conduct contrary to the internationally required result to be disregarded for the purposes of establishing international responsibility, provided that the result in question is eventually secured by subsequent conduct. It is precisely because of all the practical disadvantages inevitably attendant on these facts that various conventions expressly preclude the application of the principle of the exhaustion of local remedies to certain matters. And it is also in order to avoid the postponements and delays to which the principle may give rise, both in correcting situations incompatible with the result aimed by an international obligation and in establishing that the obligation has been definitively breached, that alternative systems have been considered and put into effect. Examples of such systems are the over-all compensation agreements concerning disputes relating to the nationalization of foreign property and the inclusion in contracts between States and foreign private companies of arbitration clauses to replace recourse to domestic courts. However, this, in the opinion of the Commission, affords no proof that States would be willing today, having regard to the progressive development of international law, to abandon the principle of the exhaustion of local remedies or greatly to reduce its scope.

(56) It is true that investing countries are showing a growing awareness of how injury to the interests of their nationals working on foreign soil can affect the interests of the national community as a whole. They would therefore like to be free to bring international claims as they see fit, regardless of whether the private individuals directly affected have exhausted the available local remedies or shown negligence in that respect. The advocates of more direct, quicker and more effective protection of human rights see the principle of the exhaustion of local remedies as an obstacle to the progress they desire. At the same time, the requirement that private individuals directly affected by measures taken by an organ of the State in which they reside and carry on their activity should exhaust the local remedies has always been a safeguard which the countries invested in have applied against a tendency unduly to extend obligations concerning the treatment of foreign natural and juridical persons. These countries regard this requirement as a protection against the undue facility with which it has traditionally been attempted to raise to the level of international relations disputes which often should have been kept on the internal level. The inclination of the developing countries would thus be to strengthen the principle of the exhaustion of local remedies within the framework of general international law rather than to weaken it. It may be added that those most attuned to present-day problems and the difficulties of solving them realize that compliance with this essential requirement may well be the best guarantee of further substantial progress in the acceptance of new obligations concerning human rights. In these circumstances, the Commission as a whole—withstanding the reservations of some of its members concerning particular aspects of the manner in which the principle is applied or of its scope or effects—therefore believes that it would be injudicious to tamper with the present general scope of the principle for the sake of a progressive development of international law which others might regard as detracting from guarantees of the sovereign equality of all States.

(57) That being said, it should be recalled that, as pointed out in the commentary to article 21, cases have nevertheless exist in which an international obligation concerning the treatment to be accorded to foreign individuals is breached “immediately” as it...
were, and in which there can be no question of the exhaustion of local remedies by the individuals concerned before the breach can be established. These are mainly cases in which the international obligation concerning the treatment to be accorded to aliens is an obligation “of conduct”, not “of result”. For example, if the international obligation specifically requires the State to enact a law on a matter affecting the status of certain aliens in its territory, the mere failure to enact that law is in itself a breach of the obligation. Likewise, if the obligation imposed on a State by a treaty is that the frontier police should take action in favour of a national of another contracting State, the mere failure to take such action constitutes a definitive breach of the obligation. The article is therefore worded so as to make it clear that the requirement of the exhaustion of local remedies applies only to obligations “of result”.

(58) The breach may also be of an “immediate” nature, in the case of an obligation which only requires the State to produce a result, if the initial conduct adopted by an organ of the State is such that the treatment which the obligation requires the State to accord to the individual concerned can no longer be accorded, and the circumstances also preclude an equivalent treatment. In a situation of this kind, and in other similar situations, the exhaustion of local remedies becomes manifestly pointless and cannot be required. The wording of the article therefore emphasizes that the result which the obligation requires, or an equivalent result which it permits, must still be possible after the conduct of the State has created a situation not in conformity with the result required.

(59) It must also be pointed out that the requirement that the individual considering himself injured must exhaust local remedies in no way implies that the State of which he is a national may not make diplomatic representations to the State alleged to have committed the wrongful act until he has exhausted the local remedies available in the latter State. Diplomatic action can be taken—albeit as an exceptional step—even before the local remedies have been exhausted by the individuals concerned, for example, in order to bring the matter to the attention of the State or simply to prevent the occurrence of an internationally wrongful act. What is not permissible, on the other hand, is that the State of which the individual concerned is a national should “take over” the wrong done him before he has had recourse to the domestic courts open to him, and on that basis make an international claim, as though a wrongful act infringing its own international subjective right had already taken place prior to the exhaustion of local remedies. What has just been said about diplomatic action probably also applies, in the absence of anything to the contrary in the applicable conventions, to an application seeking only a purely declaratory judgment.

(60) As regards the formulation of the principle in the present draft article, the Commission took the view that the text adopted should be confined to a general statement on the exhaustion of local remedies as provided for by general international law, which should be flexible enough to be able to be adapted to the various situations that arise in practice. At the same time, the Commission decided that everything essential to the general statement of the principle should appear in the text of the article itself, including the proviso expressed by the criteria of “effectiveness” and genuine “availability” of the remedies open to private individuals.

(61) Having thought it advisable that the text of article 22 should not provide for any restrictions or exceptions relating to more or less special or marginal cases, in order to avoid weakening the principle and providing a pretext for possible attempts to evade the fulfillment of an international obligation, the Commission nevertheless felt bound to point out that the principle it has defined must be interpreted in the light of the general criterion of “good faith”. It also wishes to indicate that it would welcome the views of Governments on its decision not to limit the scope of the principle explicitly to cases concerning conduct adopted by the State “within its jurisdiction”, so that it may be in possession of the necessary information to take a final position on this question.

(62) As regards the question, raised during the discussion of the report, of the possible application of the principle of the exhaustion of local remedies to the special cases in which “foreign individuals” are injured at the same time and by the same conduct as the State of which they are nationals, the Commission finds that in such cases the agreements or decisions concerning indemnification of the injured State by the offending State normally also cover the question of the indemnification of private individuals. Where this is so, the exhaustion of local remedies by individuals is obviously not required. At all events, the matter seems to be one that should be regulated by private arrangements rather than by a special provision to be included in an article of general scope.

(63) Having adopted the text of article 22 which appears at the beginning of this commentary, the Commission considered it useful to provide, for the purposes of the commentary, the following definition of the term “local remedies”:

“local remedies” means the remedies which are open to natural or juridical persons under the internal law of a State.

This definition will be kept in mind with a view to its possible insertion in an initial article of the present draft containing definitions.
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.

Commentary

(1) In the rule laid down at the beginning of chapter III (article 16), the Commission set out the general requirement for recognition of the existence of a breach of an international obligation. The Commission then examined successively, in the same chapter, the distinctions to be drawn between the various types of international obligation and any effect of those distinctions of the requirements for the existence of a breach and on its characterization. It held that the determination of the existence of a breach was not affected by any distinction between international obligations as to their origin (article 17). On the basis of the distinction that must be made by virtue of the more or less essential character, for the international community, of the subject-matter of international obligations, it differentiated between breaches of such obligations as breaches constituting, respectively, international crimes and international delicts (article 19).

With regard to the delicate distinctions, of considerable consequence in that context, pertaining to the nature of the international obligation, the Commission first examined the basic distinction between obligations requiring the State to adopt a particular course of conduct (so-called obligations "of conduct" or "of means"), and those requiring the State to ensure a specified result but leaving it free to choose the means of achieving that result and allowing it, where necessary, to remedy by subsequent conduct a situation created by its initial conduct and that was inconsistent with the result aimed at (so-called obligations "of result"). It thus defined separately, for each of those two basic categories of obligation, the respective requirements for the occurrence of a breach (articles 20 and 21). It then set out, in article 22, the additional condition that must be fulfilled for there to be a breach of an obligation of result whose object was to protect aliens and which, for the achievement of the required result, provided for co-operation by the individuals concerned in the form of the use by them of the remedies available under the internal legal order. In article 23, the Commission rounded off its work on that point by defining the specific condition to be fulfilled for the existence of another special type of obligations of result to be established, namely, those where the result specifically required of the State was to ensure the non-occurrence of a given event.

(2) Some explanation is necessary, however, to make clear the type of obligations to which the Commission was referring in that article. Among the different kinds of obligations that general international law or treaties impose on States, there are many whose direct or indirect purpose is to prevent the occurrence of certain events injurious to foreign States, their environment, their representatives or their nationals. However, these obligations cannot all be classified among those that are the subject of article 23. When States formulate the obligations they are preparing to assume, they are free to structure them as they deem preferable in the light of the particular objective pursued. They therefore sometimes subscribe to commitments which are typically obligations "of conduct" and which, as such, require of the State not that it ensure a result, but that it perform particular acts of commission or omission. There is no dearth of examples: the customary law obligation to prohibit the formation or existence in the territory of a State of movements whose aim is subversion in a neighbouring State; the obligation which, with a view to preventing collisions, requires States to prescribe specific navigation corridors to be used by ships or aircraft; the obligation which, with a view to preventing pollution of waters and beaches, requires the State to prohibit tankers from spilling hydrocarbonic wastes in certain sea areas, or to impose on them the observance of certain safety measures; the obligation requiring the State to prohibit the siting near a frontier of a factory producing toxic emanations; the obligation requiring the posting of a guard at, or the provision of special protection for, a foreign building; the obligation to carry out certain improvement or maintenance work affecting the course or flow of rivers; and the obligation, such as that in article 11 of the Agreement of 29 December 1949 concerning the régime of the Norwegian-Soviet frontier and procedure for the settlement of frontier disputes and incidents which, with a view to preventing fires, requires the parties specifically to prohibit workmen engaged in floating timber from remaining on work sites during the night, lighting fires, etc. Obligations of this kind naturally come under the provisions of article 20 of the draft, and determination of any breach of the obligation presents no problem. There is a breach whenever the State that has assumed the obligation adopts a course of conduct not in conformity with the conduct specifically required of it.

(3) However, there are also many obligations whose objectives are similar but which are based on different principles and structured in a different way—obligations that may therefore be described as obligations of result. These require the State specifically to ensure the result of preventing the occurrence of a feared event, but without in any way prescribing a particular course of conduct to that end. Here again, examples may be found in many different areas of international relations. Examples that come readily to mind are the customary obligation requiring the State to ensure that, within its territory, nationals of another State are not massacred or lynched by xenophobic mobs; the obligation on the State to prevent, within its territory, the infliction of injuries on representatives of a foreign State by individuals or organs of a third State; the obligation laid down in article 22 of the 1961 Vienna Convention on Diplomatic Relations requiring the State to ensure that the premises of a mission
are not subject to any intrusion or damage and that there is no disturbance of the peace of the mission or impairment of its dignity, not only by State organs but also by third parties, and the obligation in article 29 of the same Convention requiring the State to take all appropriate steps to prevent any attack on the person, freedom or dignity of a foreign diplomatic agent; obligations such as that laid down in article 14 of the aforementioned agreement between Norway and the USSR,395 which requires the parties to “ensure that the frontier waters are kept clean and are not artificially polluted or fouled in any way” and “to prevent damage to the banks of frontier rivers and lakes”; treaty obligations which commit the contracting parties to ensure that the use of waterways for navigation, irrigation, production of hydroelectric energy, etc., is not hampered by any acts of man or natural phenomena; and obligations such as that contained in article X of the Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano,368 which requires the parties, in the event of the construction or alteration of any civil engineering works, to ensure the prevention of “any obstruction of or interference with the regulation of the lake or any damage to the bank belonging to the other State”, etc.

(4) It is quite clear that the obligations of which examples have been given all fall within the category referred to in article 21, because they are obligations whose fulfilment, like that of others of the same category, takes place only if the result that they require can be seen to have been ensured, and whose breach similarly takes place only if that result can be seen not to have been ensured. However, it would be wrong to believe that the general provision formulated in article 21 in order to define the conditions for the existence of a breach of an obligation of result suffices, by itself, to resolve the questions arising in cases where the result aimed at by the obligation is the prevention by the State of an event caused by factors in which it plays no part. The conditions for the breach of an obligation requiring a result of this kind need a different kind of definition from those that apply to an obligation requiring a result in whose achievement or non-achievement only action by the State is involved. To ensure the result of preventing individuals or third parties from committing certain acts, or of preventing disasters, whether naturally or artificially caused (such as flooding or pollution), from taking place, is something quite different from ensuring, for example, the result that nationals of a given foreign country be allowed to practise, within the State, an occupation or other activity on an equal footing with nationals. The characteristic feature of the case taken into consideration by the Commission here is precisely the notion of an event, i.e. an act of man or of nature which, as such, involves no action by the State. Consequently, if the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation. The State bound by an obligation of this kind cannot assert that it has achieved the required result by claiming that it has set up a perfect system of prevention397 if in practice that system proves ineffective and permits the event to occur. Conversely, the State having an interest in the fulfilment of the obligation cannot claim that the obligation has been breached solely because it regards the system of prevention set up by the obligated State as clearly insufficient or ineffective, as long as the occurrence the system was intended to prevent has not taken place. In other words, the non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.

(5) The “event” whose occurrence the State is required to prevent must not be understood as being “damage” in the sense in which this term is used in the theory of State responsibility. It is true that the events whose occurrence international obligations are intended to prevent are generally injurious events, but damage is not necessarily caused in every specific case where an event occurs which the State was under an obligation to prevent. For example, an attack on a person, even when perpetrated, may sometimes have no injurious consequences, as the person attacked may have succeeded, by his reaction, in ensuring that no injury is in fact caused to him. However, this does not alter the fact that the attack has taken place, and that the responsibility of the State is therefore entailed. The requirement that the event must have occurred for there to be a breach of an obligation requiring the State to prevent its occurrence is therefore in no way a sort of exception to the general position taken by the Commission during the formulation of article 3 and of the commentary thereto.398 Even in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act, quite apart, of course, from the fact that obligations to prevent events are only a particular kind of international obligation and certainly do not account for all international obligations.

(6) However, the occurrence of the event is not the only condition specifically stipulated for the existence of a breach of an international obligation requiring the State to ensure the result of preventing the occurrence of that event. In assuming obligations of this kind, States are not underwriting some kind of insurance to cover co-contracting States against the occurrence, whatever the conditions, of events of the kind contemplated, i.e. against the occurrence of the event even regardless of any material possibility of the State’s preventing it from occurring in a given case. The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. Only when the event has

395 See footnote 393 above.
397 Obligations requiring the prevention of given events are therefore not the same as those that are commonly referred to by the blanket term “obligations of due diligence”. The commission of a breach of the latter obligations often consists of an action or omission by the State and is not necessarily affected by the fact that an external event does or does not take place.
occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said not to have been achieved. Consequently, for there to be a breach of the obligation, a certain causal link — indirect, of course, not direct — must exist between the occurrence of the event and the conduct adopted in the matter by the organs of the State. It is hardly necessary to add that the objective of each obligation and the more or less essential character of the prevention of this or that type of event must also be taken into account, once the event to be prevented has occurred, in comparing the conduct actually adopted by the State and the conduct that it might reasonably have been expected to adopt to prevent the event from occurring.

(7) The Commission believes that the foregoing considerations show why a separate rule is needed in the present draft for the particular case of the breach of an international obligation requiring the State to achieve the specific result of preventing the occurrence of an event. It also believes it has emphasized the two conditions — occurrence of the event and existence of an indirect causal link between the occurrence and the conduct adopted in the matter by the State — that such a rule must specifically stipulate for a breach of an obligation of the kind in question to be established. Having so far justified its conclusions on the basis of abstract legal logic, the Commission continues that it should now support them by an analysis of State practice and the opinions of writers.

(8) The quite special structure of so-called international obligations “of event” and its consequences for determining the conditions for the existence of a breach of such obligations did not escape the attention of the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930). Thus, in drafting point VII of the request for information addressed to States, the Committee took it for granted that the event represented by an act committed by private individuals to the detriment of foreigners must actually have occurred in order for the responsibility of the State for lack of prevention on the part of its organs to be entailed. In using the wording that it did, the Committee demonstrated its conviction that any lack of prevention on the part of the State organs entrusted with that task could not be taken into consideration as a source of international responsibility except in connexion with acts committed by a private individual to the detriment of a foreigner. The existence of a breach by the State of its international obligation therefore depended on the presence of two conditions: lack of prevention on the part of the State organs and occurrence, in that context, of the event constituted by the injuries of the private individual. The replies of governments to point VII of the questionnaire confirmed implicitly the view that lack of prevention on the part of State organs might be taken into consideration as a source international responsibility only in connexion with an act committed by a private individual to the detriment of a foreigner. The same is true of the replies to point IX of the request for information, which extended the question put in point VII to the case of damage caused to foreigners by “persons engaged in insurrections or riots, or through mob violence”.

(9) In its reply to point V, No. 1(c), of the questionnaire, the Austrian Government pointed out, in regard to persons enjoying protection, that lack of protection was not enough to engage the responsibility of the State: damage must actually have been caused for the conduct of the State to constitute a breach of the international obligation. The replies of other governments on that point, while not as specific as the Austrian reply, were interpreted by the Drafting Committee in the same way, for in drafting basis No. 10 it stated:

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised State...

In other words, the existence of the event represented by the damage actually caused to a foreigner who has some public character is expressly indicated, along with lack of diligence in prevention, as one of the two conditions

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404 International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (C.75.M.69.1929.V), p. 93.


406 Ibid., pp. 108 et seq. and p. 20 respectively.

407 Point V, No. 1(c), was worded as follows:

"Does the State become responsible in the following circumstances and, if so, on what grounds does liability rest: Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognised — for example: persons invested with a public character recognised by the State?" (Ibid., vol. III, p. 62.)

408 The reply of the Austrian Government to point V, No. 1(c), of the questionnaire was as follows:

"It is obvious that mere failure to exercise due diligence in protecting the person of foreigners does not in itself involve the responsibility of the State: such responsibility would arise only if a foreigner suffered injury through the act of a private person" (Ibid., p. 63).

409 This position of the Austrian Government is particularly interesting in that the wording by the Preparatory Committee of point V, No. 1(c), did not expressly mention "acts of a private person" as constituting the occasion for international responsibility arising in the event of lack of prevention on the part of State organs.
for establishing the State’s breach of its obligation and for engaging its responsibility.

(10) At the Hague Conference, basis No. 10 as formulated by the Drafting Committee was incorporated in a new basis No. 10, providing that a State was responsible for ‘damage caused by a private person to the person or property of a foreigner’ in general.404 The Conference did not have occasion to take a decision on the point now under discussion. It seems, however, that the view generally shared by all the governments represented was that a breach of an obligation to prevent an event such as an injurious act by a private individual against a foreigner could not be imputed to a State as long as that event had not occurred.

(11) In international jurisprudence, there have been very many cases where the subject of the dispute has been the breach of an international obligation requiring a State to ensure that certain events do not occur.405 A study of these cases confirms the view held by the governments participating in the 1930 Conference. Where a government has complained in an international judicial or arbitral body of the breach of an obligation of this specific kind, it has cited an event that has actually occurred. No such body has ever been asked to recognize as a breach of an international obligation of this kind the mere fact that the State failed to adopt measures to prevent a theoretically possible event that did not actually occur. It is in connexion with events that have actually occurred, and in particular with injurious conduct emanating from private individuals, insurrectional movements, etc., that international tribunals have been asked to rule that a State has breached its obligation to prevent such an event. Moreover, the decisions of those tribunals with regard to disputes relating to possible breaches of international obligations of “event” do not assert, even indirectly or incidentally,406 that failure to adopt measures to prevent the occurrence of an event would suffice in itself—i.e. without the actual occurrence of the event—to constitute a breach by the State of the international obligation in question.

(12) The positions taken by States in disputes settled through diplomatic channels correspond fully to those that have been observed in disputes referred to international adjudication or arbitration. In diplomatic practice, it is only after the occurrence of an event that States have invoked the breach of the international obligation to prevent the event. That has been the case, for example, with a whole series of disputes involving a State’s obligation to prevent certain attacks by private individuals, insurgents, organs of foreign States and so on. Both at the diplomatic and at the international judicial or arbitral levels, therefore, the State claiming injury has not normally complained of an internationally wrongful act until after the event, represented by the attack emanating from private individuals or other sources, has actually occurred.407 It should not be deduced from this that a State may not send a communication to the obligated


405 For cases of breach of the obligation to prevent the occurrence, in the territory of a neighbouring State, of injury resulting from an activity carried on in the territory of the State, see, for example, the Trail Smelter Case between the United States of America and Canada, referred to the Arbitral Tribunal constituted under the Convention of 15 April 1935 (United Nations, Reports of International Arbitral Awards, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905 et seq.).

For cases of breach of the obligation to prevent the occurrence of attacks against specially protected persons, see the Borchgrave Case between Belgium and Spain, referred to the Permanent Court of International Justice, especially the memorandum of the Belgian Government of 15 May 1937 (P.C.I.J., Series C, No. 83, pp. 28 et seq.), and the Spanish memorandum of 29 June 1937 (ibid., pp. 55 et seq.).

Innumerable disputes concerning breaches of the obligation to prevent attacks against the safety of foreigners and their property by private individuals or groups of individuals or by insurgents have been referred to an international tribunal. It will suffice to mention the disputes referred to the Venezuelan Commissions of 1903, in particular the Sambiasi case with Italy (United Nations, Reports of International Arbitral Awards, vol. X (United Nations publication, Sales No. 60.V.4), pp. 499 et seq., especially p. 513); the Kummerow etc. cases with Germany (ibid., pp. 369 et seq., especially pp. 397 and 398); the Aroa Mines Ltd. case with Great Britain (ibid., vol. IX (Sales No. 59.V.5), pp. 402 et seq., especially pp. 438 et seq.) and the Jenny L. Underhill case with the United States of America (ibid., p. 159); the Home Front and Foreign Missionary Society of the United Brethren in Christ case between the United States of America and Great Britain, referred to the Arbitral Tribunal set up under the Special Agreement of 18 August 1910 (ibid., vol. VI (Sales No. 1955.V.3), pp. 42 et seq., especially p. 44); the British Property in Spanish Morocco case between Great Britain and Spain, referred to Mr. Max Huber, the arbitrator appointed under the agreement of 29 May 1923 (ibid., vol. II (Sales No. 1949.V.1), pp. 615 et seq., especially p. 642); the cases submitted to the Mexico-United States of America General Claims Commission set up under the Convention of 8 September 1923, in particular the Hungarian Insurance Company case (ibid., vol. IV (Sales No. 1951.V.1), pp. 48 et seq., especially p. 52); and the Walter A. Noyes case between the United States of America and Panama, referred to the United States of America-Panama General Claims Commission set up under the Convention of 28 July 1926 (ibid., vol. VI (Sales No. 1955.V.3), pp. 308 et seq., especially p. 311).

406 They could do so, for example, in determining the moment and duration of the internationally wrongful act.

State before the event occurs in order to draw its attention to the fact that, in its opinion, the measures adopted are insufficient to prevent the occurrence of the event whose prevention is the subject-matter of the international obligation in question. However, such communications or representations, which are very frequent in relations between States, must not be confused with international claims invoking the responsibility of States for breach of an international obligation incumbent upon them.

(13) International jurists wishing to give a typical example of an international obligation requiring the State to adopt conduct capable of preventing the occurrence of certain events have generally cited the obligation to prevent injurious conduct by private individuals. In so doing, the writers concerned have usually taken as a starting point the premise of the existence, as a fait accompli, of injury caused by private individuals to a foreign State, its representatives or its nationals. It is in relation to injury actually caused that these authors pose the question of the cases in which the State could be held responsible. As has been seen, the reply of the overwhelming majority of modern writers is that the State cannot be held internationally responsible except in cases where it is omitted to adopt measures normally likely to prevent private individuals from committing the injurious acts in question and where such acts have been committed precisely because of lack of prevention by the State. For most of these writers, such lack of prevention is not a theoretical concept but a reality given substance by the actual occurrence of the event which the State had the duty to prevent and which has taken place because of the State’s failure to prevent it. Furthermore, the authors of learned works who have closely studied the question of determination of conditions for breaches of international obligations “of event” all agree that it would be out of the question to hold that there has been a breach of an international obligation requiring a State to prevent by its conduct the occurrence of certain events as long as the latter have not taken place.

(14) With regard to the conditions required as proof of a breach, the conclusion that derives from the nature of international obligations “of event” is thus fully confirmed in the practice of States, international jurisprudence and doctrine. Where general international law or a treaty places upon a State an obligation whose direct object is the prevention of a certain event, the breach of the obligation can be asserted to exist, and the responsibility of the State to be incurred, only if the event to be prevented actually occurs and also if lack of prevention on the part of the obligated State is proved. As has been seen, a further requirement is that, between the conduct of the State in the instance in question and the event that has occurred, there should be a causal link such that the said conduct may be regarded as a sine qua non of the event. These conditions are of so specific a nature that their definition, in the Commission’s opinion, cannot be omitted from the present draft articles. The special attention given hitherto to the establishment, with regard to each kind of international obligation, of the conditions under which its breach occurs would also preclude such an omission. It should be stressed, however, that the purpose of article 23 of the draft is not to introduce or identify international obligations “of event”, but merely to make it clear that, if an international obligation is an obligation “of event”, its breach occurs in a certain way.

(15) In the light of the foregoing considerations, the Commission has provided in article 23 that, “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”. The first part of the sentence defines the case to which the provision refers, placing particular emphasis on the fact, illustrated above, that the international obligations taken into account in this article are a special type of the general category of obligations “of result”. The “type” of obligation to which article 23 refers is thus one that requires the State to achieve a specific result but leaves it free to choose the means of achieving that result.

(16) In the category of “obligations of result”, the particular “type” of obligation to which article 23 is intended to refer is defined by the statement that, in the case of these obligations, the result to be achieved is “the prevention ... of the occurrence of a given event”. This statement governs the reading of the operative part of the rule, which provides that, when the obligation is of this type, “there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result”. “That result” obviously means the specific result of preventing the occurrence of a given event. The article thus defines clearly the first of the two conditions that must be met if it is to be established, in the case envisaged, that there is a breach of the obligation, namely, the condition described in paragraph (4) above. According to the rule thus defined, a breach of the obligation cannot be said to occur as long as the event that the State was required to prevent has not occurred—in other words, as long as it has not been established that the State that could...
have been expected to achieve the result of preventing "the occurrence of a given event" has failed to achieve that result. At the same time, the second condition for the breach, namely, the existence of an indirect causal link between the occurrence of the event and the conduct in fact adopted by the State, is clearly indicated by the words "by the conduct adopted". These words concisely express the requirement referred to above,648 namely, that the occurrence of the event must have been made possible by the conduct that the State chose to adopt in the case in question, whereas by a different conduct it would have been able to achieve the required 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.

**Commentary**649

(1) The preceding articles of chapter III of the present draft, a chapter that considers the objective element of an internationally wrongful act, were devoted mainly to determination of the conditions for the existence of a breach of an international obligation; to that specific end, the different categories and types of international obligations were dealt with separately. To complete the exposition of the rules relating to the subject-matter of this chapter, account remains to be taken of another aspect, namely, the temporal aspect, which in both international and internal law is characterized as the determination of the tempus commissi delicti. This term covers both the determination of the moment when the existence of the breach of an international obligation is established and the determination of the duration, or the continuance in time, of that breach.

(2) The Commission touched earlier on certain aspects of the temporal element, as for example in article 18, in which it formulated the rule stating the requirement that an international obligation must be in force for a State contemporaneously with the adoption by that State of conduct not in conformity with that required by the obligation for such conduct to be considered as internationally wrongful. The Commission also dealt with the temporal element when it set forth the rules in article 21, paragraph 2, and article 22, concerning determination of the conditions for the occurrence of a breach of certain obligations of result, as well as the rule in article 23, concerning determination of the conditions for the occurrence of a breach of an obligation requiring the prevention of an event. The solutions adopted in those articles will obviously have a bearing on the solution of the problem of determination of the tempus commissi delicti, as will appear more specifically from the commentaries to articles 25 and 26. The need to ensure full consistency between the solutions adopted in the various rules formulated in the present draft has thus been emphasized; however, it would be erroneous to think that the solution to the problems now in hand is to be found ready-made in the answers given earlier in the draft to questions that are—and continue to be—different. It is one thing to determine the existence of a breach of an international obligation, and another to determine the moment and duration of a breach whose existence has been established.

(3) The purpose of articles 24 to 26 of the draft is thus to provide answers, in connexion with the various situations that may arise, to the two questions raised at the end of paragraph (1) of the present commentary. The first of these questions is to determine the moment when—all the constituent elements of the breach of an international obligation being present—it may be concluded that the breach exists. The second is to determine the entire period during which the breach continues, i.e. from when and until when its commission extends, both before and after the moment when its existence is established.

(4) It is not very easy to answer these questions. The Commission has already described some of the delicate and at times complicated aspects involved, particularly in certain situations, in determining the conditions for the existence of a breach of an international obligation. The difficulty of these aspects necessarily affects the determination of the moment when the breach, in all its constituent elements, must be considered to have occurred, and accordingly the moment when its existence is established. Nor should it be thought that determining the time of commission of a breach of an international obligation is a matter of ascertaining facts rather than of applying legal criteria. Such determination is not in fact easy except where a breach consists in an act of the State not extending in time, in other words, where the time of commission of the breach coincides with the moment when the breach occurs. The task becomes more complicated and necessarily requires the application of legal rules in cases where an act of the State not in conformity with the international obligation is an act extending over a period of time, whether because of the continuing character of that act, or because the act is composed of a number of separate individual acts, or because it is a complex act consisting of a succession of different actions or omissions by the State. Equally dependent on the application of legal criteria is the determination of the moment and duration of the breach of an obligation to prevent the occurrence of an event. The Commission will deal more specifically with these problems in articles 25 and 26 and the commentaries thereto.

(5) The practical importance of the solution to the above mentioned problems needs no stressing. The determination of the moment when it may be concluded that a breach of an international obligation has occurred is obviously essential in determining the moment when the international responsibility of the State committing the breach is entailed and, consequently, the moment when the State against which the breach was directed is able to take action at the diplomatic level, or even at the arbitral or judicial levels, to invoke that responsibility. The moment of the occurrence of a breach of an international obligation and the duration of the commission of the breach, moreover,
are two elements that may be decisive in resolving a whole series of problems in which a temporal element is involved. That is the case, for example, with regard to the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question. It is also the case with regard to the determination of the existence or non-existence of the competence of an international tribunal to deal with a dispute arising out of the breach by a State of an international obligation where the agreement concluded by the parties to the dispute includes a clause limiting the jurisdiction of the tribunal established under or mentioned in the agreement to disputes concerning "acts" or "situations" subsequent to a specific date, 418 provided that the parties in question have not expressly laid down special criteria for the interpretation of that clause. The determination of the moment and duration of the breach of an international obligation may also have a bearing on decisions concerning the existence or non-existence of what is known as the "national character of the claim" which, according to the opinion exemplified by practice, must exist, if a State is to be entitled to intervene for the purpose of the diplomatic protection of an individual, from the moment of the commission of the internationally wrongful act injurious to that individual until the moment when the claim is submitted. 417 The determination of the moment and duration of the breach of an international obligation will always affect the determination of the moment from which the period of prescription will begin to run, assuming that international law recognizes that the right of a State to invoke responsibility for an internationally wrongful act committed against it by another State may lapse by prescription. The determination of the duration of the commission of an internationally wrongful act may also be important at times in assessing the seriousness of that act and in determining whether, on that basis, the act in question may be defined as an "international crime" under article 19 of the draft. The list of examples given is in no way intended to be exhaustive. (6) In the general context referred to in paragraph (3) above, the question dealt with in article 24 is the determination of the moment and duration of the breach of an international obligation in a case where the act of the State committing the breach is an act that does not extend in time, i.e. an act that ends as soon as it is committed. 418 Examples of such acts may readily be found: anti-aircraft defence units of one State shooting down an aircraft lawfully flying over that country's territory; the torpedo boat of a belligerent State sinking a neutral ship on the high seas; the police of one State killing or wounding the representative of another State or kidnapping an individual in foreign territory; organs of a State confiscating the building in which a foreign diplomatic mission has its headquarters, etc. 419 Tr. only object of determining the moment when a breach of an international

417 A clause of this kind appears in several bilateral treaties providing for judicial or arbitral settlement of disputes between the parties; for example, the treaty between Spain and Belgium of 1927 on which the jurisdiction of the International Court of Justice was based in the case concerning the Barcelona Traction, Light and Power Company, Limited (I.C.J. Reports 1964, pp. 35 and 140). Article 39 of the General Act for the Pacific Settlement of International Disputes, of 26 September 1928, permitted the parties, in accordance with the Act, to exclude from the procedure described in that instrument "Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute" (League of Nations, Treaty Series, vol. XCVIII, p. 361). A reservation having the same effects was also included in numerous unilateral declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice; for example, in the declaration made by Belgium on 10 March 1926, limiting that acceptance to "any disputes arising after ratification of the present declaration with regard to situations or facts subsequent to this ratification"; and in that made by India on 28 February 1940, limiting the Court's jurisdiction to "all disputes arising after 5 February 1930, with regard to situations or facts subsequent to the same date". These reservations played an important role in the evolution of the compulsory jurisdiction of the Permanent Court of International Justice. An important example is the case of the Phosphates in Morocco case and the Right of Passage in which the moment when the claim is submitted is decisive. That is the case, for example, with regard to the occupation of the building in which a foreign diplomatic mission has its headquarters, etc.

418 Under the general theory of internal law, an act falling into this category is generally known as an "instantaneous act". Frequently cited examples of such acts are murder, infliction of bodily injury on a person and the burning of another's property.

419 In the "Observations and submissions" submitted by the Italian Government to the Permanent Court of International Justice on 15 July 1937 in connexion with the Phosphates in Morocco case, the internationally unlawful act that does not extend in time is described in the following terms: The Hague, 1968, there are breaches of international law, for example an insult to the flag of a friendly nation, the torpedoing of a neutral ship and so on, which are immediate in character. When such a breach is accomplished, that is, when it has been perfected, it is then exhausted and no longer exists as such." (P.C.I.J., Series C, No. 84, p. 494.)
obligation occurs in a case where the act of the State that committed it does not extend in time is to verify whether the conditions for the existence of a breach in the particular instance have been fulfilled.\(^{420}\) It is moreover obvious that, in such a case, the moment when the said conditions have been fulfilled is at once the moment when the breach occurs and the moment when, the breach having occurred, it also automatically ceases to exist. The breach, as such, has no duration outside that moment.\(^{421}\) In the case of a breach caused by an act of this kind, therefore, to establish the moment when the breach was committed is also to determine the time of its commission.

(7) It is scarcely necessary to point out, still referring to the case considered in article 24, that both what preceded and what followed the commission of the breach have no bearing on the determination of its duration. Conceiving the idea of a breach, and even providing for the conditions that could facilitate its execution, and so on, constitute steps towards the breach, but not its commission or even only the beginning of its commission. The duration of any preparatory activities thus has no bearing on the determination of the \textit{tempus commissi delicti}. Neither do the \textit{effectus}, i.e. the possible consequences, of the act of the State committing the breach affect such determination. Blows and injuries inflicted on an alien by members of the police or the army may have lasting effects on his health, ability to work and ability to perform his duties; the plundering of a foreign citizen may deprive him of possession of his property for a certain time (or even permanently, if no remedial action is taken); the destruction of the aircraft or ships of a neutral State will in future deprive that State of those means of transport or defence and may even affect the potential of its air force or navy for a long period. The durable character of these effects may be taken into consideration for the purpose of determining the injury for which reparation is to be made, but will have no bearing on the duration of the State act that caused them—an act that will in any event remain an act that does not extend in time.

(8) Thus any lasting consequences of an act that does not, as such, extend in time must not cause any “continuing character” to be attributed to the act, nor result in its being confused with one of the acts that will be dealt with in article 25, paragraph 1. The distinction between a “continuing violation” and an “act producing lasting effects” has been emphasized, in particular, by the European Commission of Human Rights.\(^{428}\) The International Law Commission, for its part, has already applied this distinction in its commentary to article 18 of the draft, in connexion with the requirement that the “force” of the international obligation shall be contemporaneous with the performance of the act deemed to be a breach of the obligation.\(^{429}\) This distinction necessarily applies also in the determination of the \textit{tempus commissi delicti}.

(9) The fact that the \textit{tempus commissi} of an internationally wrongful act of which only the effects can continue in time does not extend beyond the moment when the act in question occurred is of practical importance from several standpoints to which reference was made earlier.\(^{430}\) It is relevant, for example, in determining the \textit{dies a quo} of the period of extinctive prescription\(^ {428}\) and, particularly, in determining the competence \textit{ratione temporis} of an international tribunal to hear a dispute caused by one of the acts here referred to. It would seem logical that it should be impossible for an internationally wrongful act to be regarded as \textit{subsequent} to the crucial date fixed by agreement, or by a unilateral declaration of acceptance of the competence of an international tribunal, if the act ceased to exist before that date and if all that transpired subsequently was no more than a simple consequence of the effects of the act concerned.

(10) The analysis of certain aspects of the \textit{Phosphates in Morocco Case} is particularly instructive in this connexion. The Commission examined this case earlier, in its commentary to article 22.\(^{431}\) As pointed out above,\(^{432}\)

\(^{420}\) In this connexion, it is necessary first of all to establish that the obligation was in force at the time when the act in question took place (article 18, para. 1), and also that the case is not one of those exceptional ones where an act that was considered wrongful at the time of its commission subsequently become compulsory by virtue of a peremptory norm of general international law (article 18, para. 2). Secondly, if the obligation whose breach is alleged is one of those that require the State to adopt a particular course of conduct, it is necessary only to ensure that the course of conduct actually adopted by the State was not in conformity with what was required of it. If, on the other hand, the obligation is of the category of those that require the State to achieve a result, but that leave the State free to choose the means of achieving it, the requirements for the existence of a breach may be considered fulfilled only if the State, by its freely chosen course of conduct, has immediately and definitively made unachievable the result intended by the obligation (article 21, para. 1).

\(^{421}\) This notion must obviously not be interpreted as meaning more than it says. Any act that occurs has some duration, however infinitesimal. The performance of an internationally wrongful act clearly falling in the category of acts defined as “instantaneous” may actually require a certain amount of time: to sink a ship, for example, a lengthy shelling may be necessary. The point it is desired to bring out here is that, in the case of the acts dealt with in article 24, the time of commission of the breach extends neither before nor after the moment when the breach occurred.

\(^{428}\) An act, such as a judicial decision or an arbitral award, that has exclusively lasting effects is nevertheless, according to the European Commission of Human Rights, an “instantaneous act”, and its consequences are merely “simple effects”, and not a prolongation of the performance of the act. See the cases cited in the Commission’s report on the work of its twenty-eighth session (Yearbook ... 1976, vol. II (Part Two), p. 93, doc. A/31/10, foot-note 437).

\(^{429}\) \textit{Ibid.}, article 18, para. (21) of the commentary.

\(^{430}\) See para. (5) above.

\(^{431}\) If, as assumed above, international law recognizes that the right of the injured State to invoke the responsibility of a State culpable of committing an internationally wrongful act against it (or at least of a wrongful act that is not of an especially serious category) may lapse by prescription, the determination of the final moment of the commission of that wrongful act may be decisive for that is the moment from which the period of prescription will run as regards the right in question. Such prescription will obviously occur earlier if, as held by the Commission and recent jurisprudence, it is necessary to exclude from the duration of the commission of the wrongful act the period during which the effects of that act, which will itself have ceased to exist, continue to occur or to subsist.


\(^{433}\) See foot-note 416.
the competence of the Permanent Court of International Justice was limited, by reason of the reservation in the French declaration of acceptance, to "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification", i.e. subsequent to 25 April 1931. In describing the terms of the dispute, the Court noted that the Italian Government had asserted, although only as a subsidiary complaint, that the decision of the Department of Mines of 8 January 1925 had deprived the Italian citizen, Mr. Tassara, of his vested rights, in breach of the international obligation of France. With a view to proving that the case was subject to the jurisdiction of the Court, the applicant Government contended not only that the decision of the Department of Mines had been carried out, and completed as an internationally wrongful act, by a denial of justice consummated after the crucial date, but also, in the words of the Court, that

The dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by the decision of the Department of Mines, was maintained in existence at a period subsequent to the crucial date.

However, the reasoning on this point in the judgement of 14 June 1938 reveals that, according to the Court, the breach of international law, in so far as there really was a breach, consisted of the decision of the Department of Mines of 8 January 1925. According to the Court, it was that decision that had deprived the Italian citizen of the rights he claimed, and that decision could not be subject to the jurisdiction of the Court, even if its harmful consequences had remained in existence up to and beyond the crucial date. Without using precisely those words, the Court thus considered—correctly, it would seem—that the 1925 decision was an "instantaneous act producing continuing effects" rather than a "continuing act" of a lasting nature. The same belief emerges clearly from the separate opinion of Judge Cheng Tien-Hsi, which states:

So far as the decision of the Mines Department is concerned, it is right in holding that the dispute has arisen in regard to a fact anterior to the crucial date, because the decision was given in 1925. If it was wrongful, it was a wrong done in 1925. If it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation.

(11) To conclude, the Commission was unanimous in considering that any duration exclusively of the effects of an act of the State not extending as such in time could not affect the determination of the tempus of commission of the breach of the obligation, that tempus being represented solely by the duration of the moment when the act in question was performed.

488 The analysis of the case by the Commission in its report on its twenty-ninth session concerned that aspect of the case in particular.
489 P.C.I.J., Series A/B, No. 74, p. 28.
490 Ibid., p. 36. Whatever the differences of opinion between the Italian Government, on the one hand, and the French Government and the Court on the other, with regard to the existence in the case in point of an "instantaneous" wrongful act, even if it was one producing lasting effects, or of a "continuing" wrongful act, it is important to note that the Italian Government itself, in its "Observations and submissions", had asserted that "... in the case of instantaneous delicts, the moment of their commission coincides in time with the moment at which they cease to exist... Consequently, in the case of such delicts, the 'moment of the delict' will be the coincident moment of commission and completion..." (P.C.I.J., Series C, No. 84, p. 494). By the expression "moment of the delict", the Italian Government clearly intended to refer both to the "moment" proper and to the "duration" of the internationally wrongful act.

(12) With regard to the wording adopted for article 24, the Commission observes that the first proposition of the text ("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") states what might appear to be self-evident, since no problems arise in determining the moment when a breach occurs as a result of an act not extending in time: the breach cannot exist except at the moment when the act constituting the breach is performed. That first proposition acquires its true significance, however, in the light of the second, namely, that "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". This means that the truth expressed in the first proposition allows of no exception where the act by which the breach is committed has effects that themselves extend beyond the moment when the act is performed. Even in this case, the breach as such does not exist beyond the moment when it occurred; it no more continues after that moment than it began before it. In the title of the article, the words "moment and duration" were preferred to the condensed expression "time" because they illustrate more clearly the two distinct aspects of time contemplated in the article. The expression "act not extending in time" was preferred to the term "instantaneous act", although the latter is customary in internal law, in order to avoid too narrow an interpretation of the category of acts covered by article 24.

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
(1) The specific purpose of this article is to determine the moment when the breach of an international obligation occurs and the time of commission of the breach in the various frequent yet different cases in which the act of the State committing the breach is not one whose duration coincides with the moment of commission of the breach, but extends in time after or before that particular moment. The three cases considered separately in article 25 are those of an act of the State taking place in time with a continuing character (a "continuing act"), an act of the State composed of a series of individual acts of the State committed in connexion with different matters (a "composite" act), and an act of the State made up of a succession of actions or omissions in connexion with one and the same matter (a "complex" act).

(2) The expression "continuing act" (or "act having a continuing character") describes conduct of a State—namely, an action or omission attributable to the State by virtue of the articles in chapter II of the draft—which proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences. Maintenance in effect of provisions incompatible with those of a treaty, unlawful detention of a foreign official, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State, maintenance of armed forces in another State without its consent, unlawful blockade of foreign coasts or ports, etc., are examples of acts of this kind.\footnote{438}

(3) Where the act of the State consists in conduct extending in time while remaining the same during the given period of its existence, it will obviously, if not in conformity with what is required of the State by an international obligation, represent a breach of that obligation from the very moment when the conduct in question emerges.\footnote{439} Consequently, a first point can be established, namely, that the breach of an international obligation by an act of a State having a continuing character occurs at the moment when that act begins.\footnote{438} A second point can also be established, namely, that the time of commission of this breach is in no way limited to the moment at which the act begins, but extends over the whole period during which the act takes place and continues to be contrary to the requirements of the international obligation. Thus, contrary to the case of a breach committed by an act not extending in time, the beginning and end of the time of commission of a breach effected by an act having a continuing character do not coincide. The initial moment, too, is that at which the breach occurs; the final moment, on the other hand, is different, and corresponds to the moment when the act that effected the breach ceases to exist.\footnote{438}

(4) The positions adopted by States in connexion with disputes that have caused them to appear before international tribunals, and the jurisprudence of those tribunals, substantiate the validity of the conclusions already dictated by mere logical deduction from the inherent characteristics of the acts of the State now under consideration. The characterization of certain acts as "continuing acts" and their differentiation from "instantaneous acts having continuing effects" reveal most particularly, as has been pointed out above,\footnote{438} their practical importance as regards the bearing they may have, \textit{inter alia}, on the

\footnote{439} As is the case of an "instantaneous act producing continuing effects", considered in connexion with article 24. In the general theory of international law, an act of the kind at present under consideration is usually called a "delit continu", "permanent wrong", "reato permanente", "Dauerdelikt", etc. illegal restraint, unlawful possession of others' property, receiving of stolen goods, illegal possession of weapons, etc., are examples of such acts.

\footnote{438} In its "Observations and submissions" to the Permanent Court of International Justice in 1937, in the Phosphates in Morocco case, the Italian Government described the characteristics of an "instantaneous delict" not extending in time (see foot-note 419 above), and went on to say: "On the other hand, there are other breaches of international law which extend over a period of time, so that when they have become complete, in the sense that all their constituent elements are present, they do not thereby cease to exist but continue, remaining identical, with a permanent character." Among other examples, the Italian Government mentioned the enactment of a statute contrary to international law, the arrest of a diplomat and the unlawful seizure of property belonging to an alien. It also quoted the passage from H. Triepel (\textit{Völkerrecht und Landesrecht}, Leipzig, Hirschfeld, 1899, p. 289), in which the learned German writer stated: "If at the given time States are internationally obliged to have rules of law with a given content, the State which already has such laws is breaching its obligation if it repeals them and fails to re-adopt them, whereas the State which does not yet have such laws breaches its obligation merely by not introducing them; both States thus commit... a permanent international delict (\textit{Völkerrechtliches Dauerdelikt})" (P.C.I.J., Series C, No. 84, p. 494).

\footnote{438} See article 24, para. (9) of the commentary.
judges forming the majority denied was, on the one hand, the continuing effects, the of the period of prescriptive nationally wrongful act may be decisive for the determination of that the acts invoked by the Italian Government had the end of the time of commission of the wrongful act itself. The "continuing" wrongful act, however, this dies before that date, was a "continuing act" which consequently the case under consideration to be unfounded. What the taken to be the entire period during which the delict occurred.

(5) In the "Observations and submissions" it submitted in 1937 to the Permanent Court of International Justice in the Phosphates in Morocco Case, the Italian Government contended that, in the case of a "permanent" wrongful act (i.e. an act of a continuing nature), the time of commission was necessarily "the whole of the period comprised between its beginning and its completion". It added:

Moreover, even if one considers the legal concept of the permanent delict in the internal legal order, one generally finds that the legislation, practice and doctrine of States accept the principle that the permanent or durable offence is considered as being committed throughout the duration of the offence itself, and that the time of the delict in the case of a permanent delict should be taken to be the entire period during which the delict occurred.

The Court, in its aforementioned decision of 14 July 1938, in no way contested the general principle thus formulated by the Italian Government. Although the majority of the Court rejected the Italian claim, it did so because it considered the use of those concepts by the applicant in the case under consideration to be unfounded. What the judges forming the majority denied was, on the one hand, that the acts invoked by the Italian Government had the character it attributed to them and, on the other hand, that, on the basis of the terms of the clause limiting ratione temporis the acceptance by France of compulsory jurisdiction, acts which, although extending over a period of time, had originated in measures taken prior to the crucial date, could be considered as subsequent to that date.

(6) More recently, it has been mainly the European Commission of Human Rights that has had to distinguish between "instantaneous" wrongful acts with "continuing effects" and "continuing" wrongful acts in order to establish its competence in respect of certain disputes. The United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms of any act or decision or any fact or event occurring after 13 January 1966. In intertemporal cases, the European Commission has clearly adopted different solutions according to the type of acts brought before it. In the case of a "continuing" wrongful act occurring partly before the crucial date and partly after, it has declared itself competent in respect of the second part of the "act". The Commission has thus recognized that the duration of a "continuing"

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437 It has been pointed out above (see foot-note 425) that the determination of the final moment of the commission of an internationally wrongful act may be decisive for the determination of the moment from which the period of the statute of limitation begins to run. As in the case of an "instantaneous" wrongful act having continuing effects, the dies a quo of the period of prescription will be established before the possible date of the cessation of those effects, which have no bearing on it; in the case of a "continuing" wrongful act, however, this dies can be established only after the end of the time of commission of the wrongful act itself.

438 P.C.I.J., Series C, No. 84, pp. 494 et seq.

439 The divergence between the point of view maintained by the Italian Government and that adopted by the Court related to the designation of the act of which Italy complained as a continuing act or an instantaneous act having continuing effects. The Italian Government had contended that the monopoly of Moroccan phosphates established by the dahirs of 27 January and 21 August 1920, i.e. before the crucial date, but also maintained after that date, was a "continuing act" which consequently fell within the jurisdiction of the Court. (Ibid., pp. 497 and 498.) The majority of the Court, however, took the view that:

"The situation which the Italian Government denounces as unlawful was a legal position resulting from the legislation of 1920; and, from the point of view of the criticism directed against it, cannot be considered separately from the legislation of which it is the result. The alleged inconsistency of the monopoly regime with the international obligations of Morocco and of France is a reproach which applies first and foremost to the dahirs of 1920 establishing the monopoly. If, by establishing the monopoly, Morocco and France violated the treaty regime of the General Act of Algeciras of 7 April 1906, and of the Franco-German Convention of 4 November 1911, that violation is the outcome of the dahir of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are "facts" which, by reason of their date, fall outside the Court's jurisdiction." (P.C.I.J., Series A/B, No. 74, pp. 25 and 26.)

The Italian viewpoint was supported by Judge Cheng Tien-Hsi, who said in his separate opinion:

"For the monopoly, though instituted by the dahir of 1920, is still existing today. It can create an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir that first created it remains in force. The case of the monopoly is not at all the same as the case where an injured party has not obtained satisfaction for an alleged injury, which would be a case like the decision of 1925; nor is it merely the consequences of an illicit act,* which would mean that the wrong was completed once for all at a given moment;... it is... not enough to say that it is a legal position resulting from the legislation of 1920 or that it cannot be considered separately from the legislation of which it is the result; for the essence of the dispute is a complaint against what the Applicant has repeatedly maintained to be the continuing and permanent state of things at variance with foreign rights, rather than the mere fact of its creation,*... For these reasons, I am of the opinion that the monopoly is not a situation or fact anterior to the crucial date and, in consequence, whatever may be the merits of the claim, the dispute concerning it is not outside the jurisdiction of the Court." (Ibid., pp. 36 and 37.)

440 For the opinion of the majority of the Court, see ibid., pp. 21 et seq.; for the contrary view, expressed in the dissenting opinion of Judge Van Eysinga, see ibid., pp. 33 et seq.

441 In force for the United Kingdom since 3 September 1953.

442 See foot-note 416 above.
wrongful act extends beyond the initial time of its perpetration.\textsuperscript{446}

(7) In writings on international law, Triepel was the first, in 1899, to formulate the concept of the continuing wrongful act, with the consequences deriving from it in regard to the time of occurrence of that type of act.\textsuperscript{447} That concept was subsequently taken up again in various general studies on State responsibility,\textsuperscript{448} as well as in works on the interpretation of the formula "situations of facts prior to a given date", used in some declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice,\textsuperscript{449} or on the interpretation of similar formulas contained in the British and Italian declarations of acceptance of the competence of the European Commission of Human Rights in respect of individual applications.\textsuperscript{450} All the writers concerned agree explicitly or implicitly in recognizing that the time of commission of a breach effected by a continuing act or situation extends beyond the initial moment of the occurrence of the breach and ends only when either the act of the State ceases or the obligation ceases to be in force for the State.

(8) To conclude on this point, the Commission considers it useful to draw attention once again, as it has already in a general way,\textsuperscript{446} to the need to ensure that the principles underlying the various rules formulated in the present draft are fully consistent with one another. In particular, it wishes to emphasize that the solution adopted in article 25, paragraph 1, is in harmony with that previously adopted in article 18, paragraph 3. By that provision, the Commission intended, in the specific case of an act of a continuing character, to meet the general requirement that, for a breach of an international obligation to occur, the obligation must be in force for the State concurrently with the commission by the State of an act not in conformity with that obligation.\textsuperscript{451} By not requiring such simultaneity from the time when the "continuing" act begins, but only that it exist at some time during the performance of the act,\textsuperscript{448} the Commission has implicitly taken a position on the question of the duration of a breach committed by an act of this kind. The two rules in article 18, paragraph 3, and article 25, paragraph 1, thus conform, with strict parallelism, to the idea that the time of the commission of a breach of an international obligation by a continuing act corresponds to the whole period during which the act takes place.

(9) The second of the cases contemplated in this article is that of a breach of an international obligation by one of the acts which the Commission, on other occasions, has already described as "composite acts of the State". This expression is intended to designate a type of act which, like the continuing act, is spread over a longer or shorter period of time. Unlike the continuing act, however, the composite act of the State does not consist of a single course of conduct extending over a period of time but remaining the same; it consists of a series of individual acts of the State succeeding each other in time, that is to say, a sequence of separate courses of conduct, actions or omissions, adopted in separate cases, but all contributing to the commission of the aggregate act in question.

\textsuperscript{446} In the partial decision of 16 December 1966 in the case of Courcy v. the United Kingdom, for example, the Commission, referring to the applicant's complaint that he had been kept in solitary confinement for a period of 10 months for 20 out of 24 hours, commented that: "... even if the said period of ten months was in part subsequent to 13 January 1966, the conditions of the solitary confinement described do not constitute a violation of the rights and freedoms set forth in the Convention, if it follows that this part of the Application is manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention" (Yearbook of the European Convention on Human Rights, 1967, vol. 10, The Hague, 1969, p. 382). Setting aside the substance of the matter, what retains attention is that the European Commission implicitly admitted that the conduct of the State erroneously considered by the applicant as wrongful (solitary confinement), although beginning before the crucial date, had extended beyond that date, so that the Commission deemed itself competent in principle to rule on the possible incompatibility of that conduct, for the second part of its duration, with the obligations laid down by the Convention.

In the case of Roy and Alice Fletcher v. the United Kingdom, the applicants complained that, \textit{inter alia}, contrary to the provisions of article 6 of the Convention, they had not been brought to trial within a reasonable time. In the decision handed down on 19 December 1967 in that case, the Commission rejected the application on the following grounds:

\textit{"Whereas, with regard to the Applicants' complaints that they were not tried within a reasonable time on the counts on which they were held and on which they were left on the file at the conclusion of their trial in 1961, it is to be observed that, insofar as the complaint relates to the period before 14 January 1966, under the terms of the United Kingdom's declaration of that date recognizing the Commission's competence to accept petitions under Article 25 of the Convention, the United Kingdom only recognizes the Commission's competence to accept petitions so far as they relate to acts or decisions, facts or events occurring or arising after 13 January 1966; whereas it follows that an examination of this part of the Application is outside the competence of the Commission \textit{ratione temporis};}

\textit{"Whereas, moreover, in regard to the period after 13 January 1966, an examination of this complaint as it has been submitted, including an examination made \textit{ex officio}, does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Article 6." (Council of Europe, European Commission of Human Rights, Collection of Decisions, Strasbourg, No. 25, May 1968, p. 86.)}

Thus in that case, too, the Commission recognized its competence to rule on the possible incompatibility with the provisions of the Convention of the part of the "continuing" act (failure to bring the applicants to trial) that was subsequent to the crucial date. Other unpublished decisions tending in the same direction are cited by M. A. Eissen in "Les réserves ratione temporis à la recevabilité du droit de recours individuel. I e clauses facultatives de la Convention européenne des droits de l'homme", Bari, Levante, 1974, p. 94, foot-note 38.

\textsuperscript{447} H. Triepel, \textit{op. cit.}, p. 289.

\textsuperscript{448} See, for example, Decencière-Ferrandière, \textit{op. cit.}, p. 93; Ago, \textit{loc. cit.}, pp. 518 et seq.; Graffath, Oesser and Steiniger, \textit{op. cit.}, pp. 60 and 61.


\textsuperscript{450} See, for example, Eissen, \textit{loc. cit.}, pp. 94 and 95.

\textsuperscript{451} See article 24 above, para. (2) of the commentary.

\textsuperscript{452} The Commission took this position, in particular, on the basis of the jurisprudence of the European Commission of Human Rights (de Becker case). See \textit{Yearbook... 1976}, vol. II (Part Two), p. 93, doc. A/31/10, article 18, para. (21) of the commentary.
The performance of these different individual acts is required to fulfill the conditions for the breach of an international obligation, which consists precisely in prohibiting the commission of the aggregate act that is the resultant of the sum of the individual acts. Taken separately, the individual acts that go to make up the "composite act" may be internationally lawful. It is also possible, and even common, for each of them to be itself an internationally wrongful act, but wrongful in relation to an international obligation other than that which determines the wrongfulness of the act as a whole. To conclude, the distinctive common characteristic of State acts of the type here considered is that they comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content and effects, although relating to different specific cases.

(10) It is easy to give examples of breaches of international obligations by composite acts. Supposing that State A has undertaken, by a treaty on establishment and economic co-operation, to permit, in general terms, participation by nationals of State B in the exploitation of certain of its own mineral, agricultural or marine resources and that, in execution of that obligation, a number of concessions have been granted to natural or juridical persons of State B. Supposing that, subsequently, one of these concessions is expropriated for specific reasons. Such expropriation may in itself be internationally irreproachable, having been carried out with due regard for the international rules relating to expropriation of foreign property. It may also be internationally wrongful, either on the basis of a conventional obligation whereby, for example, the two States are required not to expropriate assets belonging to their respective nationals, or on the basis of a customary obligation—for example, because of lack of adequate compensation. But the expropriation does not in itself constitute a breach by State A of its obligation to permit, in general, participation by nationals of State B in the exploitation of its own economic resources. If, on the other hand, the first expropriation is followed by a whole series of others, the total effect of which is actually to reduce such participation to nil, the aggregate of measures thus taken will clearly constitute an internationally wrongful act. Such expropriation may, in itself, be internationally wrongful, but subsequent individual acts that made it possible to establish the aggregate act; thus only at that moment, and not before, will the existence of the breach be established.

(12) It is also clear that, once the existence of the composite act is revealed, all the individual acts constituting it since its commencement are thereby affected. For example, as soon as it is apparent that, by a succession of individual expropriation measures, the State is effecting the general exclusion of aliens from the exercise of a specific activity, or that, by a series of specific cases of discrimination, the State is engaging in a real discriminatory "practice", such exclusion or such practice—and consequently the breach of the obligation—are deemed to have begun with the first measure, or the first case, in the series. Otherwise the absurd result would be achieved of recognizing, for example, the existence of a "practice" in a single action. Moreover, if similar actions were subsequently added to the already established series, the "composite" act would automatically be augmented by all those subsequent individual acts, and the breach of the obligation would be extended accordingly. In

450 Ibid., p. 94, footnote 438.
451 Here again, to be able to conclude that a breach of an international obligation has taken place and, consequently, to be able to determine the moment when it took place, the other conditions for the existence of such a breach must have been fulfilled. The case here referred to requires, in particular, the fulfilment of the conditions stated in article 18, paragraph 4, which specifies, with respect to this case, the general requirement of contemporaneity of the "being in force" of the obligation and the possible occurrence of the breach of that obligation. According to this provision, there is a breach of the obligation if the composite act can be considered to be constituted by actions or omissions of the State occurring within the period during which the obligation is in force for that State. It follows that, if the international obligation was in force for the State when it committed the first individual act of the series, but was not in force when it committed the subsequent individual act that made it possible to establish the existence of the composite act, it will not be possible either to establish the existence of a breach of the international obligation or, obviously, to determine the "moment" at which it took place.
conclusion, the duration, or time of commission, of the breach of an international obligation by a "composite" act extends from the time when the first of the individual State acts composing it occurred up to the time of the last act added to it. Thus the beginning of the time of commission will in no case coincide with the necessarily subsequent moment at which the breach is completed and established. The second moment might conceivably also be that which marks the end of the time of commission of the breach; usually, however, the time of commission will extend beyond that moment, for it is hardly likely that the series of individual acts constituting the composite act will end with the individual act establishing the existence of the breach.

(13) The determination of the time of commission of the breach of an international obligation by a "composite" act of the State may be of practical importance for several of the reasons given in the commentary to article 24. There is no doubt that this determination may have a considerable bearing on the establishment of the amount of reparation payable in consequence of the offence, since that amount will depend on the duration of the commission of the composite act. There is also no doubt that such determination may be decisive for recognition of the jurisdiction of an international tribunal in a dispute arising out of the commission of a composite internationally wrongful act. If the commission of the breach overlaps the crucial date, it seems obvious—subject always to a different conclusion following from the interpretation of the limiting clause—that the jurisdiction must be recognized, since the "composite" wrongful act has extended in time beyond that crucial date. With regard to the period of extinctive prescription, it seems quite normal that it should run only from the time when the last of the individual acts constituting the composite act took place. Finally, it is also possible that the determination of the time of commission of a breach by a "composite" act may have a bearing on the possible characterization of the composite act as an "international crime" under the terms of article 19 of the Draft. For example, according to paragraph 3 (c) of that article, "an international crime may result, inter alia, from ... 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, apartheid". And, for a breach of an obligation of this description by an act of the State such as the adoption of a policy or "practice" of discrimination or slavery to be characterized as a "serious breach on a widespread scale", the determination of its duration may prove to be essential.

(14) The third situation contemplated in article 25 is that of a breach of an international obligation by an act belonging to a category of acts with which the Commis- has had to deal on several occasions and which it has called "complex acts of the State". The Commission uses this term to designate a type of act whose commission also extends in time, but which differs not only from "continuing acts" but also from "composite acts", although it is similar to them. A "complex" act is not composed of a series of separate individual acts of the State committed in separate cases. Although it, too, consists of a succession of courses of conduct, of actions or omissions, by the State, such actions or omissions (either by the same organ or, more frequently, by different organs) all relate to a single specific case and, taken as a whole, represent the position taken by the State in that case.

(15) In article 21, paragraph 2, and in article 22, the Commission has set out rules for determining the existence of an internationally wrongful act constituted by a "complex" act of the State. These rules highlight the particular importance that this concept assumes in any explanation of the way in which the breach of certain obligations—commonly found in certain sectors of international law—occurs, namely, obligations requiring the State to achieve, by the means of its choice, a specified result, and which accord it, in addition to this initial choice, the right to redress, by the adoption of new means, any improper situation to which the means initially employed may have given rise in a particular case, so as to achieve at a later stage the internationally required result, or at least an equivalent result. The fundamental concept of a "complex" internationally wrongful act is therefore that of an offence which, having started or been set in train by the action or omission of a State organ through its failure at the outset to achieve, in a specific case, the result required by an international obligation, is then completed and brought to an end by further actions, sometimes, as has been said, by the same organ, but more often by other organs, relating to the same case at a subsequent time. In other words, the "complex" internationally wrongful act is the collective outcome of all the actions or omissions by State organs at successive stages in a given case, each of which actions or omissions could have ensured the internationally required result but failed to do so. The Commission has already given specific examples of such acts, and others could be added: acquittal at all the successive jurisdictional levels of the perpetrators of a crime against the representative of a foreign government; denial of justice to a foreign national as a result of a set of decisions handed down by the whole series of judicial authorities concerned; breach, in a given case, of a conventional obligation regarding the treatment to be accorded to the nationals of a particular country, or to nationals of a particular ethnic origin, resulting from the joint effect of successive acts by organs belonging to different branches of the State power; and so forth.

(16) The solution to be adopted for problems of tempus commissi delici relating to an act of this nature is logically dictated by consideration of the particular characteristics of a "complex" act and by concern for consistency with the position taken by the Commission on the questions dealt with in article 21, paragraph 2, and article 22. As regards the determination of the moment of commission...
of the breach of an international obligation by a complex act, the Commission believes it can rule out the moment of the initial conduct of the State organ in the case in question, namely the conduct of the organ that first failed in its duty to ensure the result required by the obligation. That conduct simply opens the *iter* of the breach, but does not close it. The moment of occurrence of the breach in the situation considered can only be that of the State conduct that closes this *iter*, i.e. the conduct that makes it definitively impossible for the State to achieve the result required by the obligation. For it is only at that moment that, all the constituent elements of the complex act being present, the conditions are fulfilled for the existence of a breach by that act of the international obligation in question.

(17) As to the time of commission of the breach, it appears equally evident that it cannot be limited by the moment of the final conduct that completes the breach. The non-conformity of the “complex” act of the State with what is required of the State by the international obligation is the product of a plurality of successive actions or omissions of the State, and not only of its final conduct. It would be inadmissible, therefore, in determining the duration of the breach, to take account only of this final conduct and to overlook all conduct that preceded it. Beginning with the first, which at the outset defined the character of the breach and to a large extent determined its injurious consequences. The time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable. The time of commission of a breach effected by a complex act therefore begins at a moment prior to that at which the breach occurs and is completed, and ends at that precise moment; in other words, the moment at which the commission of the breach is concluded coincides with the moment at which the breach occurs.

(18) Although they are not numerous, the positions taken by States on this matter and the opinions expressed thereon by international tribunals confirm the validity of these conclusions, which are based mainly on considerations of legal logic. In the *Phosphates in Morocco Case*, already cited in connexion with other aspects of the question, the Italian Government maintained (although, as pointed out earlier, as a subsidiary complaint) that the Italian company Miniere e Fosfati was being dispossessed of its vested rights—a dispossess, it claimed, resulting from the decision of the Department of Mines of 8 January 1925 and the denial of justice that had followed it, in breach of the obligation incumbent on France to respect those rights. According to the applicant government, that constituted an internationally wrongful act, doubtless initiated by the 1925 decision, but that did not become complete and final until the acts of 1931 and 1933, by which the French Government had refused to make available to the Italian nationals concerned effective means of redress against the disputed decision, and it was therefore a typical case of a “complex” internationally wrongful act. The applicant government had this to say concerning the intertemporal aspects of the breaches of obligations of result effected by the acts described above:

... It is only when there is, as a final result, a failure to fulfil these obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute. In this case, the international obligations incumbent on the protecting Power in regard to the treatment to be accorded to the company Miniere e Fosfati as an Italian national did not require that they should be fulfilled exclusively by certain organs. These obligations prescribed, in particular, that this company should share effectively in the profits yielded by the mining concessions; but there was as yet no decisive evidence that such a result had been set aside by the Department of Mines... As long as a possibility of redressing the situation in accordance with those obligations existed—and, had there been a serious intention in this respect, no opportunity would have been more favourable than that of a revision of the decision of the Department of Mines by the highest authority of the Protectorate—there was no ground for stating that there had occurred a complete and final internationally wrongful act, giving rise to the international responsibility of the State, and creating international responsibility.

And in its oral pleadings it ad. ... 4.

It was not until 28 January 1933 that the protecting State declared that it did not intend to take any measures to achieve the effect required by international law and that it wished to take advantage of the opportunity furnished by its own judicial law to make final the dispossess of the Italian nationals. It was at that precise moment, therefore, that the breach of conventional law was actually accomplished; it was at that precise moment that the final breach of the obligation to allow the Italian nationals to benefit from the concessions régime was actually accomplished.

It is characteristic that, confronted by this argument, neither the respondent government nor the Court itself voiced objections to the fundamental thesis developed by

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464 A case in which the initial conduct itself makes the result required of the State by the obligation definitively unattainable, so that the breach occurs at the moment of that initial conduct, is by definition outside the concept of a “complex” act of the State.

465 It goes without saying that, before affirming that the moment of a given State conduct in the moment of the breach of an international obligation, it is necessary first to make sure—as indicated in foot-note 420, 433 and 451 above—that all the other conditions for breach of the obligation have also been fulfilled. Thus it must have been established, as provided in article 18, paragraph 5, that the obligation was in force for the State when the first of the constituent elements of the complex act occurred. Further, if the obligation of result whose breach is alleged is an obligation concerning the treatment to be accorded to aliens, it will also be necessary to have established, as provided in article 22, that the aliens had not, or no longer had, any effective local remedies against the conduct of the State alleged to have rendered the required result definitively unattainable.


467 Further observations of the Italian Government, 21 February 1938 (ibid., p. 850).

468 Statement by Counsel for the Italian Government, session of 12 May 1938 (ibid., No. 85, pp. 1232 and 1233). The thesis thus developed enabled the Italian Government to maintain that the offence constituted by a succession of acts extending over the years 1925-1933 and becoming final in 1933 was to be considered as a whole as an act “subsequent” to the date on which France had accepted the compulsory jurisdiction of the Court.
the applicant government. What was contested both by the French Government and by the Court was that, by applying that fundamental thesis, it might be possible, in the case in point, to override the objection regarding the Court’s lack of competence ratione temporis. As for the solution adopted in article 25, paragraph 3, it must therefore be emphasized (a) that, in this important judicial case, the applicant openly affirmed, with regard to the definition of concepts, the existence of a class of internationally wrongful acts constituted by a succession of separate actions or omissions by the State relating to the same case, all of which, taken together, contributing to the commission of the breach, and that it deliberately and explicitly rejected the possibility that the time of commission of the breach of the obligation by an act of that type could be the moment when the initial action or omission of the series took place; and (b) that the respondent, far from raising theoretical objections to the principles affirmed by the applicant, was content to argue on the basis of cases in which the commission of the breach occurred "at more than one moment". The respondent would probably not have done so had it believed that the time of commission or of breach, in cases of that kind, must be taken to mean exclusively the moment of the initial conduct of the State.

(19) Indirect confirmation of the validity of the solutions proposed above may be found in the decisions of the European Commission of Human Rights. As pointed out earlier, the United Kingdom recognized the Commission’s jurisdiction in respect of applications submitted by individuals relating to any act or decision occurring or any facts or events arising subsequently to 13 January 1966 and Italy made a similar reservation. As the decisions of the European Commission have been published only in part, it is not always possible to know the Commission’s attitude towards applications directed against an act or decision prior to the crucial date but in respect of which local remedies had not been exhausted until after that date. However, some of the published decisions provide indications on the attitude the Commission may have adopted on this question. In one such case, for example, the applicant complained about the procedure adopted by the State organs of the United Kingdom with regard to the expropriation of property belonging to him. The decision to expropriate had been taken prior to the crucial date, whereas the last decision taken in the matter had been subsequent thereto. The European Commission held that the application was inadmissible, but on grounds other than the existence of the United Kingdom’s reservation ratione temporis. The possibility of denying the Commission’s competence on the grounds that the decision to expropriate had been taken prior to the crucial date was not in fact mentioned either by the United Kingdom or by the Commission. In another case, the applicant claimed that the last of the decisions by the United Kingdom authorities in the case—that which, in her opinion, should be considered final—had been subsequent to the crucial date. The discussion centred on whether the final decision in the case was actually the one alleged by the applicant or the one indicated by the United Kingdom Government, which had been prior to the crucial date. The European Commission endorsed the opinion of the United Kingdom Government on that point and, on that basis, declared that it had no competence ratione temporis with respect to the claim. It is nevertheless interesting that the Commission considered that the date to be taken into account in determining whether an act was prior or subsequent to the crucial date was not the date of the initial State conduct in the case (in that instance the act of expropriation), but the date of the decision embodying the final ruling on the applicant’s appeal.

(20) The conclusion of the European Commission of Human Rights on the point here considered is therefore as follows: (a) when a breach is effected by a “complex” act of the State, the moment at which the breach occurs, i.e. the moment at which its existence is established, is the moment at which the last of the actions or omissions making up the complex act is added to the preceding actions or omissions; (b) the time of commission of the breach extends over the entire period, from the moment of the first action or omission that initiated the breach by creating a situation not in conformity with the result required by the obligation to the moment of the final action or omission that completed the breach by making the result in question definitively unattainable.

(21) The practical importance of this conclusion is reflected in the consequences it produces in almost all the respects considered in the commentary to article 24. The determination of the amount of reparation payable by the State committing the breach will obviously be influenced by the fact that the time of commission of the breach is taken to be the entire period between the first and last of the actions or omissions constituting the complex act of the State, and not merely the moment of one of those actions or omissions. The condition termed national character of the claim will be reflected, in the light of the solutions adopted in paragraph 3 of article 25,

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467 See article 24 above, para. (5) of the commentary.
in the requirement that the individual on whose behalf
the State intends to intervene must have possessed the
nationality of the State in question from the time of the
initial conduct of the State creating a situation not in
conformity with the required result, and not simply, for
example, from the time of the conduct completing the
iter for the formation of the complex act. The possible
limitation "ratione temporis" of the competence of an
international tribunal to disputes relating to "situations"
or "acts" subsequent to a specific date should not nor-
mally lead to the denial of such competence, in respect
of disputes relating to a "complex" act, if the final moment
of the time of commission of the act is subsequent to the
crucial date—subject to the possibility of a different con-
clusion following from the interpretation of the text
providing for such limitation. Lastly, as regards the right
to invoke the responsibility of the State that committed
the breach of the obligation, the period of prescription
will logically begin to run from the moment when the
last of the constituent elements of the complex act is
added to the others, and not, for example, from the
moment when the first of those elements came into being.

(22) In the wording of article 25, the Commission has
taken care to establish the necessary parallelism with the
wording of article 24 and to ensure perfect unity of termi-
nology and full consistency of solutions with article 24
and other preceding articles, in particular article 18,
which requires, as has frequently been noted, that an
obligation shall be in force at the time when its breach
is alleged to have occurred. The three paragraphs of
article 25 establish in a uniform manner the criteria
relating to the determination of the tempus commissi
delicti in the three essential and distinct cases of breach
affected by acts of the State having the common charac-
teristic of extending in time. Each of these paragraphs first
states the rule relating to the determination of the moment
at which the breach of the international obligation occurs
in each of the cases considered and then the rule relating
to the determination of the time of commission of the
breach, i.e. its duration.

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.

Commentary1/

(1) The purpose of the present article is to determine the
moment and duration of the breach of an international
obligation where the obligation requires the State to
prevent the occurrence of a given event. The need for a
special rule for the determination of these two aspects of
the tempus commissi delicti in the case of a breach of an
obligation of this particular type arises essentially for the
same reasons as those that led the Commission to for-
mulate a special rule for the determination, in the same
case, of the conditions for the existence of the breach. As
stated before, the particular type of obligation requiring
the State to ensure, by means of its own choice, the non-
ocurrence of a given event, differs from other obligations
in the general category of obligations of result in that the
result it prescribes, in the case in point, is the non-occur-
rence of an external event, that is, of an act of man or
nature which as such does not involve any action by the
State. Since, as has also been pointed out, the key indi-
cation of a breach in this particular case is the "occurrence
of the event" that the State should have prevented, that
occurrence, as the sine qua non for the existence of the
breach of the obligation, must also be the decisive factor
for the determination of the moment and duration of the
breach in that same case.

(2) However, as pointed out above, the occurrence of
the event is not the only condition specifically required
for the existence of a breach of an international obligation
prescribing that the State achieve the result of preventing
the occurrence of an event; for such a breach to be con-
sidered to exist, there must also be an indirect causal
link between the occurrence of the event and the conduct
adopted in the matter by the organs of the State. It has
been emphasize that the event must have been able to
occur because the State failed, by its conduct, to prevent
it, whereas by different conduct the event could have been
prevented. Only on the further condition that all this is
clearly apparent can it be concluded that the result
required by the obligation has not been achieved. Yet
this further condition can have no bearing on the question
of determining the moment of the breach of the inter-
national obligation. The breach cannot be considered
to exist at a moment when lack of prevention by the State
—conceivably making it possible for the event to occur—
has perhaps already become manifest but has not yet
resulted in the event actually taking place. Here logic
therefore precludes the idea that the moment of the breach
could be any moment preceding the occurrence of the
event.

(3) The determination of the moment of the breach in
the case in point is therefore very simple; the moment
when the breach is committed will necessarily coincide
with the moment when the event occurs. The latter
moment will be the one at which the event in question, if
instantaneous in character, begins and simultaneously
ends; on the other hand, if the event has a continuing
character, it will be only the moment at which the event
begins. For it is evident that, when the event itself is
characterized by the fact that it extends in time, only the
inception of that event can determine the "moment" of
the breach. The obligation requires the State to achieve
the result of "preventing" the occurrence of a given event.
Therefore, when the event becomes a reality, and does so
because of lack of prevention by the State, that State has
undoubtedly failed completely to achieve the result
required of it by the obligation. The breach is therefore

1/ Yearbook ... 1978, vol. II
(Part Two), pp. 97-98.
committed at that moment, because at that moment the conditions for the breach are fulfilled.\(^4\) Moreover, it is committed definitively, regardless of the length of the period during which the event continues.

(4) The Commission accordingly finds it possible to reach a conclusion on this first point without any hesitation by stating the principle that the moment when the event begins is the moment when the breach of the international obligation requiring the State to prevent that event occurs.

(5) With regard to the duration of the breach of an obligation requiring the State to prevent the occurrence of a given event, in other words, its "time of commission", the question might arise whether this duration should be considered as limited to the moment when the event "occurs", or as extending either backward or forward in time, or in both directions at once. If backward, it might in theory be possible to trace it back to the moment when the State began to adopt conduct inappropriate to its duty to ensure that the event did not occur. In practice, of course, the determination of this initial moment might often prove extremely difficult, or even altogether impossible. However, this consideration apart, the very idea of tracing back the time of commission of the breach of the obligation to such a moment is unacceptable. To repeat, the obligation is intended to achieve the result of ensuring that the State, by its conduct, should prevent the occurrence of a particular external act of man or nature, always assuming that it is physically capable of doing so. Without the combination of the two closely linked conditions of occurrence of the event and conduct of the State that has been unable to prevent it, there can be no breach, whether total or even partial. The breach of an obligation of the particular form type forming the subject-matter of article 26 can in no way be compared with the breach of other obligations that are capable of occurring gradually in time through a succession of actions or omissions by a State, the first of which, in a given instance, initiate the violation and the others subsequently complete it. As long as the event to be prevented has not occurred, the fact that the State has adopted conduct insufficiently effective to prevent it constitutes neither a breach of the obligation nor even the mere inception of such a breach, to which the event, on occurring, would confer a definitive character. It is therefore clear that in such a case the duration of the breach can in no way encompass any period prior to the occurrence of the event to be prevented.

(6) On the other hand, it seems logical to conceive that the duration of the breach, should the event that has occurred be in any way of a continuing character, extends in time up to the moment at which the event ceases. For it is logical to consider that the obligation to prevent the occurrence of an event, should such an event nevertheless occur, entails the obligation to ensure that it is terminated.\(^5\)

(7) With regard to the determination of the duration of the breach of an obligation to prevent the occurrence of an event, the Commission accordingly arrived at the conclusion embodied in the second proposition of article 26: "Nevertheless, the time of commission of the breach extends over the entire period during which the event continues."

(8) It hardly seems necessary to emphasize that the determination of the time of commission of a breach of an international obligation to prevent an event may prove to be of practical importance in relation to the rule concerning the "national character of a claim". The initial moment of the time of commission of the breach being the moment when the event begins, it will be from that moment only that an individual who may be injured by the said event will have to have possessed the nationality of the State prepared to act on his behalf. As to the jurisdiction of an international tribunal that might be limited to disputes arising from "acts" or "situations" subsequent to a particular date, it seems logical that it should be held to be established in a case where the event occurred after the date in question. As regards the period of prescription that might apply to the right to invoke international responsibility arising from the breach, it is equally logical, in view of the conclusions arrived at above, that this period should begin to run only from the moment of cessation of the event having a continuing character.

(9) In drafting the text of article 26, the Commission was careful to choose wording in line with that of the other articles already adopted in the matter of determination of the tempus commissi delicti (articles 24 and 15). Here again, the title and text of the article distinguish between the question of the determination of the moment when the breach of the international obligation occurs and that of the determination of the duration or time of commission of that breach. The terminology employed also follows that used in those articles, as well as in article 23.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

\(^4\) The situation is the same as in the case of breaches consisting of continuing acts of the State. As the Commission has pointed out, the moment of a breach of this kind is again the moment at which the continuing act begins, because in that case too the conditions for the existence of the breach are fulfilled from that moment.

Aid or assistance by a State to another State for the commission of an internationally wrongful act

Article 27

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.

Commentary

(1) Article 27 of the draft states the basic general rule that defines the conditions under which "participation" by a State in the internationally wrongful act of another State itself constitutes an internationally wrongful act separate from the principal wrong and accordingly entails the international responsibility of the participating State. In delimiting the subject-matter of the rule enunciated in this article, a clear distinction must be drawn between the situations it covers and other situations, which are similar in some respects, but in which there is no question at all of "participation by a State in the internationally wrongful act of another State".

(2) It is thus especially important to make it clear that the participation referred to in this article does not relate to cases in which the conduct of a State takes the form, of not of actions or omissions intended to make it possible or easier for another State to commit an internationally wrongful act, but rather of action specifically intended to effect, with another State or other States, the breach of a given international obligation. In other words, the "participation" considered here excludes cases in which a State is or becomes a co-perpetrator of an internationally wrongful act. There can be no question, for example, of the participation of a State in the internationally wrongful act of another State in cases where identical offences are committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs. If, for example, State A and State B are allies and proceed in concert to make an armed attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States. Such concerted action cannot be considered as a form of "participation" by one of the two States in an act of aggression committed by the other alone. A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of Chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other.

(3) It must now be considered whether certain courses of conduct by a State that are intended to cause another State to commit an internationally wrongful act are in fact real forms of "participation" by a State in the internationally wrongful act of another State and, as such, should be taken into account in formulating the rule to be stated in this article of the draft. In this connexion, consideration should first be given to the case in which a State, by one means or another, advises or incites another State to commit a breach of an international obligation incumbent on the latter, in other words, to the case which, in the general theory of internal law, appears under the name of "incitement" to commit an offence. There can be no doubt that, in internal criminal law for example, certain forms of incitement by one subject to the commission of a delict or a crime by another subject themselves constitute a criminal offence. In the international legal order, however, it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act.

(4) International jurisprudence and practice do not appear to depart from the classical conclusion formulated by the Board of Commissioners set up to distribute the sum allocated by France under the Convention of 4 July 1831 between the United States of America and France concerning claims relating to measures for the confiscation of American merchandise taken by certain States subjected to the influence of Napoleonic France. The Commission refused to attribute to France responsibility for measures taken by States which, like Denmark, had not at the time been formally united to the French Empire or placed in a condition of dependence thereon, and had thus been independent. The fact that the Danish sovereign had taken measures to please the Emperor of the French played no part in the decisions of the Board of Commissioners, which considered the Danish Government as solely and fully responsible for the measures taken. Commissioner Kane noted, in particular, that the claims against Denmark (Holstein and Hamburg cases), unlike those raised with respect to Holland, represented:

... a train of wrongs unworthy of a State unquestionably sovereign and professing to be free, committed against the citizens of a friendly nation, who had violated no law, and were entitled to protection by every title of hospitality and justice.

But the question before the Board regarded no: Denmark, but France. One cannot be charged with the acts of the other; for neither was dependent. It may be that the conduct of King Frederic was dictated by his anxiety to conciliate the favour of the French Emperor; ... we had nothing to do with his motives or his fears. The act was his own: the Kingdom of Denmark was then, as now, independent...

... [its] intervention ... was the voluntary pander to French avidity.

(5) In international practice, protests have of course been made against States accused, rightly or wrongly, of having incited others to commit breaches of international obligations to the detriment of third States; but no cases are known in which, at the juridical level, a State has been alleged by another to be internationally responsible solely by reason of such incitement. Nor are any cases known in which States have agreed to absolve from its responsibility a State which, although it might have been incited by a third State, nevertheless, of its own free will, breached an international obligation binding it to another State. It therefore follows from international practice, and from the works on international law dealing specifically with this question, that the fact that a State has incited another to commit an internationally wrongful act to the detriment of a third State does not give rise to the separate existence of an international responsibility derived specifically from the fact of incitement. Thus mere incitement of one State by another to commit an internationally wrongful act cannot fulfil the conditions required for its characterization as "participation" in that wrong, in the legal meaning of the term, and therefore will not, as such, have legal status and consequences. The situation would of course be quite different, as will be seen, if a particular course of conduct that began as mere "incitement" were subsequently to develop to the point of constituting a real case of "complicity".

(6) It would be wrong, in the Commission's view, to make unduly facile comparisons between incitement by one sovereign State of another sovereign State and the legal concept of "incitement to commit an offence" in internal criminal law. This legal concept has its origin and justification in the psychological motives determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated. The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice on the matter from another State, which it was at liberty not to follow. Consequently, if the State in question, by virtue of the conduct adopted, has committed an internationally wrongful act, there can be no question of its avoiding or even reducing its responsibility by alleging "incitement" by another State. And neither the State that committed the internationally wrongful act nor the State injured by it can cast all or part of the responsibility for that act on another State which has done no more than encourage or incite the first State to follow a course of conduct it ultimately adopted with complete freedom of decision and choice.

(7) This conclusion would in no way be altered if the case considered were one in which the State that was incited to commit an internationally wrongful act was no more than a "puppet State" in the hands of the State inciting it to commit an international offence, or a State placed, for some reason, in a position of dependence on that other State. In such situations, it is possible that in certain circumstances the dominant State might be called upon to answer for an internationally wrongful act committed by the puppet or dependent State. But then it is the existence of the relationship established between the two States that would become the decisive factor in this transfer of responsibility from one subject to the other, not the specific circumstance of incitement of one State by another to commit a particular wrongful act. In such situations there would be no question, either, of an international responsibility separate from that generated by the wrongful act, the incitement to which, as such, would entail the responsibility of its author. In other words, the problems of international responsibility arising out of the conduct of organs of a puppet or dependent State would

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473 Ibid., pp. 4475 and 4476. The passage quoted has been favourably commented upon by C. L. Bouvé in "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), p. 399, and by F. Klein, Die mittelbare Haftung im Völkerrecht, Frankfurt-am-Main, Klostermann, 1941, p. 279. The American claims against Denmark were settled satisfactorily by the agreement of 28 March 1830 (Moore, op. cit., pp. 4549 et seq.).

474 See for example Ago, loc. cit., pp. 523 and 524. For recent support for this view, see Gräfath, Oeser and Steiniger, op. cit., p. 64.
fall, if they arose, within the notion of "indirect responsibility", which is dealt with in the following article of chapter IV, rather than be a matter of participation by a State in the internationally wrongful act of another State, which is the subject of the present article.475

(8) Would conclusions similar to those expressed above with regard to incitement or instigation be justified in a case in which a State accompanies its incitement by pressure or coercion? Where a State, in order to make another State commit an internationally wrongful act, has recourse to measures of this kind, it would obviously be difficult to maintain that such measures, like mere "incitement" by persuasion and advice, are legally "neutral" in the eyes of international law. 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. Here, indeed, lies the most striking difference between contemporary international law and that of the past. 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. However, the differences of opinion on this point do not affect the question to be settled in article 27.

(9) Thus, in a case where it was concluded that the adoption by State A of certain measures to compel State B to breach its international obligations towards another subject of international law was in itself and beyond all doubt internationally wrongful, that would entail legal consequences for the relations between A and B. Conceivably too, in the most serious cases, it might entail further consequences for the relations between State A and all the other members of the international community. All of that would be of no relevance to the problem under consideration here, which is to determine whether or not recourse to the aforesaid measures constitutes a form of "participation", by the State that takes them, in the breach, by the State subjected to those measures, of an international obligation binding it to a third State—or, more generally, whether or not such measures would affect the relations between one or other of the first two States and the third State. Solely from the point of view of these relations with the third State, the answer will finally be the same, whether or not the coercion at the origin of the offence against the third State infringed an international subjective right of the State against which it was exercised.

(10) It certainly cannot be maintained that the State subjected to coercion adopted its conduct towards a third State in the free exercise of its sovereignty; nor can anyone doubt that this would not be without legal consequences. But such consequences are not those that flow from the participation by one State in the commission of an internationally wrongful act by another State. In the case now envisaged, 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. In this sense, therefore, it certainly stops short of what would be real "participation" in the commission of the internationally wrongful act. But at the same time, its implication in the affair goes well beyond what would constitute participation, for it goes so far as to compel the will of the State it coerces, to the point of constraining it to decide to commit an international office that it would not otherwise commit, and obliging it to behave, in the given case, as a State deprived of its sovereign decision-making capacity. That is the determining factor for the purposes here envisaged. In the Commission's view, 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. It follows that the case of coercion exercised by one State against another to induce the latter to breach its international obligation to a third State is not one that falls within the scope of the present article, since it cannot be defined as a case of "participation" in the commission by another State of an internationally wrongful act.

(11) The case in which one State exercises coercion against another so that the latter shall breach its international obligation to another subject of international law falls rather within the sphere of responsibility for the act of another, since the normal consequence of such a situation is the dissociation of the subject to which the act generating the responsibility is attributed from the subject on which that responsibility is laid. For in that case, State A, the coercing State, has not committed against State or subject C any offence separate from that committed as a result of the coercion to which State B has been subjected. Moreover, State B, which has committed the offence, acts in dependence on State A, its will being determined by the will of that State, or at least its freedom of choice being restricted by the control exercised over it by that State. In other words, only B has committed an international offence against C, but it has done so while its freedom of decision was seriously

475 A similar reasoning lay behind the conclusions of the Board of Commissioners mentioned in paragraph (4) above, regarding the Kingdom of Holland in the reign of Napoleon's brother, Louis, from June 1806 to July 1810, when Holland became part of the French Empire. The Commissioners accepted the Dutch contention that, at that time, Holland had been under the "present government" of France, and they recognized the responsibility of France for the confiscation and sale, to the financial gain of France, of all goods brought to Holland in American ships, even though those measures had been taken by the so-called Kingdom of Holland (see Bouvé, loc. cit., pp. 398 and 399, and Klein, op. cit., pp. 280 and 281). There are many more recent examples of analogous situations. For instance, in many international disputes arising out of the breach of an international obligation by States or governments reduced, during the Second World War, to the status of dependent States or governments, the States that had been the victim of the breach asserted that the resultant responsibility should be attributed not to the State whose organs had in fact acted, but to the State which, in pursuing its policy in regard to a given State, had created there a kind of pseudo-State, which was really no more than its sēlā hand. In this connexion, reference may be made to disputes about international responsibility for acts committed by States or governments set up in certain territories occupied by Nazi Germany or Fascist Italy.
fettered by A. Whether this condition of dependence is de jure or merely de facto in nature, whether it is permanent or purely temporary, or even occasional, in no way affects the problem. Moreover, State A, which has subjected State B to coercion in order to induce it to breach its international obligation, cannot escape being called to account internationally for the act committed by State B under its coercion. Clearly, therefore, this is one of the cases of indirect responsibility that will be considered in the following article of the draft.

(12) Incitement and coercion having been ruled out, for different reasons, the only remaining case of "participation" by one State in the commission of an internationally wrongful act by another State is that which the members of the Sixth Committee and of the Commission had in mind in 1975, when they stressed the need to deal with that question in the present draft articles,\(^ {478}\) namely, the case where one State renders aid or assistance to another State in order to facilitate the commission by the latter of an internationally wrongful act. In such a case, the State in question does not confine itself to inviting another State, by its suggestions and advice, to commit an international offence, nor does it resort to coercion to make it do so. What it does is to facilitate, by its own action, the commission by the other State of the internationally wrongful act in question. Cases such as this can be defined as ones of "complicity", but obviously in the particular sense that that term may possess in international law, where it is far from having the same meaning as is attributed to it in the different internal legal orders of States.

(13) In this connexion, one of the most frequently mentioned examples is that of a State placing its territory at the disposal of another State to make it possible, or at least easier, for the latter to commit an offence against a third State or third subject of international law. In this context, reference: "coerced" has been made mainly to article 3 (f) of the Definition of Aggression approved by the General Assembly in 1974,\(^ {477}\) which includes in the list of acts qualifying as acts of aggression:

- The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.
- Another classic and frequently cited example of complicity is that of a State that supplies another with weapons to attack a third State. It is obvious, too, that aid or assistance in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even the placing at the disposal of the State that is preparing to commit aggression of military or other organs for use for that purpose. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of assistance by another State may arise. For example, assistance may also take the form of provision of weapons or other supplies to assist another State to commit genocide,\(^ {479}\) to support a régime of apartheid,\(^ {480}\) or to maintain colonial domination by force, etc. Nor is it true to say that outside participation is possible only where the internationally wrongful act in which another State lends aid or assistance is one of those defined in article 19 of the present draft as an "international crime". There may equally well be assistance by another State for the purpose of commission of a less typical and less serious offence; providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, and assisting in the destruction of property belonging to nationals of a third country, are some of the examples that may be mentioned. The aid or assistance provided may consist in the provision of material means, but there can also be aid or assistance of a legal or political nature, such as the conclusion of a treaty that may facilitate the commission by the other party of an internationally wrongful act. Even incitement may sometimes assume forms that make it, in fact, aid or support for the "incited" State to commit the wrongful act.

(14) The conduct by which one State helps another State to commit an internationally wrongful act may sometimes in itself constitute a breach of an international obligation, quite independently of participation in the wrongful act of the State to which such conduct lends assistance. That would be the case, for example, if a State Member of the United Nations supplied arms to the Government of the Republic of South Africa in breach of the obligation provided for in Security Council resolution 418 (1977), calling for an embargo on the supply of arms to that country. In most cases, however, the conduct in question, taken in isolation, will be an act that is not, as such, of a wrongful character. For example, to supply another State with raw materials, means of transport and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What is of interest in the present context, however, is not whether the action, as such, does or does not constitute a breach of an international obligation, but whether the conduct adopted by the State, in addition to having materially facilitated the perpetration of the

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\(^{477}\) See, for example, the statements made at the 1975 session of the General Assembly by the representatives of the German Democratic Republic (Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings, p. 64, 1539th meeting, para. 3), Turkey (ibid., p. 106, 1547th meeting, para. 20), Iran (ibid., p. 112, 1548th meeting, para. 6) and Bolivia (ibid., pp. 115 and 116, para. 30), during the discussion on the Commission's report. See also Yearbook ... 1975, vol. I, pp. 44 and 45, 1312th meeting, paras. 13 and 28; pp. 47 and 48, 1313th meeting, paras. 4, 9 and 10; p. 58, 1315th meeting, para. 19.

\(^{478}\) General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.


\(^{480}\) Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on 30 November 1973 by the General Assembly of the United Nations (resolution 3068 (XXVIII), annex), provides for the criminal responsibility of individuals—including "representatives of the State"—who conspire in the commission of acts of apartheid or who directly co-operate in them. It is open to question, however, whether the complicity of another State in the commission of such acts, or in the pursuance of a policy of apartheid by a government, comes within the terms of the Convention.
international offence by the other State, was intended to enable another State to commit such an international offence or to make it easier for it to do so. The very idea of "aid or assistance" to another State for the commission of an internationally wrongful act necessarily presupposes an intent to collaborate in the execution of an act of this kind and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.

(15) Examples taken from the recent practice of States show, moreover, that whatever may have been the situation formerly, the idea of participation in the internationally wrongful act of another by providing "aid or assistance"—and thus, in this sense, of "complicity"—has now gained acceptance in international law. That this is the attitude of governments is shown, for example, by the statement made in 1958 by the United Kingdom Secretary of State for Colonial Affairs in reply to a parliamentary question concerning the supply of arms and military equipment by certain countries to Yemen, those arms having subsequently been used in an attack against Aden, which was then a British protectorate. The Secretary of State endeavoured to justify the delivery of arms in the case in point by pointing out that the supply of arms by one State to another was lawful per se, and that in the particular instance the supplier had probably been unaware, at the time when the arms were supplied, of the use to which the other State was to put them later. However, although it appears from the position taken by the spokesman for the United Kingdom Government that in his view the supply of arms by one State to another is lawful per se, and that in the particular instance the supplier had probably been unaware, at the time when the arms were supplied, of the use to which the other State was to put them later, it also appears, from the position he took, that a State that knowingly supplies arms to another State for the purpose of assisting the latter to act in a manner inconsistent with its international obligations cannot escape responsibility for complicity in such illegal conduct.

Further confirmation of the same conviction is provided by a statement of position made by the Government of the Federal Republic of Germany the same year. On 15 August 1958, that Government replied to a note of 26 July from the Government of the USSR taking it to task for participating in an act of aggression by allowing United States military aircraft to use airfields in the territory of the Federal Republic in connexion with the United States intervention in Lebanon. In its reply, the Government of the Federal Republic of Germany made clear that the measures taken in the Near East by the United States and the United Kingdom did not constitute intervention directed against any party, but constituted assistance to countries whose independence appeared to be seriously threatened and which were calling for help. Since, in the Federal Government's view, its allies were not guilty of any aggression in the Near or Middle East, it followed that the accusation made against it of supporting an act of aggression committed by other States was baseless. The Federal Government concluded by giving an assurance that it never had and never would have allowed the territory of the Federal Republic to be used for the commission of acts of aggression. Quite apart from its assessment of the specific circumstances of the case, the Government of the Federal Republic of Germany thus showed its conviction, based on principle, that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an act of aggression by that other State would be a form of complicity in such aggression and would therefore constitute an internationally wrongful act. The authors of various recent works also give the impression that they accept as a separate internationally wrongful act the notion of "participation", in the sense of "aid" or "assistance" in the commission of a wrongful act by another.

(16) In the light of the international practice and doctrine just described, the Commission concluded that a set of draft articles codifying the general rules governing the responsibility of States for internationally wrongful acts could not fail to include a rule concerning "participation in the internationally wrongful act of another" in the form of aid or assistance in the commission of such an act. Furthermore, this is an area of international law in which the requirements of the "expansive development" of international law cannot be ignored. The need to take into consideration such a form of "participation" by a State in the internationally wrongful act of another State is further attested by the fact that, as a general rule, aid or assistance in the commission of a wrongful act by another remains in international law, like "complicity" in internal law, an act separate from such commission, an act that is classified differently and that does not necessarily produce the same legal consequences. In other words, the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains. The conduct of a State which supplies, for example, weapons or other means to another State in order to facilitate the commission of an act of aggression or genocide by that other State does not necessarily, and in every case, constitute conduct that can also be classified as aggression or

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481 As was stated in a commentary on the position taken by the United Kingdom Government: "...the Answer appears to proceed on the basis that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful. In addition, the Answer suggests that the responsibility for the use of those arms—at least in the circumstances referred to in the Answer—must rest primarily upon the State which receives them. There is, however, nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct." (Ibid., p. 551 (commentary by E. Lauterpacht).)
genocide. An argument in favour of a different conclusion could be drawn from the fact that the Definition of Aggression, for example, as has been seen, also treats as an act of aggression the placing by a State of its territory at the disposal of another State with a view to aggression by the latter against a third State. It would be inadmissible, however, to generalize the idea of such equivalence and to extend it beyond cases in which it is specifically stipulated in an express provision. Even in cases of this kind, moreover, it seems impossible to conclude that the position of international law in respect of any action of aid or assistance for the commission of a given internationally wrongful act is necessarily the same as the position of international law in respect of the principal wrongful act itself. In any case, the determination of such equivalence can be only a question of degree, since in the final analysis it depends on a variety of factors and above all, on the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act.

(17) Having unanimously agreed on the need to include in the text of the draft a rule concerning the "aid or assistance" rendered by a State to another State for the commission of an internationally wrongful act, the Commission also agreed on the following essential elements that should be brought out in the basic general rule to be enunciated: (a) the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act; (b) the aid or assistance must have been rendered with intent to facilitate the commission of that internationally wrongful act by another; (c) the conduct by which a State thus participates in the commission by another State of an internationally wrongful act against a third subject must be characterized as internationally wrongful precisely by reason of such participation, even in cases where, in other circumstances, such conduct would be internationally lawful; (d) the internationally wrongful act of participation through aid or assistance for the commission of an internationally wrongful act by another must not be confused with this principal offence, and consequently the international responsibility deriving from it must remain separate from that incurred by the State committing the principal offence.

(18) In view of the foregoing, the Commission drafted article 27 in the following manner:

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.

This wording brings out clearly, first, that the material element characterizing the internationally wrongful act of participation on which the present discussion turns must consist in real aid or assistance in the commission by another State of an internationally wrongful act, but must also remain within the limits of such aid or assistance. That is what makes it possible to draw a clear distinction between the act envisaged here and those other possible forms of association in an internationally wrongful act where the degree of participation is such that the State in question becomes a veritable co-author of the principal internationally wrongful act. At the same time the wording adopted for the article lays stress on the intellectual element of intent, which must also be present before it can be concluded that the internationally wrongful act of participation that is sought to define has been committed. As the article states, the aid or assistance in question must be rendered "for the commission of an internationally wrongful act", i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established". Unless these essential requirements are fulfilled, an act that is lawful per se cannot become an unlawful act, and a possibly wrongful act cannot be invested with additional wrongfulness.

(19) The words "carried out by the latter" specify a condition that would seem to be essential in a general rule on this subject, namely, that, in order to establish the existence of the internationally wrongful act of participation to which the article refers, the principal internationally wrongful act must actually be committed by the State which receives the aid or assistance in question. It is not impossible that special rules of international law may provide that the rendering of aid or assistance for the commission by another of a breach of certain obligations of fundamental importance for the international community is per se an internationally wrongful act, whether or not the principal internationally wrongful act is actually carried out. But the general rule defined in article 27, which is intended to apply to participation in the breach by another of all types of international obligations, cannot take account of these special cases.

(20) The wrongfulness of the aid or assistance rendered to another State for the commission by the latter of a breach of an international obligation does not depend on the gravity of the breach in question. The fact of aiding another State to commit an internationally wrongful act always entails the responsibility of the aiding State, regardless whether the principal wrongful act is defined as a crime or a delict, and even regardless of the degree of gravity of the crime or delict involved. That is why the article refers, without being more specific, to "aid or assistance ... rendered for the commission of an internationally wrongful act". This by no means signifies, however, that the consequences, as regards responsibility, of the internationally wrongful act of participation referred to in article 27 must always be the same, or that they may not vary according to circumstances, such as the extent or manner of the participation, the nature of the act in which the State participates, the gravity of the principal internationally wrongful act, etc. These, however, are questions that relate not to the part of the draft dealing with the origin of international responsibility but rather to the second part, i.e. that which will deal with the content, forms and degrees of international responsibility.
The words "itself constitutes as internationally wrongful act" specify a point that is a primary concern of this article, by making it clear that participation consisting in the rendering of aid or assistance to another State for the commission by the latter of an internationally wrongful act is an act of wrongfulness different from that of the principal act. The responsibility of the State engaging in this form of participation is therefore entailed otherwise than is that of the State committing the principal act. The last part of the sentence, reading "even if, taken alone, such aid or assistance would not constitute the breach of an international obligation", emphasizes the distinct and separate nature of the particular wrongful act to which the article refers, by stating that such form of participation is internationally wrongful regardless of the fact that, in other circumstances, the conduct that produces it would be internationally lawful.

Finally, the Commission considers it useful to emphasize that aid or assistance rendered by a State to another State for the commission by the latter of an internationally wrongful act is itself an internationally wrongful act, whether the principal wrongful act is committed against a State or a particular group of States, a subject of international law other than a State, or the international community as a whole.

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 provisions of the present articles, of the State which has committed the internationally wrongful act.

Commentary

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". 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 case, 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. 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 belonged 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. (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-

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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 I, 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", Österreichische 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.
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. 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, 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 whether, as one writer maintained, 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". 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. 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 responsible, even if the claim is addressed to it through the representing State, because the act was committed by its own organs.


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 in respect of the latter 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 course 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.

492 Verdross, loc. cit., pp. 408 et seq.


494 Ibid., pp. 648–649.

495 See League of Nations, Conference for the Codification of International Law, Basis 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 involved 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. In the other hand, what matters for 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

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 responsibility in the Phosphates case (Italy v. France). In the representation which existed between France and Morocco. Nor did either party make any mention in the subsequent proceedings of the relationship of representation which existed between France and Morocco.


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 by Anzilotti's theory and do not explain how they might be overcome (see, for example, P. Guggenheim, Traité de droit international public (Geneva, George, 1934), 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.; L. J. Gold, "Völkerrechtliches Dekret", Wörterbuch des Völkerrechts, 2nd ed (Berlin, de Gruyter, 1960), I, pp. 334-335; F. Berger, 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 the 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 proposed 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, iner 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 been presented to that State through the diplomatic representatives of a nation representing the interests of the responsible State. (Amador, L. B. Sohn and R. R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (Dobb's Ferry, N.Y.: Oceanus, 1974), pp. 255-265.

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 States\(^{500}\) 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 fulfill 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 the "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 with the consent of 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 concerned, 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)—by a subordinate State would be an inadmissible "intrusion" into the jurisdictional 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 Principality 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 Principality 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 Principality 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, letter in J. Wyrthlik, "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 Wyrthlik, loc. cit., pp. 279-280.
affirm that responsibility. This applies, for example, to the Stüder 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 judgment of the Permanent Court of International Justice, of 30 August 1924, in the Mavrommatis 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 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 sovereignty 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

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 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 assumed 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. 1934. 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 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).
507 United Nations. Reports of International Arbitral Awards. vol. VI (op. cit.), pp. 120 et seq.
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. The Commission noted that that idea was later taken up and developed with a number of variations: in 1928 by C. Eagleton (loc. cit., p. 413) and Ross (Turin), vol. XV (1968), p. 734; G. Morelli, "Responsabilita degli Stati", Nuovo Digesto Italiano. (Turin), vol. XI (1939), pp. 474-475, Basile, loc. cit. pp. 443 et seq. (1964), "Les principes de droit international public", Recueil des cours de l'Académie de droit international de La Haye, 1930-II (Paris, Sirey, 1951), vol. 77, p. 446; G. Morelli, "Responsabilita degli Stati", Nuovo 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. 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, only, 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 them—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.

(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 subject 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 "dominant" State devolved on the "dependent" State, he regarded it as responsibility for the State's "own" act, not for the act of "another".

(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.

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 on behalf of 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" (Tratté de droit international, trans. A. Léo (Paris, Maresq aine, 1883), vol. I, p. 379). According to this writer: "If one state controls another in any circumstances which might prevent or deter from discharging its international obligations, the basis of a responsibility of the protecting state for the subordinate 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 respondents" (C. Eagleton, The Responsibility of States in International Law (New York, New York University Press, 1928), p. 43).

510 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.)

511 See M. Scerni, "Responsabilita degli Stati", Nuovo Digesto Italiano (Turin), vol. XI (1939), pp. 474-475; Basile, loc. cit., pp. 443 et seq. (1964), "Les principes de droit international public", Recueil des cours de l'Academie de droit international de La Haye, 1930-II (Paris, Sirey, 1951), vol. 77, p. 446; G. Morelli, "Responsabilita degli Stati", Nuovo 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. 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.

512 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.

513 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 abrogation of jurisdiction, to permit the occupying power to set up its own machinery of the occupation, as it may receive from the local authorities; it follows that the occupied 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. It is precisely in connexion with these sectors of 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 Fezzan State, for acts 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." 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 petition of a German national, claimant for 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. It follows by implication from this negative conclusion that, in the view of the Court, which did not have to rule on this other...

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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 the Allied Military Government only in areas near the front line (H M Whiteman, Digest of International Law, (Washington, D C. U.S. Government Printing Office, 1963), vol. 1, pp 990.)
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 murder. 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 the object of the control of the German occupying authorities—responsibility which must therefore be qualified as responsibility for the act of another.

(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-

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519 On these matters, see R. Ago, "L'occupazione bellica di Roma e l'attacco lateranese", 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 that 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.1, 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.


partial or whether it was effected lawfully or not, since the occupied State's position of adscription 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, 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 adscription 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 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 members\(^{528}\) 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 in which 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 in 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 him for the value of his services, treating him as a State deprived of its sovereign capacity of decision. In the opinion of the Commission, the condition of that State would always be attributable to that State which would itself be 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.

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.


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).

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. 329 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. 330 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. 331 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 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. 332 In the case under consideration, the organs of the State coerced acted 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 wrongful but mainly because, even when it is wrongful, it constitutes an offense 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 coercing 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

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 Romanian 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 remark 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 Strauss 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 have been paid to the Romano-Americana Company arising out of the destruction of their properties in Roumania in 1916." (Ibid., p. 704.)

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. 280; Quadri, op. cit., p. 603; Verdross, "Theorie ..." (loc. cit.), pp. 413 et seq.; J. H. W. Verzijl, International Law in Historical Perspective (Leiden, Sijthoff, 1973), vol. VI, pp. 712 et seq.

533 In the commentary to article 27, the Commission stated in this connection: "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, 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 seeking 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. 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. 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. 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 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 respect and that this doctrine is divided on the point. 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 never 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

footnotes:
336 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.
337 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.
338 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. official records. vol. II. p. 121 et seq.). It will be noted that in the Fink case (referred to above in paragraph (30) 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, in this particular case, the responsibility of the State to which the internationally wrongful act was attributable has never been expressly precluded.
339 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 (La responsabilita indiretta... . op. cit.. p. 54, Barie? (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. 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. 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 unanimously, 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 States, and this 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

\[\text{footnote text}\]
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.

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 analyze 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

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.

(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. 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 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 1, 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. However, the converse does not apply with the same ineluctable logic. There is no reason why, from a purely theoretical 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.

(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 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 understand 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.

The reply from the United Kingdom Government stated that:

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544 For example, H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, Zeitschrift für öffentliches Recht (Vienna), vol. XXXV, 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 linked to the international responsibility, under other articles of the draft, of the State which has committed the internationally wrongful act.
...self-defence may justify action on the part of a State which would otherwise have been impropre...**544**

Even more clearly, the Norwegian Government stated, in connexion with self-defence, that...**545**

...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"...**546**

(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 practice**550** confirms the validity of the assertion that the circumstances to which this chapter refers preclude the wrongfulness of the conduct of a 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", "circumstances excluding illicitness", "motifs d’exclusion de l’illicité", "ausschluß der Rechtswidrigkeit", "Gründe die die Rechtswidrigkeit ausschließen", "unrechtausschließungsgründe", "circostanze escludenti la illecitità," 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" ("circumstances annihilating l’illegaîté de l’acte") or of "grounds precluding wrongfulness" ("motifs d’exclusion de l’illicité"). 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...
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. 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 no 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 1 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 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.

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 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 to... is 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.

(3) The case covered by the article therefore comprises, first, the request of a State to be permitted to act in a...
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 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.

(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. 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. The points on which there were differences of opinion concerned 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. 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...
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. 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, through the conduct of its gendarme, the British government consented to that conduct, or at least had allowed the British police to believe that it had so consented. 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 conduct of the organs of the State in the context of action taken by organs of a State in the territorial State are arrested. Here again, the act completely lawful.

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(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 the moratory interest, which the Ottoman Government refused to make. The Permanent Court of Arbitration, to which the dispute was submitted, took the view that:

(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 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. The conclusions reached through a study of learned works are

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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 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 v. Jebb. 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.).


564 United Nations, Reports of International Arbitral Awards, vol. XI (United Nations publication, Sales No. 61.V.A.4), p. 446. [Translation by the Secretariat.]

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 is, it must be 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. 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. If, for example, 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. 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. 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. 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. 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 cooperating 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.

(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...

Foot-note 563 continued)


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:


This conclusion is by no means weakened by the fact that certain writers, such as, for example, Strupp, Gugenheim and Steininger, take the view that the "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 of the principal in 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).
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.\(^{573}\) However, the Commission finds it difficult to accept, even de lege ferenda, that such a circumstance could be dealt with the question.\(^{574}\) 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 regarded under international law as precluding 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.

(15) Again, the "consent" must be internationally attributable to the State. In other words, it must emanate from an organ whose wil 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 regarded under international law as precluding 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 already 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 oil overflight of its territory by 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, 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).

\(^{574}\) See, in this connexion, Ago, "Le delit international" (loc. cit.), p. 535 et seq., and Schütz, loc. cit., p. 85. For a contrary view, see Dahm, op. cit., p. 215.

\(^{575}\) For example, in 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 (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).

\(^{576}\) 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.

\(^{577}\) For example, in 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).
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 internationally wrongful acts 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 involved, the conduct of one of them, regardless of 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 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 (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.598 This does not, however, involve any 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

598 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 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” 180 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 limited to 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 international 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” 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 preclude 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. The concept of countermeasure 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

180 Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes, 745th meeting, para. 72, and 742nd meeting, para. 6.

*/ Yearbook ... 1979, vol. II (Part Two), pp. 115-122.
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 wrongful 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 circumstances, as just indicated, would represent a breach of an international obligation and the infringement of another's subjective right.

4) Only where conduct of this nature is a breach against which the measures are applied 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-a-vis a State accused of breaching an 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 by another party a measure which, in a case of this nature, could 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 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. 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.

5) In international practice and judicial decisions, it is unusual to find pronouncements or conclusions which explicitly and specifically affirm the principle that 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.

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 of an internationally wrongful act committed by another State toward 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
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 redress; 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. In the first award, relating to Responsibility of Germany for damage caused in the Portuguese colonies in the South of Africa (Nautilia 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 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. 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 connection 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: 586

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 ("Cyane" case), the Tribunal states the following:

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 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. 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.

582 United Nations, Reports of International Arbitral Awards, vol. II (op. cit.), p. 1025-1026. (Translation by the Secretariat.)
583 Ibid., p. 1027.
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).** *(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. Unquestionably, therefore, this opinio has become much more restrictive. 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. The progress of the legal belief of States in this respect found tangible expression 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, 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.

(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. These views therefore confirm that, if the necessary conditions are fulfilled, 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. 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 the right of self-defence provided for in Article 51 of the Charter of the United Nations, and the rejection of the "manifestation of a policy of force, such as has, in the past, been disproportionate to the offence from reacting 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.

589 The incompatibility of reprisals involving the use of armed force has been maintained by virtually all writers on this question. See L. 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 a tendency to question the incompatibility of this principle as encountered by the Security Council in performing the function assigned to it by the Charter. See in this connexion the debate which 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. 66, No. 3 (July 1972), 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.

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 the State 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, 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. 594 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. 595 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 or other Member States against 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 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 sanctions or reaction to a prior internationally wrongful act 602 and others—who are more numerous to legitimate reprisals 603 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 situation is beyond the scope of the draft articles, which are concerned exclusively with internationally wrongful acts committed by States and with the responsibility which flows from such acts.


596 See, for example, Scerni, *loc. cit.*, p. 476 and Sereni, *Diritto internazionale (op. cit.*)*, pp. 1524–1554.

of self-protection.\textsuperscript{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.\textsuperscript{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 sanctions\textsuperscript{606} or of reactions to an internationally wrongful act by means of reprisals and other coercive measures.\textsuperscript{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 committed the action sometimes exercises a justification vis-à-vis the third State whose rights have been unduly infringed for 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 third State, which were detailed for these purposes, 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.\textsuperscript{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, b) 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
Admittedly, it can happen that legislative restraints 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 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 repressions. 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 repressions, 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 Cymre as absolute contraband.\(^\text{609}\)

The views of learned writers on this point confirm the soundness of the principle set forth in this decision.\(^\text{610}\)

(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 deliberately 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 repressions 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

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\(^\text{609}\) United Nations, Reports of International Arbitral Awards, vol. II (op. cit.), pp. 1036–1037. [Translation by the Secretariat.]

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, 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. 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. 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, the voluntary nature of the act or omission is not only undeniable but also logically in-

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611 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.

612 For example, ensuring the survival of part of the population afflicted by a natural disaster by requisitioning foreign means of transport or suppliers; 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.
heret 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 fulfill an international obligation—whether 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. 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 the circumstances was not that required by the obligation.

(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 circumstances 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, or to human action—loss of sovereignty or simply loss of control over a portion of State territory, for example. This same external factor may have the effect of rendering the performance of the international obligation definitively impossible, just as it may render it only temporarily impossible, it may prevent the State from...
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 or 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 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 38 of the draft articles on the law of treaties adopted by the Commission in 1966\(^{626}\) 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 exempting a party from liability for non-performance of the treaty. But it considered that, when there is a contin. of 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 fulfillment of the obligation, it attributed this preclusion of responsibility to the termination or suspension of the obligation.\(^{628}\)

(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

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\(^{621}\) This would be the case if, for example, an earthquake destroyed property to be handed over to another State, or if an insurrection rendered 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, on 15 April 1968, imposes on a State on whose territory astronauts are stranded unhandily 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 or seq. 81, 99 and 100). Clearly, however, such "primary" rules must not be taken as evidence that force majeure and fortuitous events 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.


\(^{625}\) 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. 143 et seq. and Supplements to Vol. III (op. cit.) pp. 14 and 15 et seq.

\(^{626}\) 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.


\(^{628}\) Ibid., p. 256, para. (3) of commentary to article 58.
obligation impossible. 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. 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 non. 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 invoked 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-

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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 (g)).

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.)
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. 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.*112

(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 quality of visibility, 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.1124

(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 some hundreds north of the expected course and covered a distance considerably greater than the pilots then thought or had reason to believe they were covering.1125

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.*1126

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 chairman of the main committees of the Conference.112 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 transit.1127

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.1128

(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 Charge d’Affaires at Santiago, the Chilean


1124 Ibid., p. 504, and Secretariat Survey, para. 145.

1125 See Secretariat Survey, para. 147.


“The crew selected for the flight were competent for the purpose. . . . The aircraft and its equipment . . . were in sound flying condition”.

1127 United Nations, Treaty Series, volume 516, p. 214. It is interesting to note that in the English text the term “relache forcee” 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.

1128 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 II, Rev. 1, p. 271).

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.  

(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\footnote{See A.-C. Kiss, Repertoire de la pratique française en matière de droit international public (Paris, C.N.R.S., 1962), vol. 1, p. 128.} 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 shooting 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.  

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.\footnote{See 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.} 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 fulfill 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.\footnote{See United Nations, Reports of International Arbitral Awards, vol. XII, (United Nations publication, Sales No. 63.V.3), pp. 219–220.} 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.\footnote{See Secretariat Survey, para. 484.}  

This statement implicitly recognized, contra, that if it really had been "materially impossible" for Germany to fulfill its commitment, there would have been no breach of the obligation.\footnote{See A.-C. Kiss, Repertoire de la pratique française en matière de droit international public (Paris, C.N.R.S., 1962), vol. 1, p. 128.}  

(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.\footnote{See International Law Reports, vol. 52, pp. 13 et seq.}  

(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 paralyzing the will to do, frequently prevent the execution of obligations...  

\footnote{See International Law Reports, vol. 52, pp. 13 et seq.}  

\footnote{See International Law Reports, vol. 52, pp. 13 et seq.}
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 contemporary history is against any such admission . . . .

Although some representatives challenged the assertion that the situations of force majeure were foreseen 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 fulfill 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. 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.

(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. 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.

(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. The French Government did not agree that in the case in point there had been any genuine impossibility of making payment. 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.

(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.

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**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 Russia 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 making the debt, but possible non-"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 only as a circumstance within the field of international law as well as in private law. Improvement 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.]


Force majeure as a circumstance making performance of an obligation impossible was expressly invoked and discussed at length in another case, that of the Societé 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 international 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.)

**In both cases, the disputed obligation was an obligation of internal public law and not an international obligation proper, but the failure to perform 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
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".\textsuperscript{652} 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,\textsuperscript{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 \textit{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.\textsuperscript{655}

The Mexican Commissioner, Palacio, particularly stressed the notion of "possibility" as limiting the obligation of protection, and in that connexion, commented as follows:

\begin{quote}
... 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 nenunus, 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... as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no 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.
\end{quote}

(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 \textit{Saint Albans Raid} case, the American and British Claims Commission, set up under the Treaty of 8 May 1871, rejected the United States claim. Commissioner Findlay, in particular, stressed the idea that the Canadian authorities could not have discovered the preparations for the raid, which had been planned and arranged in the greatest secrecy.\textsuperscript{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 Venzuelan coast. Indian tribes attacked the vessel and looted the Consul's belongings. The United States Government demanded reparations 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 knowledge of the occurrence or any cause to expect that such a raid was threatened... the raid was one of those occasional and unexpected incidents of which no one could have had any appreciation.\textsuperscript{658}

\begin{footnotes}
\item[652] 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.
\item[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 size 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.
\item[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, \textit{op. cit.}, vol. IV, p. 4054; reproduced in Secretariat Survey, para. 339.
\item[658] Moore, \textit{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.
\item[659] 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).
\item[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 lack 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, \textit{op. cit.}, vol. IV, p. 4054; reproduced in Secretariat Survey, para. 339.
\end{footnotes}
(29) Commissioner Findlay took a similar position in his opinion in the Britsot 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 Garcia, 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 Garcia 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 a 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.**

(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 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".***

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.**** 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.***** 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 works****** reveals that the latter are virtually unanimous, despite differences in use of terms and definitions of notions, in maintaining that the wrongfulness******* 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 obligations. 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.******** 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.******* Many authors mention force majeure as a circumstance precluding wrongful conduct 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

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*** 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.

**** 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 incontrollable by him, in short if it results from "force majeure"--that is, from a cause of which the wrongdoer is not the author, and hence not in his power to prevent or control."

***** See also T' enekides, loc. cit., p. 785.

******* For instance, G. Sperduti ("Sulla colpa in diritto internazionale", Istituto di Diritto internazionale e straniero della Universita di Milano, Comunicazioni e studi (Milan, Giuffre, 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.]

861 Similarly, Jimenez de Arechaga (op. cit., p. 783) 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 (Tracte de droit international public (Paris, Dalloz, 1951), vol. II, p. 313), 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 (Paris, 1955), vol. I, p. 231), there is no responsibility "the illegal act must be "voluntary". See also Quadri, op. cit., p. 589, and Brownlie, Principles... (op. cit.), p. 423.
obligation. 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.

(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 up 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" responsibility, 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. 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.

(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. Moreover, although other codification drafts do not expressly mention force majeure as a circumstance precluding wrongfulness, that does not necessarily mean that such a situation is not precluded. 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. Again, others do so in connexion with acts which are not in conformity with obligations of prevention.

These drafts therefore implicitly include...


668 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 major cause 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.

669 On the other hand, some authors (C丈夫and and Speredini, 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 Ruzie, advocates of the view that the absence of "fault" or "negligence" is not sufficient to preclude international wrongfulness.

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 is that in that situation it is its own doing and, therefore, it cannot use the situation to justify or excuse the conduct.  

(37) If the conditions specified above are met, the undeniable 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 inoperative 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. 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. 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

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Footnotes:

677. 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.

678. In the Société Commerciale de Bélige 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 has 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, then the conduct 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 obligations, 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.

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 situation 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 force majeure 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 State \(^{684}\) 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, 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 systemic wrongfulness 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 its 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. \(^{686}\) 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

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\(^{682}\) 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 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. 304, in Secretariat Survey, para. 145. The same argument is found in the Memorial of 2 December 1938 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 1934, pp. 358–359).


\(^{688}\) 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. 326–331. 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 1953 case (I.C.J. Pleadings, op. cit., pp. 358–359).
seas, permits stopping and anchoring in so far as they are regarded necessary by force majeure or distress. A similar provision appears in article 18, paragraph 2, of the 1979 "Informal Composite Negotiating Text Revision 1" on the law of the sea; this too provides for "stopping" in order to save persons, ships or aircraft in distress. 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". 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 avering the threat.

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.

(9) Doctrine is divided on the answer to the first of these questions. 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 inadmissibility 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 of an important interest of other States or of the international community as a whole. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious

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690 See para. (16) of the commentary to article 31, above.
691 For reference, see foot-note 637, above.
693 IMCO publication, Sales No. 74.01 E. p. 19. See Secretariat Survey, para. 92.
694 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, Giuffre, 1977), vol. 27, pp. 905-906.
695 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 extreme 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 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”.

(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 (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 (12) of the commentary to article 31 also apply to the provisions of article 32 concerning distress as a circumstance precluding wrongfulness in international law.

**Article 33**

**State of necessity**

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

   (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

   (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

   (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

   (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

495 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.

496 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.
(c) if the State in question has contributed to the occurrence of the state of necessity.

Commentary*/

(1) The term "state of necessity" is used by the Commission to denote the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.

(2) A state of necessity is a situation which is particularly clearly distinguishable from other concepts. It differs from the circumstances precluding wrongfulness contemplated in articles 29 (Consent), 30 (Countermeasures in respect of an internationally wrongful act) and 34 (Self-defence) by the fact that, contrary to what happens in those other circumstances, the wrongfulness of an act committed in a state of necessity is not precluded by the pre-existence, in the case concerned, of a particular course of conduct by the State acted against. In the case envisaged in article 29, for example, the existence of such prior conduct is the *sine qua non* whereby the act of the State is rid of its wrongfulness. The conduct in question is represented by the expression of consent to the commission by the latter State of an act not in conformity with the international obligation binding it to the "consenting State". In the case provided for in article 30, the conduct in question is represented by the prior commission, by the State acted against, of an internationally wrongful act. In the case envisaged in article 34, it consists in the commission, once again by the State acted against, of the particularly serious

offence of wrongful recourse to armed force. In the case provided for in the present article, on the other hand, the preclusion of the wrongfulness of an act of a State not in conformity with an international obligation to another State is totally independent of the conduct adopted by the latter. In determining whether the wrongfulness is precluded by a state of necessity, there is no need to ascertain whether the State in question had consented to or previously committed an internationally wrongful act, or engaged in aggression. This last possibility will be especially important in distinguishing the circumstance precluding wrongfulness dealt with in the present article from the one to be dealt with in article 34, namely self-defence. In both cases the act which in other circumstances would be wrongful is an act dictated by the need to meet a grave and imminent danger which threatens an essential interest of the State; for self-defence to be invokeable, however, this danger must have been caused by the State acted against and be represented by that State's use of armed force.

(3) Conversely, the irrelevance of the prior conduct of the State which has suffered the act it is sought to justify is a feature common to a state of necessity and to the circumstances dealt with in articles 31 (Force majeure and fortuitous event) and 32 (Distress). A further shared feature is therefore that the State must have been induced by an external factor to adopt conduct not in conformity with the international obligation. In the case contemplated in article 31, however, the factor is one making it materially impossible for the persons whose conduct is attributed to the State either to adopt conduct in conformity with the international obligation or to know that their conduct conflicts with the conduct required by the international obligation. The conduct adopted by the State is therefore either unintentional *per se* or unintentionally in breach of the obligation. In the case of a state of necessity, on the other hand, the deliberate nature of the conduct, the intentional aspect of its failure to conform with the international obligation are not only undeniable but in some sense logically inherent in the justification alleged; invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation. The case provided for in article 32 lies somewhere between the two. The persons acting on behalf of the State are admittedly not obliged materially to adopt, quite unintentionally, a course of conduct not in conformity with what is required by an

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*/ Yearbook ... 1980, vol. II (Part Two), pp. 34-52."
international obligation of that State; nevertheless, an external factor intervenes to place them in a situation of distress such that, unless they act in a manner not in conformity with an international obligation of their State, they themselves (and whoever may be entrusted to their care) cannot escape a tragic fate. Theoretically, it could be said that a choice always exists, so that the conduct is not entirely unintentional, but the choice is not a "real choice", with freedom of decision, 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 certainly perish. In such circumstances, therefore, the possibility of acting in conformity with the international obligation is purely superficial. The situation is different when States invoke a state of necessity to justify their acts. This "necessity" is then a "necessity of State": the situation of extreme peril alleged by the State consists not in danger to the lives of the individuals whose conduct is attributed to the State, but in a grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or sections of its territory, and so on. The State organs which then have to decide on the conduct which the State will adopt are in no way in a situation that deprives them of their free will. It is certainly they who decide on the conduct to be adopted in the abnormal conditions of peril facing the State of which they are the organs, but their personal freedom of choice remains intact. The conduct adopted will therefore result from a considered, fully conscious and deliberate choice.

(4) Traditionally, so-called "justifications" have been sought for the situation described here by the term "state of necessity". According to some writers, particularly the earlier ones, this situation is characterized by the existence of a conflict between two "subjective rights", one of which must inevitably be sacrificed to the other: on the one hand, the right of State X, which State Y must respect under an international obligation binding it to State X, and on the other, a right of State Y, which the latter can in turn adduce against State X. This idea had its origin in the nineteenth century in the widespread belief that there were certain "fundamental rights" and that they necessarily prevailed over the State's other rights. The so-called "right" defined as the "right of existence", or more often as the "right of self-preservation" ("droit à la conservation de soi-même", "droit à l'autoconservation", "Recht auf Selbstverhaltung") was, it was held, the subjective right that should take precedence over the subjective rights of another State. Subsequently, jurists having rejected the existence of a "right of self-preservation", the right in question was said to be embodied in a no less theoretical "right of necessity". Most writers, however, consider it incorrect to speak of a "subjective right" of the State which invokes the state of necessity. The term "subjective right" denotes the possibility at law of requiring a particular service or course of conduct from another subject of law, but a person who invokes a situation of necessity as justification for his act makes no "claim" on others for service or conduct. The situation might therefore be better described as a conflict between an interest, however essential, on the one hand and a subjective right on the other. A third view, advanced in the Commission in the course of discussion, is that the situation should be described as a conflict between two separate abstract norms which, owing to a fortuitous set of circumstances, cannot be observed simultaneously, and that one of these norms governs the state of necessity. The Commission noted the various explanations given, but did not feel that it had to take a stand on them, since acceptance of one or other of the explanations was of no relevance in determining the content of the rule which it had to formulate.

(5) In this connection the Commission decided that, as with the preceding articles, its task was to examine State practice and international judicial decisions, having regard also to the views of learned writers, in order to ascertain whether it should include among the circumstances excluding wrongfulness the situation it has called a "state of necessity" and, if so, upon what conditions and to what extent.

(6) In international practice, there are numerous cases in which a State has invoked a situation of necessity (regardless of whether it has used precisely that or some other term, e.g., force majeure or "self-defence", to describe it) to justify conduct different from that required of it in the circumstances under an international obligation incumbent on it.118 The Commission considered it sufficient, however, for the purposes of this commentary, to mention and examine only those cases which, in one way or another, may appear conclusive for the purpose of determining the content of the rule to be codified. For this reason, the cases cited will be mainly those relating to matters in regard to which the applicability of the

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118 The preparatory work of the Conference for the Codification of International Law (The Hague, 1930) is not, however, of great interest on this point, contrary to what may be said of many other articles of the present draft. The request for information submitted to States by the Preparatory Committee of the Conference did not ask whether or not a state of necessity should be regarded as a circumstance excluding wrongfulness. Denmark nevertheless mentioned the point in its reply on self-defence:

"Self-defence and necessity should as a matter of principle be an admissible plea in international law; but, as in private law, they should be subject to certain limitations which have not yet been fixed with sufficient clearness. . . ."

Denmark added, as regards necessity, that it should be pleadable only in those cases in which the municipal legal order allowed private individuals to plead it. (League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929 V), p. 126).
plea of necessity does not seem to have been really challenged in principle, even though there were reservations and strong opposition to its application in the cases in point. The cases in which a state of necessity was pleaded to justify non-fulfilment of an obligation "to act" and those in which the same situation was invoked to justify conduct not in conformity with an obligation "not to act", will be examined separately. Within each of these two categories, the cases have been arranged according to the specific matters to which they relate.

(7) Although some members of the Commission expressed hesitation about the pertinence of citing cases of non-fulfilment of international financial obligations in support of their conception of state of necessity, most of the others acknowledged the importance in this connection of cases in which, for reasons of necessity, States adopted conduct not in conformity with obligations "to act" in regard to the repudiation or suspension of payment of international debts. An interesting example is the Russian Indemnity case, considered earlier from another aspect in regard to article 29.117 The Ottoman Government, in order to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as "force majeure", but which was much more like a state of necessity.118 The Permanent Court of Arbitration, to which the dispute was referred, made its award on 11 November 1912. It stated as follows in regard to the argument advanced by the Ottoman Government:

The exception of force majeure, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is... self-destructive".119

The Court considered, however, that:

It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation...120

In the case in point, therefore, the Court rejected the plea put forward by the Ottoman Government. It based its decision on the finding that, in this particular case, the conditions under which that plea could be allowed were not met. The Court thus recognized the existence in international law of an "excuse of necessity", but only within very strict limits. In the view of the Court, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.121

(8) A majority of the Commission also found it relevant that in another connection, that of debts contracted by the State not directly with another State but with foreign banks or other foreign financial institutions, there has often been discussion as to whether it is permissible to invoke very serious financial difficulties—and hence a situation which might fulfil the conditions for the existence of a state of necessity—as justification for repudiating or suspending payment of a State debt. Although it is disputed whether an obligation exists under international customary law to honour debts contracted by the State with foreign private individuals, some of the statements of position made in the discussion referred to above are of interest not only because such an obligation can be imposed in any case by conventional instruments, but also because the statements in question were often put in broad terms whose implications went beyond the case involved.

(9) One question in the request for information submitted to States by the Preparatory Committee of the Hague Codification Conference was whether the State incurred international responsibility if, by a legislative act (point III, 4) or by an executive act (point V, 1 b)), it repudiated debts contracted with foreigners. A number of Governments maintained that the answer to that question depended on the circumstances involved; some of them expressly mentioned the defence of "necessity". For instance, the South African Government expressed the following view:

Such action would prima facie constitute a breach of the State's international duties and give rise to an international claim...122

The Union Government would not, however, exclude the possibility of such repudiation being a justifiable act... If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provision for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money with which to meet its moneylenders, foreign or national. There are limits to what may

118 The Commission stated earlier, in the commentary to art. 31 (Ibid. p. 128, foot-note 646) that the situation was not one of "material impossibility" of paying the debt but of a state of necessity.
120 Ibid.
121 A case in which the parties to the dispute agreed that a situation of necessity such as the existence of very serious financial difficulties could justify, if not the repudiation by a State of an international debt, at least recourse to means of discharging the obligation other than those actually envisaged by the obligation, arose in connection with the enforcement of the arbitral award made by Ö. Unden on 29 March 1933 in the case of the Forests of Central Rhodope (Merits) (see League of Nations, Official Journal, 15th year, No. 11 (Part I) (November 1934) p. 1432).
be reasonably expected of a State in the same manner as with an individual.  

In the light of the replies received, the Preparatory Committee made a distinction, in the Bases of discussion drawn up for the Conference, between repudiation of debts and suspension or modification of debt servicing. It stated with regard to the latter:

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity. (Basis of discussion No. 4, second para.)

(10) This same question has also been considered repeatedly in connection with disputes referred to international tribunals. The most interesting example is the dispute between Belgium and Greece in the Société Commerciale de Belgique case. Here, there had been two arbitral awards requiring the Greek Government to pay a sum of money to the Belgian company in repayment of a debt contracted with the company in question. As the Greek Government was slow in complying with the award, the Belgian Government applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government, while not contesting the existence of the obligations, stated in its defence that its failure thus far to comply with the arbitral awards was due not to any unwillingness but to the country's serious budgetary and monetary situation.

(11) In its counter-memorial of 14 September 1938, the Greek Government had already argued that it had been under an "imperative necessity" to "suspend compliance with the awards having the force of res judicata". "A State has a duty to do so", it observed, "if public order and social tranquillity, which is responsible for protecting, might be disturbed as a result of the carrying out of the award, or if the normal functioning of public services might thereby be jeopardized or seriously hindered". It therefore denied having "committed a wrongful act contrary to international law" as alleged by the plaintiff, and concluded that:

The Government of Greece, anxious for the vital interests of the Hellenic people and for the administration, economic life, health situation and security, both internal and external, of the country, could not take any other course of action; any Government in its place would do the same.

This argument is taken up again in the Greek Government's rejoinder of 15 December 1938. Having regard to the country's serious budgetary and monetary situation, the Government stated:

In these circumstances, it is evident that it is impossible for the Hellenic Government, without jeopardizing the country's economic existence and the normal operation of public services, to make the payments and effect the transfer of currency that would be entailed by the full execution of the award...".

But the most extensive development of the issue of excuse of necessity is to be found in the oral statement made by the counsel for the Greek Government, Mr. Youpis, on 16 and 17 May 1939. After reaffirming the principle that contractual commitments and judicial decisions must be executed in good faith, Mr. Youpis went on to say:

Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. The painful problem arises of making a choice between the two duties; one of them must give way to the other in some measure: which?

Doctrine and the decisions of the courts have therefore had occasion to concern themselves with the question...

Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration, ... Government is, in the opinion of authors, authorized to suspend or even to reduce the service of debt.

The counsel for the Greek Government then proceeded to a detailed analysis of the doctrine and judicial decisions, in which he found full confirmation of the principle he had stated. In the hope of making that principle more easily acceptable—which he may also have had other intentions—he first referred to it as "the theory of force majeure", but he added that "various schools and writers express the same idea in the term 'state of necessity'". He continued:

Although the terminology differs, everyone agrees on the significance and scope of the theory; everyone considers that the debtor State does not incur responsibility if it is in such a situation.

The respondent Government was thus enunciating, in a particularly well-documented manner and as being absolutely general in scope, the principle that a duly established state of "necessity" constituted, in inter-

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122 Secretariat Survey, para. 64.
123 Yearbook ... 1956, vol. II, p. 223, document A/CN.4/96, annex 2. See also, to the same effect, Basis No. 9, concerning the repudiation or modification of debts by the executive power (ibid.).
124 In line with the idea already expressed by the Commission in connection with art. 31 (see foot-note 98 above), although the Greek Government referred on occasions to "force majeure" and the "impossibility" of adopting the conduct required by the obligation, what it had in mind was not so much a "material impossibility" as the impossibility of paying the required sum without thereby injuring a fundamental interest of the State, that is to say, a situation which might be considered as a case of state of necessity. (P.C.I.J., Series C, No. 87, pp. 141 and 190. See also Secretariat Survey, para. 278).
125 Secretariat Survey, para. 276.
national law, a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation and the responsibility which it would otherwise engender. It is important to note that so far as recognition of that principle is concerned, the applicant Government declared itself fully in agreement. In his statement of 17 May 1939, the counsel for the Belgian Government, Mr. Sand, stated as follows:

In a learned survey ... Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services. So far as the principle is concerned, the Belgian Government would no doubt be in agreement.\(^{130}\)

Indeed, the Belgian counsel was not contesting even factually the point that the financial situation in which the Greek Government found itself at the time might have justified the tragic account given by its pleader. The points on which he sought reassurance were the following: (a) that Government's default on its debt was solely on factual grounds involving inability to pay, and that no other reasons involving contestation of the right of the creditor entered into the matter; and (b) that inability to pay could be recognized as justifying total or partial "suspension" of payment, but not a final discharge of even part of the debt. In other words, it had to be recognized that the wrongfulness of the conduct of the debtor State not in conformity with its international obligation would cease to be precluded once the situation of necessity no longer existed, at which time the obligation would again take effect in respect of the entire debt. From that standpoint, the position of the Belgian Government is particularly valuable for the purpose of determining the limit to the admissibility of the excuse of necessity.

\(^{(12)}\) The Court itself noted in its judgment of 15 June 1939\(^{131}\) that it was not within its mandate to declare whether, in that specific case, the Greek Government was justified in not executing the arbitral awards. However, by observing that in any event it could only make such a declaration after having itself verified the financial situation alleged by the Greek Government and after having ascertained the effect which the execution of the awards would have, the Court showed that it implicitly accepted the basic principle on which the two parties were in agreement.\(^{132}\)

(13) On this subject of international obligations "to act", it should be noted that obligations relating to the repayment of international debts are not, in international practice, the only obligations in connection with which circumstances bearing the marks of a "state of necessity" have been invoked to justify State conduct not in conformity with what was required. The case of Properties of the Bulgarian minorities in Greece is a quite typical example. Under articles 3 and 4 of the Treaty of Sèvres, the Bulgarian minorities residing in the territories of the Ottoman Empire ceded to Greece were entitled to choose Bulgarian nationality. In that case, they had to leave Greek territory, but remained the owners of any immovable property they possessed in Greece and were entitled to return there. At one time, many persons who had departed to Bulgaria exercised their right to re-enter Greece and return to their properties. In the meantime, however, large numbers of Greek refugees arrived in Greece from Turkey, and the Greek Government had no other possibility than to settle them on the lands of those who had left Greece when they took Bulgarian nationality. There were incidents on the frontier between the two countries, and a League of Nations commission of enquiry was set up. In its report it expressed the opinion that:

... under the pressure of circumstances, the Greek Government employed this land [the ex-Bulgarian district] to settle refugees from Turkey. To oust these refugees now in order to permit the return of the former owners would be impossible.\(^{133}\)

The Commission of Enquiry therefore proposed that the Greek Government should compensate the Bulgarian nationals who had been deprived of their property,\(^{134}\) and the Bulgarian representative to the Council of the League of Nations endorsed the Commission's proposal and recognized that the application of articles 3 and 4 of the Treaty of Sèvres had been rendered impossible by events.\(^{135}\) In the opinion of the Commission, the Greek Government (despite the use, in French, of the expression "force majeure" by the League of Nations Commission of Enquiry) had not been in a situation in which it was materially impossible for it to fulfil the obligation to respect the Bulgarian property on its territory, but in a situation of necessity. What had led the Greek Government to act in a manner not in conformity with its international obligations to Bulgaria was the need to safeguard an interest which it deemed essential, namely, the pro-

130 Ibid., para. 284.
131 Ibid., para. 288.
132 Ibid., para. 288.
133 In a case referred some years earlier to the Permanent Court of International Justice, the case between France and the Serb-Croat-Slovene State concerning the payment of various Serbian loans issued in France, judgement in which was given by the Court on 12 July 1929, the positions of the parties and the Court on the point at present under discussion were very close to those just described. (See Secretariat Survey, paras. 263-268.)
134 Cases in which an arbitral tribunal accepted the plea of grave financial difficulties as relieving the State of payment of a debt contracted with a private foreign company include the French Company of Venezuela Railroads case, referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 27 February 1902 (United Nations, Reports of International Arbitral Awards, vol. XX (United Nations publication, Sales No. 60.V.4), p. 353; Secretariat Survey, paras. 385-386).
136 Ibid.
137 Ibid., p. 111; Secretariat Survey, para. 126.
vision of immediate shelter for its nationals who were pouring into its territory in search of refuge. This conduct could thus be purged of the imputation of international wrongfulness which would otherwise have attached to it. From another standpoint, however, it still entailed the obligation to compensate the individuals whom the act committed in a state of necessity had deprived of their properties.

(14) Regarding cases in which the existence of a state of necessity was invoked by a State to justify conduct not in conformity with an obligation “not to act”, particularly relevant are those cases where the “essential interest” of the State threatened by a “grave and imminent danger” and safeguardable only through the adoption of conduct which in principle was prohibited by an international obligation was to ensure the survival of the fauna or vegetation of certain areas on land or at sea, to maintain the normal use of those areas or, more generally, to ensure the ecological balance of a region. It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an “essential interest” of all States. Consequently, most statements of position proposing to preclude on that basis the wrongfulness of conduct not in conformity with an international obligation will be found to be contemporary ones. But there are also a few precedents. In this respect, references can be made to the position adopted in 1893 by the Russian Government in the case of Fur seal fisheries off the Russian coast. In view of the alarming increase in sealing by British and United States fishermen near Russian territorial waters, and in view of the imminent opening of the hunting season, the Russian Government, in order to avert the danger of extermination of the seals, issued a decree prohibiting sealing in an area that was contiguous to its coast but was at the time indisputably part of the high sea and therefore outside Russian jurisdiction. In a letter to the British Ambassador dated 12 (24) February 1893, the Russian Minister for Foreign Affairs, Chickline, explained that the action had been taken because of the “absolute necessity of immediate provisional measures” in view of the imminence of the hunting season. He added that he considered it necessary to:

emphasize the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances\(^{136}\)

and declared his willingness to conclude an agreement with the British Government with a view to a permanent settlement of the question of sealing in the area. This position is therefore interesting as an affirmation of the validity of the plea of necessity in international law and also because it brings out several of the conditions that must in any case be fulfilled before one can even consider whether a situation of “necessity” justifies action by a State which is not in conformity with an international obligation, namely: the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the State, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this “justification”, depending on the continuance of the danger feared.

(15) A case that has occurred in our own times and may be regarded as typical is The “Torrey Canyon” incident. On 18 March 1967, the Liberian tanker Torrey Canyon, with a cargo of 117,000 tons of crude oil, went aground on submerged rocks off the coast of Cornwall, but outside British territorial waters. A hole was torn in the hull, and after only two days nearly 30,000 tons of oil had split into the sea. This was the first time that so serious an incident had occurred, and no one knew how to avert the threatened disastrous effect on the English coast and its population. The British Government tried several means, beginning with the use of detergents to disperse the oil which had spread over the surface of the sea, but without appreciable results. In any event, the main problem was the oil remaining on board. In order to deal with that, it was first decided to assist a salvage firm engaged by the shipowner in its efforts to refloat the tanker, but on 26 and 27 March the Torrey Canyon broke into three pieces and 30,000 more tons of oil split into the sea. The salvage firm gave up, and the British Government then decided to bomb the ship in order to burn up the oil remaining on board. The bombing began on 28 March and succeeded in burning nearly all the oil. It should be noted that the British Government’s action did not evoke any protests either from the private parties concerned or from their Governments. It is true that the bombing did not take place until after the ship had been reduced to a wreck and the owner seemed implicitly to have abandoned it; but even before that, when the action to be taken was under discussion, there was no adverse reaction to the idea of destroying the ship, which the Government was prepared to do against the wishes of the owner if necessary. The British Government did not advance any legal justification for its conduct, but on several occasions it stressed the existence of a situation of extreme danger and the fact that the decision to bomb the ship had been taken only after all the other means employed had failed.\(^{137}\) Whatever other possible justifications there may have been for the British Government’s action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.

(16) As a result of the Torrey Canyon incident, conventional instruments were prepared to enable a coastal State to take necessary measures on the high seas to protect its coastline and related interests from a

\(^{136}\) Secretariat Survey, para. 155.

grave and imminent danger of pollution following upon a maritime casualty.\textsuperscript{138} Despite this trend at the treaty level, a state of necessity can still be invoked, in areas not covered by these rules, as a ground for State conduct not in conformity with international obligations in cases where such conduct proves necessary, by way of exception, in order to avert a serious and imminent danger which, even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or—even this is not ruled out—in an area subject to the sovereignty of another State. The latter would apply, for example, if extremely urgent action beyond its frontiers were the only means for a State to protect from fire a forest covering both sides of the frontier and time and means were lacking for the organs of the neighbouring State to take the necessary measures to extinguish the fire which had started to spread on its territory. Other examples of the same kind can well be imagined.

(17) Another area in which States have frequently pleaded a situation of necessity in order to justify the adoption of conduct not in conformity with an international obligation incumbent on them is that of obligations concerning the treatment of foreigners. In these cases, the obligation at issue is more often a conventional one, since customary obligations in this respect are relatively few and there are differences of opinion as to their very existence and their scope. There is, however, one case, already old, in which the parties to the dispute do seem to have taken for granted the existence of an obligation on the State, under general international law, to honour prospecting and exploitation concession contracts concluded with foreigners. In the \textit{Company General of the Orinoco} case, a French company had obtained from the Venezuelan Government concessions to exploit minerals and develop a transport network in a large area over which Venezuela believed it had sovereignty. However, much of the area covered by the concession contracts was claimed by Colombia, which in fact had grounds for considering it part of its territory. Colombia therefore strongly protested against the granting of the concessions by the Venezuelan Government and demanded the return of the area concerned. Venezuela, wishing to avert the danger of armed conflict with the neighbouring republic, which was becoming imminent, felt obliged to rescind the concessions it had granted and return to Colombia the areas over which it had mistakenly exercised sovereign powers. This led to a dispute between the Venezuelan Government and the Company General of the Orinoco. The French Government having sided with the company, the case was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. The Commission, however, accepted the argument advanced by Venezuela, which had been forced to annul the concessions granted to the French company because of the real danger of war they had created. Umpire Plumley therefore ruled that, in the exceptional circumstances of the case, it was lawful under international law for the Venezuelan Government to rescind the concessions, although he agreed that the company was entitled to compensation for the consequences of an act which had been internationally lawful but severely detrimental to its interests.\textsuperscript{139}

(18) As regards cases in which the obligation arose out of an international convention and the party concerned sought to justify non-compliance with the obligation on the ground that it had acted in a state of necessity, there are three that the Commission considers important enough to be cited. The first is a very old case; it concerns an Anglo-Portuguese dispute dating from 1832. The Portuguese Government, which was bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects. Upon receiving that answer to its protests, the British Government consulted its Law Officers on the matter. On 22 November 1832, Mr. Jenner replied with the following opinion:

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\ldots \text{whether the Privileges and Immunities so granted to the British subjects are, under all circumstances, and at whatever risk, to be respected} \ldots \text{the proposition cannot be maintained to that extent. Cases may be easily imagined in which the strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself. When such a case occurs, Vattel, Book 2, C. 12, Sect. 170 observes that it is "tacitly and necessarily expected in the Treaty". In a case, therefore, of pressing necessity, I think that it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be requisite for its subsistence, even against the will of the Owners, whether British or Portuguese; for I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.}
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The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.\textsuperscript{140}

Despite its age, this case is therefore a particularly sound precedent, mainly because the two parties were


agreed on the principles enunciated and hence on express recognition of the validity of the plea of necessity where the conditions for it are fulfilled. But the case is also of interest because of the terminology used, which is unusually apt for those times, and because of its contribution to the definition of the two conditions—that the danger to be averted be "imminent" and "urgent".

(19) The second case, a century later and well known, is the Oscar Chinn case. In 1931, the Government of Belgium adopted measures concerning fluvial transport, designed to benefit the Belgian company Unatra, in what was then the Belgian Congo. According to the United Kingdom, one of whose subjects, Oscar Chinn, had been harmed by the measures in question, the latter had created a "de facto monopoly" of fluvial transport in the Congo, which in its view was contrary to the principles of "freedom of navigation", "freedom of trade" and "equality of treatment" provided for in articles 1 and 5 of the Convention of Saint-Germain-en-Laye of 10 September 1919.\(^\text{141}\) The question was submitted to the Permanent Court of International Justice, which gave its judgment on 12 December 1934. The Court held that the "de facto monopoly" of which the United Kingdom complained was not prohibited by the Convention of Saint-Germain-en-Laye.\(^\text{142}\) Having thus found that the conduct of the Belgian Government was not in conflict with its international obligations towards the United Kingdom, the majority of the Court saw no reason to consider whether any wrongfulness in the conduct in question might have been precluded because the Belgian Government had perhaps acted in a state of necessity. The question was, however, considered in depth in the individual opinion of Judge Anzilotti, who stated:

6. If, assuming the facts alleged by the Government of the United Kingdom to have been duly established, the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements.

7. The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.

The question whether the Belgian Government was acting, as the saying is, under the law of necessity is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that the Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in prices.

It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with a plea of necessity.

To begin with, there is the fact that, when the Belgian Government took the decision of June 20th 1931, it chose from among several possible measures—and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of Commerce—that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the plea of necessity which, by definition, implies the impossibility of proceeding by any other method than the one contrary to law.

Another undisputed fact which seems irreconcilable with the plea of necessity is the offer made by the Government to transporters other than Unatra on October 3rd, 1932. Whatever its practical value, that offer showed that it was possible to concede advantages to all enterprises, similar to those granted to Unatra, and hence to avoid creating that de facto monopoly which, in the submission of the Government of the United Kingdom, was the necessary consequence of the decision of June 20th, 1931.\(^\text{143}\)

The admissibility of the "plea of necessity" as a principle in international law is evident from this opinion. At the same time, the concept of "necessity" accepted in international legal relations is very restrictive. It is restrictive as regards the determination of the essential importance of the interest of the State which must be in jeopardy in order for the plea to be effective; it is also restrictive as regards the requirement that the conduct not be in conformity with an international obligation of the State must really be.

In the case in question, the only means of safeguarding the essential interest which is threatened.

(20) The third case is the one involving the United States of America and France that came before the International Court of Justice in 1952 under the title case concerning Rights of Nationals of the United States of America in Morocco. One of the points at issue was whether or not it was lawful to apply to United States nationals a 1948 decree by the Resident General of France in Morocco establishing a régime of import restrictions in the French zone of Morocco in a manner that the United States did not consider to be in conformity with obligations arising out of treaties concluded between the United States and Morocco. The treaties in question guaranteed to the United States the right freely to engage in trade in Morocco without any import restrictions save those that were specified in the treaties themselves. In its defence the French Government asserted, inter alia, that the import restrictions imposed by the decree were necessary for the enforcement of exchange controls, such controls being essential to safeguard the country's economic balance. It argued that that balance would have been seriously jeopardized by the removal of exchange controls in a situation which had been rendered critical by the fluctuation of the franc on the Paris black market and by the "dollar gap" of

\(^{142}\) P.C.I.J., Series A/B, No. 63, p. 89.
\(^{143}\) ibid., pp. 112–114.
Morocco. The United States Government, for its part, denied that the danger feared by the other party actually existed or that, in any event, there was a connection of the kind established by that party between the necessity of averting such a danger and the restrictions imposed on American imports without the consent of the United States Government. It did not, however, challenge outright the validity of the "ground" described by the French Government and its possible applicability to situations other than that involved in the particular case in question. The Court did not have occasion to rule on the issue. But in the opinion of the Commission, this case too provides support for the recognition of the applicability of the plea of necessity in international law. It is true that, in describing the situation characterized by the "necessity" of taking measures to avert the grave danger which would otherwise have jeopardized an essential interest of the country, the French Government used the term "force majeure", but the characteristics of the situation invoked were not those of "material impossibility": rather, they were those of a situation that the Commission has termed a "state of necessity".

(21) Worthy of mention in an area related to that of the treatment accorded to foreigners within the territory of the State, namely, the obligations imposed on a State to refrain from placing restrictions on or impediments to the free passage of foreign vessels through certain areas of its maritime territory, is the "Wimbledon" case. During the Russo-Polish war of 1920-1921, the British vessel Wimbledon, chartered by a French company and carrying a cargo of munitions and other military material destined for Poland, was refused passage through the Kiel Canal by the German authorities on the ground that, in view of the nature of the cargo, its passage through German waters would be contrary to the position of neutrality adopted by Germany in connection with the war between Poland and Russia. The French Government protested, on the ground that Germany's conduct was not in conformity with article 380 of the Treaty of Versailles. The ensuing dispute was referred to the Permanent Court of International Justice, with the United Kingdom, Italy and Japan, as co-signatories to the Treaty, intervening before the Court on the side of France. The issue debated during the proceedings was essentially whether or not the action taken by the German authorities with regard to the Wimbledon was prohibited by article 380 of the Treaty of Versailles. In its judgment of 17 August 1923, the Court ruled that it was, and that such a prohibition in no way conflicted with the obligations of Germany as a neutral State. Consequently, the Court did not have occasion to rule on any "plea of necessity" that Germany might have made. However, the question was mentioned by the agents of the two parties during the oral proceedings. For instance, the Agent of the French Government, Mr. Basdevant, said:

"Will not the principles of international law, the general rules of the law of nations, furnish some grounds for frustrating the rule of free passage through the Kiel Canal in the case of a vessel carrying military material destined for a neutral State? First, let me say without otherwise dwelling on this point that no arguments against the application of the rule of free passage have been advanced on the ground of impossibility of compliance, nor that of the danger which compliance with the provision might have created for Germany; the plea of necessity was not made at all. Indeed, any such arguments seem inconceivable in this case."

Again, the Agent of the Italian Government, Mr. Pilotti, observed that:

"Neither would it be possible to speak of force majeure, or more particularly of that concept which had been expressly sanctioned in the first book of the German Civil Code relating to the exercise of rights in general (§227), and which, besides, lends itself to controversy: I mean the status necessitatis. Indeed, there is no proof to show that the war between Poland and Russia, in consequence of the acts accomplished by the two belligerents, constituted for Germany that immediate and imminent danger, against which she would have had no other means of protection but the general prohibition of the transit of arms through her territory, and particularly that such a danger should have continued to exist at the time when the "Wimbledon" presented herself at the entrance of the Canal."

Finally, the German Agent, Mr. Schiffer, said:

"The representative of one of the applicant parties argued that Germany claimed that she acted under the jus necessitatis. This is not the case. There was no impossibility whatever for Germany to carry out the Treaty; nor has Germany contravened the Treaty."

"I repeat that it is not the intention of the German Government to claim any jus necessitatis. On the contrary, Germany claims that she has remained true to her conventional obligations resulting from the Treaty."

The Wimbledon case therefore shows a significant concurrence of views as to the admissibility in general international law of state of necessity as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation, and a no less significant contribution by some of the protagonists to the definition of the conditions to be fulfilled in order for the existence of such a circumstance to be recognized.

(22) The Commission then went on to examine cases in which a state of necessity has been invoked to justify...
conduct not in conformity with international obligations relating to respect by a State of the territorial sovereignty of other States. History shows that on many occasions Governments have tried to give necessity a leading role as justification for acts committed in breach of an obligation of that kind. And it is mainly these cases which have been the focal point of the argument concerning the general admissibility of the plea of necessity; it is they which have done most to mobilize a large section of learned opinion against the very principle of such a plea. In the opinion of the Commission, however, the interest of these cases is now much more limited. They are, indeed, mainly in cases in which the existence—usually spurious—of a "state of necessity" was alleged in order to justify either the annexation by a State of the territory or part of the territory of another State,\(^{150}\) or the occupation and use, for purposes of war, of the territory of a State which had been neutralized by a treaty concluded before the outbreak of war between some of the parties to the treaty,\(^ {151}\) or of the territory of a State which had declared its neutrality in a war between other States.\(^{152}\)


151 What may be considered the "classic" case was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany claimed as necessary to justify the ground of the necessity of forestalling an attack on its territory by France through Luxembourg and Belgium. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs (J. B. Scott, ed., Diplomatic Documents Relating to the Outbreak of the European War (New York, Oxford University Press, 1916), Part I, pp. 749–750) and the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words "wir sind jetzt in der Notwehr; und Not kennt kein Gebot!" (Jahrbuch des Völkerrechts (Munich), vol. III (Special No.): Politische Urkunden zur Vorgeschichte des Weltkrieges (1916), p. 728).

Such cases are very numerous; mention may be made of the occupation of Korea by Japanese troops during the Russo-Japanese war of 1904 (see the documents cited by E. T. Hazan in L’état de nécessité en droit pénal internatéiatique et international (Paris, Pedone, 1949), p. 53); the occupation of certain Greek territories or islands by the Entente Powers during the First World War for use as bases for their military operations against Turkey (see the documents cited by T. P. Ion in "The Hellenic situation from the point of view of constitutional and international law—Part IV", The American Journal of International Law (New York), Vol. 12, No. 3 (July, 1918), pp. 564 et seq.; the occupation by Germany, during the Second World War, of Denmark, Norway, Belgium and Luxembourg and by Germany and Italy of Yugoslavia and Greece (see Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946 (Nuremberg, 1949), vol. XXII, pp. 446 et seq.); and the occupation, during the same war, of Iceland by the United Kingdom (ibid., vol. XVII, p. 415); of Iran by the United Kingdom and the Soviet Union (G. E. Kirk, "The Middle East", in Survey of International Affairs, 1939–1946: The World in March 1939, ed. A. Toynbee and F. T. Ashton-Gwatkin (London, Oxford University Press, 1952), pp. 133 et seq.; M. M. Whitman, ed., Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1963), vol. 5, pp. 1042 et seq.; of Portuguese Timor by the Netherlands and Australia (Keesing’s Contemporary Archives, 1940–1943 (Bristol), vol. IV, pp. 4943 et seq.). In so far as any "justification" of these actions was sought, "necessity" was always invoked, with varying degrees of candour.

152 See para. (37) below.

153 Resolution 3314 (XXIX), annex.
of that kind. The Commission is referring in particular to certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is, first, the existence of grave and imminent danger to the State, to some of its nationals or simply to human beings—a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allow to continue. Another common feature is the limited character of the actions in question, as regards both duration and the means employed, in keeping with their purpose, which is restricted to eliminating the perceived danger.

(24) In the past, there has been no lack of actual cases in which necessity was invoked precisely to preclude the wrongfulness of an armed incursion into foreign territory for the purpose of carrying out one or another of the operations referred to above. To cite only one example of the many involving situations of this kind, there was the celebrated "Caroline" case, in which British armed forces entered United States territory and attacked and destroyed (also causing loss of life) a vessel owned by American citizens, which was carrying recruits and military and other material to the Canadian insurgents. For the State organs and for the writers of the time, it made no difference, with regard to the possibility of invoking a state of necessity, whether the obligation with which the act of the State was not in conformity was or was not an obligation relating to respect for territorial sovereignty. But can the same be said today? Apart from doubt on the question whether all international obligations concerning respect for the territorial sovereignty of States have really become obligations of jus cogens, it must be borne in mind that Article 2, paragraph 4, of the Charter of the United Nations requires Member States to refrain from the use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". Now this requirement raises another question, namely, that of the possible effect of treaty provisions which explicitly, or even implicitly, exclude the possibility of invoking a state of necessity as a circumstance precluding the wrongfulness of an act of the State not in conformity with one of its international obligations. As can be seen from what is said below, the Commission considered that the possibility of invoking this exception should be excluded not only when such exclusion is provided for by an express treaty obligation, but also when it follows implicitly from the text of the treaty. That being so, the problem is reduced to knowing whether the Charter, by Article 2, paragraph 4, is or is not intended to impose an obligation which cannot be avoided by invoking a state of necessity. It has been observed in this connection that Article 51 of the Charter mentions only self-defence as an admissible form of the use of armed force. Should it be inferred from this that the drafters of the Charter might have had the intention of implicitly excluding the applicability of the plea of "necessity", however well that the American Secretary of State was referring, for he did not make the preclusion of wrongfulness depend on the existence of a prior or threatened aggression by the State whose territory had been violated, or on any kind of wrongful act on its part. In his message to Congress of 7 December 1841, the President of the United States of America reiterated that:

"This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ..." (ibid., 1841-1842 (1858), vol. 30, p. 194).

Thus, eliminated on the plane of principle, the divergence of views shifted to that of fact. The incident was not closed until 1842, with an exchange of letters in which the two Governments found themselves in agreement, both on the basic principle that the territory of an independent nation is inviolable and on the fact that "a strong overpowering necessity may arise when this great principle may and must be suspended." "It must be so", added Lord Ashburton, the British Government's ad hoc envoy to Washington, "for the shortest possible period during the continuance of an admitted overruuling necessity, and strictly confined within the narrowest limits imposed by that necessity." (ibid., pp. 195 et seq.). See Secretary of State Webster's reply: ibid., pp. 201 et seq. Thus, the applicability in principle of the plea of necessity in the area under discussion here was expressly recognized by the two Powers between which the dispute had arisen.

115 See para. (38) below.
founded it might be in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force. The Commission considered that it was not called upon to take a position on this question. The task of interpreting the provisions of the Charter devolves on other organs of the United Nations.

(25) The Commission will here only point out that after the Second World War, and hence after the adoption of the Charter, there is only one known case in which a State invoked a state of necessity—and then not exclusively—to justify violation of the territory of a foreign State: this is the case of the despatch of parachutists to the Congo by the Belgian Government in 1960. According to the Belgian Government the parachutists were sent to the Congo to protect the lives of Belgian nationals and other Europeans who, it claimed, were being held as hostages by army mutineers and by the Congolese insurgents. According to one author, Mr. Eyskens, the Belgian Prime Minister, told the Senate that the Government had found itself "in a situation of absolute necessity". In a statement before the Security Council, the Belgian Minister for Foreign Affairs, Mr. Wigyn, said that Belgium had been forced "by necessity" to send troops to the Congo, and that the action undertaken had been "purely humanitarian", had been limited in scope by its objective, and had been conceived as a purely temporary action, pending an official intervention by the United Nations.

The Congolese Government, in its reply, maintained that the justification asserted by Belgium was a pretext, that its real objective was the secession of Katanga and that, consequently, an act of aggression had taken place. The views expressed in the Security Council were divided between two opposing positions: both sides, however, concentrated on determination and evaluation of the facts. No one took any position of principle with regard to the possible validity of a "state of necessity" as a circumstance which, if the conditions for its existence were fulfilled, could preclude the wrongfulness of an act not in conformity with an international obligation. Hence all that can be said is that there was no denial of the principle of a plea of necessity as such.

(26) In other cases in which armed operations have been undertaken on foreign territory for purposes said to be "humanitarian", the State which undertook them has relied on other justifications, such as the consent of the State in whose territory the operations took place or self-defence. The concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence.

It may, however, be that the preference for other "justifications" than that of necessity was due, in these cases, to an intention of bringing out more clearly certain alleged aspects of the case, such as the non-innocence of the State against which the act was committed, or to a belief that it was not possible to prove that all the particularly strict conditions for the existence of a genuine state of necessity were fulfilled. It must, in any case, be concluded that the practice of States is of no great help in answering the question specifically raised above.

(27) The Commission finally came to consider the cases in which a State has invoked a situation of necessity to justify actions not in conformity with an international obligation. The question whether or not "necessity of war" or "military necessity" can be invoked to justify conduct not in conformity with that required by obligations of the kind here considered. On this point a preliminary clarification is required. The principal role of "military necessity" is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity with an obligation under international law. Military necessity appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality, namely, those rules which, by derogation, from the principles of the law of peace, confer on a belligerent State the legal faculty of resorting, against the enemy and against neutral States (and against their nationals), to actions

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158 See Official Records of the Security Council, Fifteenth Year, 873rd meeting, paras. 182 et seq., 192 et seq.; 877th meeting, para. 142; 879th meeting, para. 151.
159 Ibid., 877th meeting, paras. 31 et seq.
160 Ibid., 873rd meeting, para. 144; 878th meeting, paras. 23, 65, 118; 879th meeting, paras. 80 et seq.
161 At the time of the second Belgian intervention in the Congo—also defined as an "emergency rescue operation" (see Official Records of the Security Council, Nineteenth Year, Supplement for October, November and December 1964, document S/6082)—which took place in 1964, the Belgian Government invoked as its justification the consent of the Congolese Government, which the latter contested (ibid., documents S/6053 and S/6063).
162 The same justification has sometimes been invoked for raids carried out by organs of a State in foreign territory to liberate the hostages of terrorists who have diverted aircraft. This was the case of the Federal Republic of Germany in the raid on Mogadishu (Somalia) in 1977, and of Egypt in the raid on Larnaca (Cyprus) in 1978.
163 This was the case of the raid on Entebbe (Uganda) undertaken by Israel in 1976. (For the various positions taken on the subject of the raid and the draft resolutions, none of which were adopted, see Official Records of the Security Council, Thirty-first year, Supplement for July, August and September 1976, documents S/12123, 12124, 12126, 12132, 12136 and 12139, and ibid., 1939th, 1941st and 1942nd meetings).
164 See para. (23) above.
which meet the needs of the conduct of hostilities. In relation to those rules, therefore, what is involved is certainly not the effect of "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when this "necessity of war", the recognition of which is the basis of the rule and its applicability, is seen to be absent in the case in point, that this rule of the special law of war and neutrality must not apply and the general rule of the law of peace prohibiting certain actions again prevails. It follows that all those very numerous—positions taken on this question are without relevance for the purposes of determining the content of the rule which the Commission is here called upon to codify.

(28) Having clarified this point, the Commission must, however, note that some writers have referred to the concept of "military necessity" with a purpose which is really the same as that pursued by the Commission in the present article, namely, to determine whether there are circumstances connected with the idea of necessity which are capable as such of precluding, exceptionally, the wrongfulness of conduct not in conformity with an international obligation. What these writers were studying is the question whether this particular kind of necessity, the object of which is to safeguard the vital interest of the success of military operations against the enemy and, in the last resort, of victory over the enemy, can have the effect of precluding the wrongfulness of State conduct not in conformity with one of the rules of the law of war, which impose limitations on the belligerents regarding the means and methods of conducting hostilities between them, the general purpose being to attenuate the rigours of war. These are what are called the rules of humanitarian law applicable to armed conflicts; most of them, moreover, are codified rules. The Commission does not believe that the existence of a situation of necessity of the kind indicated can permit a State to disobey one of the abovementioned rules of humanitarian law. In the first place, some of these rules are, in the opinion of the Commission, rules which impose obligations of jus cogens, and as stated below, it is a state of necessity cannot be invoked to justify non-fulfilment of one of these obligations. In the second place, even in regard to obligations of humanitarian law which are not obligations of jus cogens, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with the purposes of the legal instruments drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that "military necessity" was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States and to provide for some restrictions on the almost total freedom of action of which belligerents take advantage in their reciprocal relations by virtue of this criterion. And they surely did not intend to allow necessity of war to destroy retrospectively what they had achieved with such difficulty. They were also fully aware that compliance with the restrictions they were providing for might hinder the success of a military operation. But if they had wished to allow those restrictions only in cases where they would not hinder the success of a military operation, they would have said so expressly—or, more probably, would have abandoned their task as being of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest; States signing the Conventions undertook to accept that subordination and not to try to find pretexts for evading it. It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all. It is true that some of these conventions on the humanitarian law of war contain clauses providing for an explicit exception to the duty to fulfil the obligations they impose: this is in the case of "urgent military necessity". But these are provisions which apply only to the cases expressly provided for. Apart from these cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose. And as will be seen...
below, the Commission took the view that a State cannot invoke a state of necessity if that is expressly or implicitly prohibited by a conventional instrument.

(29) With regard to the positions taken on the admissibility or non-admissibility of state of necessity as a circumstance which can preclude the wrongfulness of an act of the State not in conformity with an international obligation, the Commission first noted that the idea that necessity can, exceptionally, justify State conduct contrary to an international obligation is explicitly accepted—although in the context of research in which analysis of internal law is mixed with that of international law—by classical writers in our discipline, such as Ayala, Gentili and, especially Grotius, in the sixteenth and seventeenth centuries, and Pufendorf, Wolff and de Vattel in the eighteenth century. Although it was not contested, this acceptance was accompanied by very restrictive conditions. During the nineteenth century these appeared to be the first steps in support of this position to clothe the recognition of the pretext of necessity with a principle of "justification". At the same time, there appeared the first opposition by certain writers to the hitherto unchallenged idea. However, the Commission considers it useful to emphasize that the arguments advanced by these first opponents, which were taken up by nearly all their successors having the same position, do not in fact amount to a real rejection of the idea of necessity itself as an exceptional justification of certain State conduct. They rather represent a twofold reaction: (a) on the theoretical level, to the cumbersome apparatus of "foundations" and "justifications" with which the advocates of the idea of necessity now wished to accompany it, and (b) on the practical level, to the entirely abusive application of the idea by certain Governments. During the twentieth century, the number of writers opposed to the applicability of the concept of state of necessity in international law gradually increased, although it remained smaller.

166 See para. (38).


170 To put it plainly, it is, first, the idea of the existence of a "fundamental" and "natural" right of "self-preservation" that is the target of those making this critical revision, and it is, secondly, the concern caused by the quite inadmissible use of the idea of self-preservation or of "Not", made by States for purposes of expansion and domination, which leads these writers to take an attitude that is in principle hostile to recognition of the concept of state of necessity in the international legal order. On the other hand, it must be said that certain writers more particularly aware of the realities of international life, such as Westlake (op. cit., p. 115), while expressing their opposition to general recognition of a justification based on state of necessity, do not think it necessary to carry their opposition so far as to deny the applicability of that justification to conduct not in conformity with certain kinds of obligation. In cases where the obligation not fulfilled relates to matters less essential than respect for the sovereignty of others, which are thus less dangerous to international life, it is felt that opposition to the idea of state of necessity as a circumstance which can preclude the wrongfulness of the conduct in question has no raison d'être and is not in fact extended.

interpretation of State practice, it is mainly the old fear of abuses that determines the opposition of the first group of writers, as is confirmed by the fact that some of them are willing to accept a state of necessity in cases where the possibilities of abuse are less frequent and less serious, and particularly where it is necessary to protect a humanitarian interest of the population. Nor is the danger of abuses underestimated by the writers in the second group, but they are careful to point out that other legal principles have lent themselves to abuses in interpretation and application and that to deny, in the abstract, the existence of principles which are clearly operative in real international legal life would not check the abuses committed under cover of those principles. Thus, what these writers are more concerned to show are the inherent limits to the applicability of the notion of state of necessity.

(30) The Commission considers that the divergence of views which seems to divide the more recent opinion, like that which preceded it, into two opposing camps is, in reality, much less radical than it appears at first sight and than some vehement assertions would have us believe. In the last analysis, the "negative" position on state of necessity amounts to this: we are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unacknowledgable purposes, but we are ultimately prepared to grant it a limited function in certain specific areas of international law less sensitive than those in which the deployed abuses usually occur. The "positive" position, on the other hand, reduced to its essentials, is this: we accept the ground of necessity as constituting a recognized principle of existing international law, and we cannot overlook the function which this concept performs in legal relations between States, as in all other legal systems; but we are careful to lay down very restrictive conditions for the application of this principle, so as to prevent this "plea" from being used for violating international law with impunity. We particularly wish to make it impossible to invoke this principle in those areas where abuses have traditionally occurred in the past. Thus it is easy to see that the gap separating the best "reasoned" positions of the two camps is a narrow one. Hence the Commission does not see these doctrinal differences, the importance of which has

than the number who supported the applicability of that concept.172 Apart from a few differences in the


Footnote continued.

often been exaggerated, as a serious obstacle to the accomplishment of the task entrusted to it.

(31) It was not until the Commission had carefully examined the international practice and doctrinal opinion described in the preceding paragraphs that it turned its attention to the content of the rule to be inserted in the draft articles. Before discussing this, it had naturally to decide the preliminary question whether or not an article on state of necessity should form part of chapter V of the draft articles. In this connection, one member of the Commission—without denying the merits of the rule that, exceptionally, a State might find itself justified in having adopted conduct not in conformity with an international obligation, because that was in fact the only way it could escape the inevitably harmful consequences of the rule—nevertheless expressed the opinion that such cases would be very rare and that, in view of the abuse to which the rule might lend itself, and above all of the difficulty of determining objectively that the State had an “essential” interest which was threatened by an extreme peril, it would probably be best not to insert an express provision on the subject in the draft. A few other members of the Commission were at first inclined to take this view, but were led to change their opinion after the question had been thoroughly discussed. In doing so, they continued to bear in mind the risks of abuse to which the matter might lend itself, but came round to the view of the great majority of the Commission that those risks would largely be avoided by including in the draft, in regard to state of necessity, an explicit provision that would not only set out in precise terms the various conditions that must exist for a State to be entitled, exceptionally, to invoke a state of necessity as justification for its action, but would also plainly exclude certain matters from the domain in which the state of necessity might be held to operate. The notion of state of necessity is too deeply rooted in general legal thinking for silence on the subject to be considered a sufficient reason for regarding the notion as totally inapplicable in international law, and, in any case, there would be no justification for regarding it as totally so. The fact that abuses are feared—abuses which are avoidable if detailed and carefully worded provisions are adopted—is no reason to bar the legitimate operation of a ground for precluding the wrongfulness of conduct by a State in cases in which the utility of this ground is generally acknowledged.

In other words, the great majority of the Commission came to the view that any possibility of the notion of state of necessity being applied where it is really indispensable must certainly be prevented, but that this should not be so in cases where it is and will continue to be a useful “safety-valve” by means of which States can escape the inevitably harmful consequences of trying at all costs to comply with the requirements of rules of law. The imperative need for compliance with the law must not be allowed to result in situations characterized so aptly by the maxim summum jis summa injuria.

(32) The Commission thus decided to give an affirmative answer to the question whether the text of the draft article should contain a provision of an act not in conformity with an international obligation. It then set about the task of determining, firstly, what conditions must exist—and coexist—for a State to be entitled to invoke the existence of a state of necessity as justification for a course of conduct not in conformity with an international obligation. In this connection, the Commission found that the first condition which called for mention concerned the manner of determining those interests of the State which must be in peril for the State to be justified in adopting conduct not in conformity with what is required of it by an international obligation. In the view of the Commission, the most appropriate way of determining them was to indicate that an essential interest of the State must be involved, but this does not mean that the Commission considered the interest in question to be solely a matter of the “existence” of the State; it has made it quite clear in its review of practice that the cases in which a state of necessity has been invoked in order to safeguard an interest of the State other than the preservation of its very existence have ultimately proved more frequent and less controversial than the cases in which a State has sought to justify itself on the ground of a danger to its actual existence. As regards the specific identification of the State interests that could be described as essential, the Commission decided that it would be pointless to try to spell them out any more clearly and to lay down pre-established categories of interests. The extent to which a given interest is “essential” naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.

(33) Secondly, the Commission thought it essential to point out that the peril, the danger to what proves in the circumstances to be a genuinely “essential” interest of the State, must have been extremely grave, that it must have been a threat to the interest at the actual time, and that the adoption by that State of conduct not in conformity with an international obligation binding it to another State must definitely have been its only means of warding off the extremely grave and imminent peril which it apprehended; in other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations. Also, not just part but the whole of the conduct in question must have proved indispensable for preserving the essential interest threatened. Any conduct going beyond what is strictly necessary for this purpose will inevitably constitute a wrongful act per se, even if the excuse of necessity is admissible as regards the remainder of the conduct. In particular, it is self-evident that once the peril has been averted by the adoption of conduct conflicting with the international obligation, the
conduct will immediately become wrongful if persisted in, even though it has not been wrongful up to that point. Compliance with the international obligation affected must, if still materially possible, begin again without delay.

(34) Thirdly, the Commission pointed to the condition that the State claiming the benefit of the existence of a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity.

(35) Fourthly, the Commission wished to draw particular attention to the fact that the interest of the State towards which the obligation existed—the interest sacrificed to the need of assuring the otherwise impossible defence of an “essential” interest of the State—must itself be a less essential interest of the State in question. In other words, it wishes to point out that the interest sacrificed on the altar of “necessity” must obviously be less important than the interest it is thereby sought to save. The Commission considered this point particularly important in view of its having barred the possibility of the state of necessity being invocable to safeguard the State’s interest in its own “existence” and nothing else.

(36) The Commission wishes to reiterate that the above conditions must coexist for a State to be entitled to invoke a state of necessity as justification for conduct not in conformity with an international obligation. In regard to those conditions, it feels it worthwhile to observe that the State invoking the state of necessity is not and should not be the sole judge of the existence of the necessary conditions in the particular case concerned. Obviously, at the moment when the State adopts the conduct conflicting with an international obligation, only that State itself can decide whether those conditions exist; it does not really have time in its situation of imminent peril to refer the matter to any other instance. But this does not mean that the determination of the existence of the conditions that permit the State to act out of a state of necessity will be left for good to the unilateral discretion of the State that relies on those conditions. The State affected by the conduct alleged to have been adopted in a state of necessity may very well object to the unilateral adoption of the State in question. The possibility that the State invoking the state of necessity will be left for good to the unilateral discretion of the State that relies on those conditions. The State affected by the conduct alleged to have been adopted in a state of necessity may very well object to the unilateral adoption of the State in question.

(37) The Commission thus defined the conditions which it considered should coexist for a State to be entitled to invoke a state of necessity as precluding the wrongfulness of conduct adopted by it in breach of an international obligation. It then turned to the question whether the invocability of a state of necessity should not be totally barred a priori in cases in which the conduct requiring justification conflicted with certain particular categories of international obligations. The first such category which the Commission considered in this context was that of obligations arising out of peremptory norms of international law (jus cogens), i.e., norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character. In the Commission’s view, a decisive point in this connection is that peremptory rules may not be derogated from by the mutual agreement of the parties concerned, and that accordingly, as laid down in article 29, the consent of the injured State can in no event preclude the wrongfulness of an act of a State not in conformity with an international obligation created by such a rule. This obviously means that peremptory rules are so essential for the life of the international community as to make it all the more inconceivable that a State should be entitled to decide unilaterally, however acute the state of necessity which overtakes it, that it may commit a breach of the obligations which those rules impose on it. Moreover, States have most often abusively invoked a state of necessity in the past as justification for breaches of precisely this kind of obligation. Here again, of course, the Commission has simply referred in general to the obligations arising from the rules of jus cogens, and has not tried to enumerate them or specify them in any particular way. The question whether the obligation breached for reasons of necessity was peremptory or not will have to be settled, in each particular case, by reference to the general international law in force at the time the question arises. The only point which the Commission feels it appropriate to make in this commentary is that one obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State. The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation. The rule outlawing genocide and the rule categorically condemning the killing of prisoners of war were mentioned in the discussion as further examples of rules whose breach is in no event to be justified on any ground of necessity.

(38) The second category of obligations to which the Commission referred, with the same aim, was that of obligations established in the text of a treaty, where the treaty is one whose text indicates, explicitly or implicitly, that the treaty excludes the possibility of invoking a state of necessity as justification for conduct not in conformity with an obligation which it imposes on the contracting parties. This possibility is obviously excluded if the treaty explicitly says so, as in the case of certain humanitarian conventions applicable to armed conflicts. However, there are many cases in which the treaty is silent on the point. The Commission thinks it important to observe in this connection that silence on the part of the treaty should
not be automatically construed as allowing the possibility of invoking the state of necessity. There are treaty obligations which were especially designed to be equally, or even particularly, applicable in abnormal situations of peril for the State having the obligation and for its essential interests, and yet the treaty contains no provision on the question now being discussed (this is true of other humanitarian conventions applicable to armed conflicts). In the view of the Commission, the bar to the invocability of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted. The Commission therefore felt it was particularly important to mention this situation too in connection with the present article.

(39) As regards those cases in which, on the other hand, the Commission decided that it should not exclude the possibility of invoking the state of necessity as justification for conduct of a State not in conformity with an international obligation, it asked itself whether such an exclusion, if established, would have the effect not only of completely relieving the State of the consequences which international law attaches to an internationally wrongful act, but also of relieving it of any obligation it might otherwise have to make compensation for damage caused by its conduct. Several publicists who regard a state of necessity as a circumstance precluding the wrongfulness of an act of a State nevertheless consider that the State should, all the same, be bound to make compensation for the material damage caused by the act in question. The Commission found instances in State practice where States relied on the existence of the state of necessity to justify their conduct but offered to make compensation for the material damage it had caused. This being so, the Commission takes the view that there can be no question of excluding the possibility of an obligation of this kind being laid on the State which has adopted the conduct justified by a state of necessity. Some members of the Commission went so far as to suggest that a state of necessity should not be regarded as a circumstance precluding the wrongfulness of the act of a State, but as a circumstance mitigating the responsibility arising from the wrongful act of the State. But this was not the view of the Commission as a whole, which did not fail to note that the existence of a genuine state of necessity, just like the existence of any other circumstance mentioned in the present chapter, has the effect of totally ridding the conduct of the acting State of its wrongfulness, but not thereby of necessarily precluding that State from being asked to make compensation for the injurious consequences of its action, even if that action is totally free of wrong. In other words, in the view of the Commission, the preclusion of the wrongfulness of an act of a State does not automatically entail the consequence that this act may not, in some other way, create an obligation to make compensation for the damage, even though that obligation should not be described as an obligation "to make reparation for a wrongful act". The Commission recalled, moreover, that the question of a possible obligation to make compensation for damage had already arisen in connection with the situations provided for in articles 29, 31 and 32, and that it had decided then that the conclusion to be reached on this question should be deferred and dealt with in a separate single article; it therefore decided that the same should be done with the present article.

(40) As regards the wording of the article, the Commission chose to adopt a negative formula, modelled to some extent on the solution taken in article 62 of the Vienna Convention on the Law of Treaties; this was done in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception—and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness considered in chapter V. The Commission did not overlook the importance of the fact that, unlike what happens in the cases provided for in article 30 (Countermeasures) and article 34 (Self-defence), the State in regard to which a state of necessity is invoked as a justification for non-fulfilment of an international obligation may be, and often is, in the case in point, an entirely innocent State; that, unlike what happens in the case provided for in article 29 (Consent), the State has never given its consent to the act committed in regard to it; and that, unlike what is found in the cases provided for in article 31 (Force majeure and fortuitous event) and article 32 (Distress), the conduct which a State aims to justify on the ground of a state of necessity is entirely voluntary and intentional conduct.

(41) In paragraph 1 of the article, the Commission has set out the various conditions which must in any case and at the same time be met by the situation invoked if a State is to be able to claim that the wrongfulness of its act is precluded by reason of that situation. In paragraph 2, the Commission has added an indication of the cases in which, even if the conditions set out in paragraph 1 are satisfied, the existence of a state of necessity cannot preclude the wrongfulness of an act of the State not in conformity with the obligation. The first of these cases, provided for in subparagraph (a), is that in which the obligation in question is one arising out of "a peremptory norm of general international law". The Commission did not consider it necessary to introduce into the text of the article an explanation of the significance of this expression, which appears in article 29, since it wished to avoid unnecessary repetition in the same chapter of the draft articles. The Commission will, moreover, examine on second reading the question whether this explanation would be better placed in an article containing definitions. The second case, mentioned in

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subparagraph (b), is that in which the obligation with which the conduct is not in conformity is an obligation "laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation". Several members of the Commission emphasized the importance they attached to mentioning the case in which the exclusion, although only implicit, was none the less evident and important. Finally, as regards the exclusion provided for in subparagraph (c), it must be mentioned that the form of words "if the State in question has contributed to the occurrence of the state of necessity" is used in paragraph 2 of articles 31 and 32. By those words, the Commission intended to refer to the case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification for its non-fulfilment of an international obligation.

Article 34

Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary\footnote{Yearbook ..., 1980, vol. II (Part Two), pp. 52-61.}

(1) This article relates to self-defence only from the standpoint and in the context of the circumstances precluding wrongfulness covered by chapter V of the draft. Its sole purpose is to indicate that, when the requisite conditions for a situation of self-defence are fulfilled, recourse\footnote{This does not mean that the imminent peril cannot originate in the State's own territory, in the area in which it exercises its sovereignty, e.g. from actions carried out in that territory by private persons not acting on behalf of the State or not under its control. The test for deciding that a case comes within the scope of state of necessity and not within the scope of self-defence is that the cause of the grave and imminent peril must not be an act attributable to the State and constituting non-performance by that} to a State to the use of armed force with the specific aim of halting or repelling aggression by another State cannot constitute an internationally wrongful act, despite the existence at the present time, in the Charter of the United Nations and in customary international law, of the general prohibition on recourse to the use of force. Accordingly, this article does not seek to define a concept that, as such, goes beyond the framework of State responsibility. There is no intention of entering into the continuing controversy regarding the scope of the concept of self-defence and, above all, no intention of replacing or even simply interpreting the rule of the Charter that specifically refers to this concept. The article merely takes as its premise the existence of a general principle admitting self-defence as a definite exception, which cannot be renounced, to the general prohibition on recourse to the use of armed force, and merely draws the inevitable inferences regarding preclusion of the wrongfulness of acts of the State involving such recourse under the conditions that constitute a situation of self-defence.

(2) The absolutely indispensable premise for the admission of a self-contained concept of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated as a general rule the general prohibition of the use of force by private subjects and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Another element—which, in logic, is not so indispensable as the foregoing, but has been confirmed in the course of history as its necessary complement—is that the use of force, even for strictly defensive purposes, is likewise admitted not as a general rule, but only as an exception to a rule under which a central authority has a monopoly or virtual monopoly on the use of force so as to guarantee respect by all for the integrity of others. Only in specific situations where, by its very nature, the use of force by the agencies of the central authority cannot be resorted to promptly and efficiently enough to protect a subject against an attack by another does the use of means of defence involving force by the subject in question remain legitimate. In view of these remarks, it is obvious that only in relatively recent times did the international legal order adopt a concept of self-defence that, in certain essential aspects, is entirely comparable to that normally employed in national legal systems. It is in any case obvious that the gradual development of the definition of the concept could only go hand in hand with that of the principle outlawing wars of aggression and conquest, regardless of the times or the circles in which the principle asserted itself in the international law in force.

(3) In view of the considerations set out in the commentary to draft article 33 in connection with the study of the features that distinguish state of necessity from the other circumstances precluding wrongfulness, it is not now necessary to spend much time on determining the aspects in which in theory self-defence resembles state of necessity or the aspects which, by contrast, clearly differentiate the two concepts. Admittedly, a State acting in self-defence, like a State acting in a situation of necessity, acts in response to an imminent danger or peril, which must in both cases be serious, immediate and incapable of being countered by other means. But, as has been pointed out, the State towards which another State adopts a course of conduct not in conformity with an international obligation without having any excuse other than "necessity" may be completely innocent, a State which has committed no international wrong against the State that took the action. It may in no way have been responsible by any of its own actions for the danger threatening the other State.\footnote{By contrast, the State}
against which another State acts in self-defence is itself the cause of the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law but also constitutes the especially serious specific international offence of recourse to armed force in breach of the existing general prohibition on such recourse. Acting in self-defence means responding by force to wrongful forcible action carried out by another. In other words, for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of armed force, by the subject against which the action is taken.  

(4) Again, a distinction should be drawn between action taken by a State in self-defence and action constituting legitimate exercise of one of the countermeasures that a State can take against another State which has committed an internationally wrongful act, i.e. the countermeasures dealt with in article 30 of the draft. A comparison has sometimes been made between action taken by a State in the form of self-defence and action taken in the form of reprisals. There is undeniably a common element in that, in both cases, the State—normally at least—takes action after it has suffered an internationally wrongful act, in other words, the failure to respect one of its rights by the State against which the action is directed. However, any possible analogy stops there. The internationally wrongful acts which make it permissible, exceptionally, for the State suffering them to adopt, in the form of countermeasures against the responsible State, conduct otherwise not in conformity with an international obligation may be extremely varied; by contrast, the only internationally wrongful act which makes it permissible, exceptionally, for a State to react against it by recourse to force, despite the general prohibition of the use of force, is an offence which itself constitutes a violation of that prohibition. Hence the offence is not only an extremely serious one, but is also of a very specific kind. Moreover, and even more important, self-defence and countermeasures (sanctions or enforcement measures) are reactions that relate to different points in time and, above all, are logically distinct. Action in self-defence is action taken by a State to defend its territorial integrity or its independence against violent attack; it is action whereby “defensive” means are used to resist an “offensive” use of armed force, with the object of preventing another’s wrongful action from proceeding and achieving its purpose. Action taking the form of a sanction, on the other hand, consists in the application ex post facto, to a State committing a wrongful act, of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially punitive; this punitive purpose may be exclusive and as such represent an objective per se, or else it may be accompanied by the intention to give a warning against a possible repetition of the conduct which is being punished, or again, it might constitute a means of exerting pressure in order to obtain compensation for harm suffered, etc. Be that as it may, the point is that self-defence is a reaction to the commission of a specific kind of internationally wrongful act of the kind discussed here, whereas sanctions, including reprisals, are reactions that fall within the context of the operation of the consequences of the internationally wrongful act in terms of international responsibility. It may also be noted that there is nothing to stop a State which, in the circumstances and

State of an international obligation towards the State which reacts out of “necessity”. This point has to be made because, under the influence of a now obsolete terminology, measures taken against individuals, merchant ships or private aircraft in circumstances not implying any international responsibility on the part of the State of nationality of those individuals, ships or aircraft are sometimes classed as measured of “self-defence”.  

The great majority of writers agree that, unlike the case of state of necessity, to be able to invoke self-defence it is indispensable that the State against which measures of self-defence are taken shall have committed an internationally wrongful act. See, among the more recent writers, Bowett, op. cit., p. 9; G. Arangio-Ruiz, “Difesa legittima (Diritto internazionale)”, Novissimo Digesto Italiano (Turin), vol. VI (1960), p. 632; J. Delivans, La légitime défense en droit international public moderne (Paris, Librairie generale de droit et de jurisprudence, 1971), pp. 63-64; P. Lamberti Zanardi, La legittima difesa nel diritto internazionale (Milan, Giuffrè, 1972), p. 120; Žourek, loc. cit., pp. 59 et seq.; Taoka, op. cit., pp. 2 et seq.

Footnote 174 continued.

It is often said that acts of unarmed aggression also exist (ideological, economic, political, etc.), but even though they are condemned, it cannot be inferred that a State which is a victim of such acts is permitted to resort to the use of armed force in self-defence. Hence, these possibly wrongful acts do not fall within the purview of the present draft, since recourse to armed force, as analysed in the context of self-defence, can be rendered lawful only in the case of armed attack.  

See, for example, Lamberti Zanardi, La legittima difesa . . . (op. cit.), p. 131, and Žourek, loc. cit., p. 60.

Similar ideas are to be found in the publications of the most authoritative writers on international law. See Strupp, “Les règles générales . . . (loc. cit.), p. 570; H. Walock, “The regulation of the use of force by individual States in international law”, Recueil des cours . . ., 1952-11 (Paris, Sirey, 1953), vol. 81, p. 464; Quadri, op. cit., pp. 266 et seq., 270 et seq.; D. W. Bowett, “Reprisals involving recourse to armed force”, The American Journal of International Law (Washington, D.C.), vol. 66, No. 1 (January 1972), pp. 3 et seq.; Lamberti Zanardi, La legittima difesa . . . (op. cit.), pp. 133 et seq.; Žourek, loc. cit., pp. 60-61 Soviet writers too—for example, Levin and Petrovski—normally exclude self-defence from the sanctions allowed as legitimate countermeasures in response to an internationally wrongful act. E. I. Skakunov (“Samooobraza i vopros o sanktsiakh v mejjunarodnom prave”, Pravoovedenie (Leningrad), No. 3 (May-June 1970), pp. 107 et seq.) is an exception to this trend and criticizes the prevailing view, which he reproaches for the exclusively punitive idea of a sanction. In his opinion, the concept of a sanction should be extended to include measures aimed at securing application of the law. In this respect, therefore, he presents self-defence as a form of sanction.
for the purposes mentioned, uses force against another State in self-defence against a wrongful attack made by the latter from later adopting sanctions in respect of the offence suffered. However, these measures manifestly do not form part of the action taken in self-defence; their purpose is different and, if they are justifiable, the reasons for their justification are different.

(6) Again, self-defence almost by its very nature involves the use of armed force. On the other hand, in consequence of the evolution that has apparently occurred in the legal thinking of States since the Second World War and which the Commission described in the commentary to article 30 of the draft, it seems to be settled law that sanctions and the other countermeasures capable of being applied directly against the State committing an international wrong by the State suffering the wrong can now no longer—as they used to do—involve the use of armed force. As 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, adopted by the General Assembly on 24 October 1970, “States have a duty to refrain from acts of reprisal involving the use of force.” Armed reprisals cannot now be considered as legitimate. This may be regarded as a further element of differentiation, if such is needed, between the concept of self-defence and the countermeasures dealt with in article 30 of the draft. The prevailing view nowadays is that only the sanctions referred to in Chapter VII of the Charter of the United Nations can entail a lawful use of force. But it goes without saying that, in that instance too, a distinction will have to be made between the use of measures involving recourse to armed force as a “sanction” properly speaking from the use of armed force in the context, for example, of collective self-defence.

(7) This should not lead to the mistake, one that has already been amply decried in connection with “state of necessity”, of seeking in another concept a needless justification or a basis for “self-defence”. Moreover, self-defence cannot be confused with the concept of self-help (autoprotection, Selbsthilfe, autolutela, etc.), whereby legal theory describes and encompasses all

the specific forms taken by the system recognizing that, in principle, a State which enjoys a particular subjective right is entitled, where necessary, to take action to protect and safeguard that right within an egalitarian society such as the international community. “Self-defence” may therefore be regarded as a form of “armed self-help or self-protection” that, under modern international law, States are permitted to exercise directly.

(8) The legal justification for the effect attributed in terms of international responsibility for an internationally wrongful act to a situation of self-defence is here, as in all the other circumstances considered in this chapter of the draft, the existence of a rule of international law—a rule which specifically provides that action taken in self-defence does not come under the general ban now existing on recourse to armed force. It is indispensable to differentiate most clearly the concept of self-defence properly so-called from all the other concepts. Self-defence is a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to defend himself by the use of force against attack by another. Nowadays this is as true in the system of international law as in the systems of national law, where the concept was defined long ago. The State which is a victim of an armed attack and is therefore placed in a situation of self-defence is exceptionally permitted under international law to resort to the use of armed force to halt the attack and prevent it from succeeding, regardless of any actual punitive intention. The Charter of the United Nations expressly recognizes its right to do so. To distinguish self-defence from other concepts does not in any way deny that States may, in other circumstances, resort to certain courses of conduct that are, if justified by a state of necessity, even distress, or exonerated from any wrongfulness as lawful measures in response to an infringement of their rights that has nothing to do with an armed attack—on the understanding, of course, that the present limitations on such kinds of response are borne in mind.

(9) As has already been pointed out, only relatively recently did the international legal order finally begin to contemplate a genuine and complete ban on the use of force as a means employed by States to safeguard their rights and interests. Only since then therefore, after the fulfillment of this paramount condition, has the principle come to be fully asserted.

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179 See for example Quadri, op. cit., pp. 269 et seq. Quadri none the less regards the two concepts as quite distinct.
181 Resolution 2625 (XXV), annex.
182 The distinction between self-defence and reprisals is unquestionably of practical importance. See, for example, the discussions in the Security Council on the attack carried out by the British Royal Air Force against the Yemen Arab Republic on 28 March 1964 (Repertoire of the Practice of the Security Council, Supplement 1964—1965 (United Nations publication, Sales No. E.68.71.1), chap. XL, part IV, Case No. 7). See also the discussions which took place in the Security Council on the attack against two United States destroyers in the Gulf of Tonkin on 4 August 1964 (ibid., Case No. 8).
183 The Commission realizes that behind the idea of describing as instances of self-defence cases which do not come within such a definition there may be the intention to circumvent the obstacle— one that some people consider to be too categorical—to the use of coercion in the application by a State of countermeasures designed to impose sanctions or to secure performance of an obligation after an infringement of its rights falling short of armed attack. Nevertheless, to advocate misguided interpretations of certain provisions could lead to a dangerous confusion of principles.
184 See para. (2) of this commentary.
that, in international relations, recourse to war can only be compatible with the general prohibition of the use of armed force if it is in the nature of a defence against an armed attack by another subject in breach of the prohibition. The ban, now undeniably applicable to every State, on engaging in any violent infringement of the integrity or independence of another State represents in itself both the necessary and the sufficient condition for the full validity of the concept of self-defence in the international legal order. After the Second World War, the Charter of the United Nations, which enunciates the principle banning the use or threat of force in international relations in the clearest terms, also expressly recognizes the right to defend oneself by using armed force, if necessary, in a situation of self-defence. Before the Charter, in the period between the two wars, the adoption in various international instruments of clauses designed to restrict progressively, and eventually to outlaw, the freedom of States to resort to war and occasionally, in a more general way, their freedom to use armed force in any manner whatsoever, clearly reveals a parallel tendency to limit the scope of those clauses. The limitation is reflected in an exception, the effect of which is to rule out the wrongfulness of conduct involving recourse to war in the case where a State would do so only in order to defend itself against armed attack.183

(10) Several of the instruments adopted at that time which provide for a general or special prohibition of recourse to war for the settlement of international disputes also contain an express clause stating the exception in question. In this respect, reference may be made to the Geneva Protocol for the Pacific Settlement of International Disputes, adopted by the Fifth Assembly of the League of Nations on 2 October 1924184 and the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, which constitutes annex A to the Final Protocol signed at Locarno on 16 October 1925 and is known as the Rhine Pact.187 Language similar to that used in the Rhine Pact recurs in bilateral treaties signed between 1926 and 1929.188 Similar terms also occur in the model treaties of reciprocal assistance and non-aggression prepared in 1928 by the League of Nations Committee on Arbitration and Security.189

(11) The attitude observed, and the conviction expressed, by States in connection with the scope and application of certain instruments intended to limit to extreme situations the possibility of resorting to armed force or designed even to rule out this possibility altogether, although the relevant clauses do not contain an express provision concerning the lawfulness of the use of armed force by a State that meant only to defend itself, is even more significant as regards the existence—undisputed even at that time—of the principle that self-defence is a situation that has the effect of precluding, exceptionally, the wrongfulness of conduct involving the use of armed force. The Covenant of the League of Nations and the General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (more commonly known as the Briand-Kellogg Pact or simply the Pact of Paris)190 were occasions for particularly significant statements in this regard. Both the Member States and the bodies of the League of Nations at all times expressed the conviction that, although there was no such express provision in the Covenant, recourse to armed force in a situation of self-defence remained perfectly lawful despite the limitations on recourse to war in the case where a State would do so only in order to defend itself against armed attack.191

183 For a detailed discussion of the agreements entered into and, more generally, of the practice of States in the period 1920–1940, see in particular Lamberti Zanardi, La legittima difesa ... (op. cit.), pp. 79 et seq. See also Brownlie, op. cit., pp. 231 et seq.; Zourek, loc. cit., pp. 25 et seq.; Taoka, op. cit., pp. 88 et seq.


The general report on the Protocol, submitted to the Fifth Assembly of the League of Nations by Mr. Politis (Greece) and Mr. Beneš (Czechoslovakia), states that the prohibitions of recourse to war in article 2:

"affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim. (League of Nations, Official Journal, Special Supplement No. 21, p. 483.) At the same time, the Protocol provided another express exception to the obligation not to resort to war, viz. in the case where States resorted to war "with the consent of the Council or the Assembly of the League of Nations under provisions of the Covenant and the Protocol"."


The notion of self-defence endorsed by the Rhine Pact was not limited to a State's resistance to an act of aggression directed against its own territory but extended also to resistance to an occupation of the demilitarized zone of the neighbouring State's territory. The Pact likewise provided for a further exception to the obligation laid down in article 2(1), viz., in the case of action in pursuance of Article 16 of the Covenant of the League of Nations or, more generally, in the case of action as the result of a decision taken by the Assembly or the Council of the League. For comments made on these points at the time, see inter alia K. Strupp (Das Werk von Locarno (Berlin, de Gruyter, 1926) and G. Salvioli ("Gli accordi di Locarno", Rivista di diritto internazionale (Rome), XVIIIth year, 3rd series, vol. V (1926), pp. 429 et seq.).

188 For example, the treaties of 10 June 1926 between France and Romania (League of Nations, Treaty Series, vol. LVIII, p. 226), art. 1; of 11 November 1927 between France and the Kingdom of the Serbs, Croats and Slovenes (ibid., vol. LXVIII, p. 374), art. 1; of 27 March 1929 between Greece and the Kingdom of the Serbs, Croats and Slovenes (ibid., vol. CVIII, p. 202), art. 2; of 21 March 1928 between Greece and Romania (ibid., p. 188), art. 1.

189 All the model treaties contained a clause in approximately the following terms:

"Each of the High Contracting Parties undertakes, in regard to each of the other Parties, not to attack or invade the territory of another Contracting Party, and in no case to resort to war against another Contracting Party".

This stipulation did not, however, apply in the case of exercise of the right of self-defence, that is to say, the right to resist a violation of the undertaking entered into. (League of Nations, Official Journal, Special Supplement No. 64, pp. 513 et seq.)

armed force introduced by the Covenant. In armed conflicts, the States concerned and the bodies of the League of Nations never challenged the principle of self-defence as justification for recourse to armed force. They tended, rather, to go no further than to query the admissibility of the justification in particular cases.  

(12) The diplomatic correspondence which preceded the conclusion of the Briand-Kellogg Pact in 1928 shows clearly that the contracting parties were fully in agreement in recognizing that the renunciation of war which they were about to proclaim in no way debarked the signatories from the exercise of self-defence. The French and the British Governments stressed this point. The reason why the contracting parties eventually recognized, after the interpretative statements made by the Department of State of the United States of America, that it was not necessary to include in the treaty an express proviso for the case of self-defence was that they wished to accede to the opinion of the American Secretary of State, who argued that the value of the treaty depended largely on its simplicity, and also that they agreed with him that such a clause was superfluous. In their eyes, it was a self-evident truth that war waged in a situation of self-defence was not wrongful, a principle which should be recognized as implicitly written into any conventional instrument intended to limit or prohibit recourse to war—a principle which, in the final analysis, was bound to clash with the terms of the treaty in such a situation. By the views that they expressed, the contracting parties even gave the impression that they frankly admitted the existence of a principle of international law that was absolutely binding, did not admit of any derogation by a treaty, even a multilateral treaty, and meant that conduct adopted by a State in a situation of self-defence ceased to be wrongful.  

(13) A like conviction regarding the existence of an absolute, or even peremptory, principle under which recourse to war—henceforth undeniably regarded as wrongful—ceases to be wrongful in a situation of self-defence, seems to be confirmed in the replies given by States to a questionnaire prepared by the Secretariat of the League of Nations concerning any amendments to be made in the League Covenant in order to bring it into harmony with the terms of the Briand-Kellogg Pact, and also the statements made in the course of the debate on the question in the First Committee of the League of Nations Assembly during the Assembly’s eleventh and twelfth sessions. States then said that a total prohibition without “loopholes” on recourse to war would not affect the right to resort to war in cases where the conditions of a situation of self-defence were fulfilled. The same ideas are found in the report that was prepared on the close of the proceedings of the First Committee and submitted to the twelfth session of the Assembly.  

(14) To close the list of the occasions between the two World Wars on which States were able to comment on the plea of self-defence in justification of conduct that would otherwise be wrongful, reference should also be made to some of the answers given by Governments to point XI (a) of the request for information by the Preparatory Committee of the Hague Conference of 1930 on the responsibility of States for damage caused to the person or property of foreigners. The Government of Belgium, for example, stated that “the State is justified in disclaiming responsibility in the case of self-defence against an aggressor State”, and the Government of Switzerland answered that “the situation of self-defence exists where a State suffers an unjust aggression, contrary to law.” Other Governments also agreed with the principle that a situation of self-defence permitted a State to disclaim responsibility, in other words, it

191 See Lamberti Zanardi, La legittima difesa ... (op. cit.), pp. 90 et seq.  
192 This is what happened in the cases of the Greco-Bulgarian dispute of 1925 concerning a frontier incident, the dispute of 1932–1934 between Paraguay and Bolivia concerning the Chaco territory, the dispute between Japan and China in 1931–1934 concerning Manchuria, the Italo-Ethiopian dispute of 1935, and the Sino-Japanese dispute of 1937.  
194 In article I of the Briand-Kellogg Pact (for reference, see foot-note 129 above), the high contracting parties declared: "in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"; and in article II, they agreed: "that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means".  
195 To reassure the other partners, the American Government stated expressly that what it called "the right of self-defense" was, in its opinion, "inherent in every sovereign State and it is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion ...". Many other States, including Italy and Japan, referred to this statement at the time of signing or acceding to the Pact. See Žourek, loc. cit., pp. 32 et seq.  
196 See, for example, the reply of the Italian Government (League of Nations, Official Journal, 12th year, No. 8 (August 1931), p. 1602.  
197 See, for example, the statement by the representative of Germany (League of Nations, Official Journal, Special Supplement No. 94, p. 41).  
198 Ibid., Special Supplement No. 93, pp. 221 et seq.  
199 Point XI (a) of the request read: "Circumstances in which a State is entitled to disclaim responsibility: (a) What are the conditions which must be fulfilled: 'When the State claims to have acted in self-defence'?"  
200 League of Nations, Bases of discussion ... , op. cit., p. 125.  
201 Ibid., p. 127.
exonerated the State from the otherwise undeniable wrongfulness of the conduct that it adopted. 201
(15) The International Military Tribunals of Nuremberg and Tokyo, established respectively by the Agreements of 8 August 1945 and 19 January 1946, virtually took it for granted that during the period from 1920 to 1939 there had come into being in international law a principle the effect of which was to preclude the wrongfulness of the use of armed force in a situation of self-defence, as an exception to and indefeasible limitation on the general ban on the use of armed force laid down by international instruments such as, in particular, the Briand-Kellogg Pact. The particular issue that had to be adjudicated by the Nuremberg Tribunal was whether the invasion by Nazi Germany of Denmark and Norway, and later of Belgium, the Netherlands and Luxembourg, and also its attack on the USSR, could be justified as acts committed in a situation of self-defence. 202 The same issue came before the Tokyo Tribunal in connection with the conduct of Japan, on the one hand, and the Netherlands on the other (the question of the declaration of war by the Netherlands on Japan). 203 In the judgements of both tribunals, the principle itself that conduct involving the use of armed force in self-defence was lawful was not challenged in any way whatsoever. What was challenged was the de facto existence of conditions representing a situation of self-defence, and it was solely on that basis that the plea of self-defence was rejected. The Tokyo Tribunal had occasion to state explicitly in an obiter dictum, in its judgement of 1 November 1948, that:

Any law, international or municipal, which prohibits recourse to force is necessarily limited by the right of self-defence. 204
(16) Like the discussion of State practice, and for the same reasons, the study of doctrine confirms the

201 This should none the less be noted that the idea of self-defence various Governments had in mind was very different from that reflected in the opinio juris of States as it evolved pari passu with the gradual affirmation of the principle of the prohibition of recourse to war and as a necessary exception to that principle. What happened was that, in referring to self-defence, Governments cited the case of measures taken by a State in defence against a threat emanating, not from another State but from private persons, in other words, a case that is wholly outside the present context. This is explained by the fact that the question was whether self-defence could be regarded as a circumstance precluding the wrongfulness of State conduct in an area such as that of responsibility, not for acts committed directly against a foreign State, but for actions harming foreign private persons. Influenced by the replies, those who prepared the questionnaire ended up by framing a basis of discussion that was obviously very far removed from the proper idea of "self-defence". (See Basis of discussion No. 24, in League of Nations, Bases of Discussion ... (op. cit.), p. 125.)

202 As regards the Nuremberg Tribunal, see the passages in the judgement of 1 October 1946 reproduced in Trial of Major War Criminals ... (op. cit.) (1947), vol. 1, pp 204 et seq.

203 As regards the Tokyo Tribunal, see the passages in the judgements reproduced in: B. V. A. Röling and C. F. Rüter, eds., The Tokyo Judgments (Amsterdam, APA-University Press, 1977), vol. I, pp. 46 et seq. and 382.

204 As regards the Tokyo Tribunal, see the passages in the judgements reproduced in: B. V. A. Röling and C. F. Rüter, eds., The Tokyo Judgments (Amsterdam, APA-University Press, 1977), vol. I, pp. 46 et seq. and 382.

205 Ibid., pp. 46-47.
that, where the wrongfulness is not explicitly precluded by the written texts establishing the prohibition, it is generally held to be implicit in the text in question, rather than imposed by a pre-existing rule of general international law from which those texts could not have derogated. In the final analysis the practical result is the same. The conviction that there exists in customary international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question is taken in self-defence will become part and parcel of the thinking of publicists when the principle per se of such wrongfulness moves from the sphere of purely treaty law to that of customary international law. It is furthermore significant in this connection that the authors of works published since the Second World War all recognize that the use of armed force by a State in order to repel an aggression is to be considered as lawful notwithstanding the general prohibition on the use of such force, and they hold this view irrespective of the way in which they visualize the relationship between customary law and the provisions of the Charter on the subject.

(18) The long process of totally outlawing the use of armed force in international relations has thus led to the assertion of a rule imposing on all States the duty to refrain from using armed force in their relations with one another. The principle whereby its use was condemned once and for all as utterly wrongful has become part of the legal thinking of States in the form of a peremptory rule of international law. This same process has created the conditions for the definitive assertion of the other parallel and likewise peremptory rule that self-defence is a limitation of the prohibition imposed by the first rule. Both rules are now indisputably part of general international law and, in written form, of the juridical system represented by the United Nations. The United Nations Charter in fact provides in Article 2, paragraph 4, in much stricter terms than those employed even in the Briand-Kellogg Pact, that the "use of force" and even the "threat . . . of force" against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations is prohibited. The Charter also vests in the Security Council a wide range of powers for the adoption of suitable measures to prevent, and where necessary suppress, any breach of the obligation to refrain from the use or threat of force laid down in the Charter. Moreover, the Charter does not fail to specify expressis verbis in Article 51 that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. 208

(19) The other circumstances taken into consideration in the present draft in connection with the preclusion of the wrongfulness of an act of a State share with self-defence the effect indicated but, unlike self-defence, are not provided for in the United Nations Charter. In the minds of some, therefore, the question arose whether the rule in Article 51 of the United Nations Charter and a customary rule of international law on the same subject should be presumed to be totally identical in content. A majority of the writers totally reject the idea that self-defence is invocable except where an armed attack occurs against the State, either from a direct and exclusive interpretation of Article 51 of the Charter, or from a consideration of the relationship between that provision and the corresponding rule of customary international law, or from an examination of the latter law alone. 209


208 All the collective defence agreements concluded since the adoption of the Charter make an explicit or implicit reference to Article 51. Some of them reproduce textually the principle laid down in the article. Examples are art. 3, para. 1, of the
A contrary school of thought, however, is that the
draftsmen of the United Nations Charter did not	intend the rule in Article 51 to have the same object
to extent as customary international law imparts to	the rule that self-defence is a circumstance precluding	the wrongfulness of conduct involving the use of armed
time. The writers of this latter school consider that	Article 51 of the Charter betrays no intention whatso-
tever that self-defence should be invokeable solely when	"an armed attack" occurs against the State. In their	view, this provision simply sets out to state the rule	concerning a particular case. 210 These differences of	opinion among publicists have naturally been reflected	in the positions taken by States in discussions of	specific problems in United Nations organs.

(20) That being so, the Commission considers that	no codification taking place within the framework and	under the auspices of the United Nations should be	based on criteria which, from any standpoint what-
soever, do not fully accord with those underlying the	Charter, especially when, as in the present case, the	subject-matter concerns so sensitive a domain as the	maintenance of international peace and security. There	have, of course, been problems of interpretation as	regards Article 51 and other provisions of the United	Nations Charter, and also as regards the relationship	between these provisions and general international law,
and such problems still exist, but it is not for the	Commission to take a stand on this matter in	connection with the present draft articles, nor to allow	itself to be drawn into a process of interpreting the	Charter and its provisions, which would be beyond its	mandate. The Commission therefore sees no reason	why its commentary should set forth its position on	the question of any total identity of content between the	rules in Article 51 of the Charter and the customary
type of international law on self-defence. The Commis-
tion intends in any event to remain faithful to the	content and scope of the pertinent rules of the United
Nations Charter and to take them as a basis in	formulating the present draft article.

(21) Differences of opinion are also found in	principle and doctrine in regard to a whole series of	questions concerning the definition of the legal	notion of self-defence and the interpretation of the	United Nations Charter. Examples of these questions are the	interpretation of the English term "armed attack" and	the French term "aggression armee" and the exact
to which they coincide with each other and
correspond to the terms used in other languages; the
determination of the moment at which the State can	claim that it is in a situation of self-defence, 211 whether	self-defence can be invoked to justify resistance to an	action which is wrongful and injurious, but undertaken	without the use of force; 212 the meaning of "collective"
tself-defence. 213 The Commission is acquainted with the
differences of opinion that exist about the conclusions	that may be drawn, on these and other issues, from a
textual, or a historical, or a teleological interpretation	of the Charter, and from the lengthy discussions that
take place on this subject between States with
different views in numerous specific cases. It neverthe-
less considers it both unnecessary and inappropriate	that the present draft article should deal with all these	questions, which are at just the reverse of the "primary"
rules relating to self-defence. It would be mistaken to	think that it was possible, in a as it concerns rules
governing the responsibility of States for internation-
ally wrongful acts, to explore and devise solutions to

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Foot-note 209 continued.

Brownlie, op. cit., pp. 272 et seq.; K. Skubiszewski, "Use of force by States. Collective security. Law of war and neutrality", Manual of Public International Law (op. cit.), pp. 765 et seq.; Shakunov, loc. cit., pp. 107 et seq.; Lamberti Zanardi, La legittima difesa ... (op. cit.), pp. 204 et seq.; Delivans, op. cit., pp. 49 et seq.; Zourek, loc. cit., pp. 52 et seq.; see also the comments by E. Castren and G. Chaumont on the report by Zourek, ibid., pp. 74 et seq.; Taoka, op. cit., pp. 126 et seq. In the 2nd ed. of H. Kelsen's Principles of International Law, rev. R. W. Tucker (New York, Holt, Rinehart and Winston, 1966), this author examines the two conflicting interpretations of Article 51, but in the main he seems to prefer that in which self-defence is applicable only in the case of armed attack (pp. 64 et seq.). Similarly, Goodrich, Hambo and Simons, in the 3rd ed. of their commentary (see footnote 208 above), pp. 344 et seq., incline towards the narrow interpretation, thus rectifying the attitude adopted in the earlier editions.


One writer, for example, recognize the existence of "preventive" self-defence in fairly broad terms. See in this connection the particular position taken by R. L. Bindschedler, "La délimitation des compétences des Nations Unies", Recueil des cours ..., 1963-1 (Leyden, Sijthoff, 1964), vol. 108, pp. 397 et seq.

212 One author who goes a long way in this direction is Bowett, Self-defence ... (op. cit.), pp. 269 et seq.

213 It should be pointed out in this connection that the "collective" self-defence expressly mentioned in Article 51 of the Charter is recognized in general international law, just as much as "individual" self-defence, as being an exception to the general prohibition of the use of armed force.
these problems—some of which are a matter of considerable controversy—arising in United Nations practice and in doctrine from the interpretation and application of Article 51 of the Charter. The Commission's task in regard to the point dealt with in article 34, as in the case of all the other draft articles, is to codify the international law which relates to the international responsibility of States. The Commission would certainly be doing more than it has been asked to do if it tried, over and above that, to settle questions which ultimately only the competent organs of the United Nations are qualified to settle. It is not for the Commission to opt for one or another of the opposing arguments sometimes put forward with regard to the interpretation of the Charter and its clauses. Besides, it is not the purpose of the present article to seek a solution to these various problems.

(22) Nor does the Commission feel that it should examine in detail issues, discussed in some cases at length in the literature, such as the "necessary" character which the action taken in self-defence should display in relation to the aim of halting and repelling the aggression, or the "proportionality" which should exist between that action and that aim, or the "immediacy" which the reaction to the aggressive action should exhibit. These are questions which in practice logic itself will answer and which should be resolved in the context of each particular case.

(23) Having found that a "primary" rule on self-defence exists in the United Nations Charter, and in present customary international law as well, and having seen its repercussions on State responsibility, the Commission concluded that it should insert in the present chapter of the draft articles a rule whose sole purpose is to state the principle that the use of force in self-defence p. 1, the wrongfulness of the acts in which force is so used. In doing this, the Commission has no intention of defining or codifying self-defence, any more than it defined or codified consent, countermeasures in respect of an internationally wrongful act, and so on. Quite simply, the Commission has found that self-defence is a principle recognized both in the Charter of the United Nations and in contemporary international law and it has drawn the necessary inferences from this in regard to the present chapter of the draft, which deals with circumstances precluding wrongfulness.

(24) In this connection the Commission wishes to point out, as it indicated in the introduction to chapter V, that the purpose of this chapter is to define the circumstances in which, despite the apparent combination of the objective element and the subjective element of the existence of an internationally wrongful act, the existence of such an act cannot be inferred owing to the presence of a circumstance which stands in the way of that inference. Self-defence is one of the circumstances to be taken into account in this connection. In this case, as in the case of the other circumstances dealt with in chapter V, the effect of a situation of self-defence underlying the conduct adopted by the State is to suspend or negate altogether, in the particular instance concerned, the duty to observe the international obligation, which in the present case is the general obligation to refrain from the use or threat of force in international relations. Where there is a situation of self-defence, the objective element of the internationally wrongful act, namely the breach of the obligation not to use force, is absent and, consequently no wrongful act can have taken place.

(25) As regards the wording of the article, the Commission has been particularly careful to avoid any formulation which might give the impression that it intended to interpret or even amend the United Nations Charter. It has adopted the following text:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

The words "in conformity with the Charter of the United Nations" refer to the Charter in general and get round the problems of interpretation that might arise from a reference solely to Article 51 of the Charter out of context, or to both the Charter and general international law, or to general international law alone.

(26) Some members of the Commission nevertheless expressed reservations about this wording. In the view of some members, the general reference to the Charter should be replaced, in conformity with what the Special Rapporteur had proposed in his draft, by a specific reference to Article 51 of the United Nations Charter. A further observation was that the article should use the actual terminology of Article 51 of the Charter, namely "inherent right of... self-defence". A further point was made that the article would be clearer if the words "a lawful measure of self-defence taken in conformity with..." were replaced by the words "action taken in exercise of the right of self-defence in conformity with...". A majority of the Commission nevertheless took the view that, as regards the effect of "self-defence" on the lawfulness or otherwise of "an act of a State"—the only question involved in chapter V of the draft—the point to be considered was the situation of the State acting, and that it was of no importance whether that situation constituted the exercise of a "right", of a "natural right" or of any other subjective legal situation.

(27) In the view of one member of the Commission, who of course approved of the idea of the article, the text could not possibly begin with a reference to "an act of a State not in conformity with an international obligation of that State", because no act of a State
constituting self-defence is contrary to any international obligation.

(28) It should also be noted that action taken in self-defence may injure the interests of a third State. Those interests must obviously be fully protected in such a case. The Commission therefore wishes to point out that the provision in article 34 is not intended to preclude any wrongfulness of, so to speak, indirect injury that might be suffered by a third State in connection with a measure of self-defence taken against a State which has committed an armed attack. The observations made in this connection in the commentary to article 30 (Countermeasures in respect of an internationally wrongful act) therefore apply mutatis mutandis to the case in which the rights of a third State are injured by action taken in self-defence.

(29) Having concluded its consideration, on first reading, of the chapter on circumstances precluding wrongfulness in international law, the Commission wishes to stress that the circumstances dealt with in this chapter are those which "generally" arise in this connection. Consequently, the chapter does not seek to make the list of circumstances it enumerates absolutely exhaustive. The Commission is sufficiently aware of the evolving nature of international law to believe that a circumstance which is not today held to have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation, may have that effect in the future. At all events, the Commission wishes to point out that chapter V is not to be construed as closing the door on that possibility.

Article 35
Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not preclude any question that may arise in regard to compensation for damage caused by that act.

Commentary*/*

(1) At its thirty-first session, in 1979, during its examination of article 31 of the draft (Force majeure and fortuitous event), the Commission considered whether, bearing in mind the comments made on the subject, 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 that article should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question. The Commission found, however, that a stipulation of that kind would also have to apply to other circumstances precluding wrongfulness dealt with in the present chapter of the draft. It therefore decided that, 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.

(2) At the same session, the Commission emphasized that the above considerations were also applicable to the provisions of article 32 on "distress" as a circumstance precluding wrongfulness. Moreover, it had already pointed out in connection with article 29 (Consent) that a State may also consent to an action provided that the action includes the assumption of risks deriving from activities not prohibited by international law.

(3) At the present session, the question, already raised during the adoption of articles 29, 31 and 32, came up again forcefully in connection with article 33. For it appeared all the more logical for the Commission to reserve the possibility that compensation might be due for damage caused by an act or omission whose wrongfulness could only be precluded because it had been occasioned by a state of necessity.

(4) Having thus completed its examination of the various circumstances precluding wrongfulness, the Commission, at the present session, considered the question here discussed with respect to all the circumstances provided for in chapter V of the draft. It decided to include, at the end of that chapter, a reservation in quite general terms, stipulating that preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29 (Consent), 31 (Force majeure and fortuitous event), 32 (Distress) and 33 (State of necessity) does not preclude any questions which may arise in regard to compensation for damage caused by that act. The Commission considered it essential that the reservation should not appear to prejudice any of the questions of principle that might arise in regard to the matter, either with respect to the obligation to indemnify, which would be considered in the context of part 2 of the present draft, or with respect to the codification of the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law". The codification of which has already been entrusted to the Commission. The Commission also wishes to emphasize that the position of article 35 at the end of chapter V of Part I of the draft is provisional. The final position of the article may be decided at a later stage in the elaboration of the draft.


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215 The member in question suggested that the article should read as follows: "Recourse by a State to self-defence in conformity with Article 51 of the Charter of the United Nations precludes the wrongfulness of an act of that State constituting such recourse to self-defence".
216 See Yearbook... 1979, vol. II (Part Two), pp. 120-121, document A/34/10, chap. III, sect. B.2, art. 30, paras. (17)-(19) of the commentary.
217 Ibid., p. 133, art. 31. para. (42) of the commentary.
218 Ibid., p. 136, art. 32, para. (14) of the commentary.
219 Ibid., p. 114, art. 29, para. (19), in fine, of the commentary.
SECRETARIAT NOTE

The draft articles contained in Part Two and Part Three were provisionally adopted from 1983 to 1996 and were originally numbered independently of the numbering of the preceding draft articles contained in Part One. During the completion of the first reading of Part Two and Part Three in 1996, the Commission agreed to various drafting changes in these articles to ensure consistency of terminology and renumbered them to follow sequentially the numbering of the draft articles contained in Part One. The commentaries to the draft articles contained in Part Two and Part Three that were provisionally adopted before 1996 were not amended to reflect these subsequent changes. Thus, the commentary refers to the draft articles as originally adopted and as originally numbered. The original number of each draft article appears between square brackets after the newly numbered draft article to facilitate the use of the references and the cross-references to the articles as previously numbered which are contained in the commentaries.
Part Two

Content, forms and degrees of international responsibility

CHAPTER I

GENERAL PRINCIPLES

Article 36 [1]

Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Commentary*/

(1) The sole object of this article is to mark the transition, and the link, between part 1, dealing with the conditions under which the international responsibility of a State arises, and part 2, determining the legal consequences of the internationally wrongful act.

(2) As will appear from the provisions of part 2, these legal consequences consist, in the first place, of new obligations of the author State, such as the obligation to make reparation. The legal consequences may also include new rights of other States, notably the injured State or States, such as the right to take countermeasures.

(3) In respect of particular internationally wrongful acts, another legal consequence may be that every State, other than the author State, is under an obligation to respond to the act.

(4) The foregoing refers to legal consequences as regards the legal relationships between States. However, article 1 does not exclude that an internationally wrongful act entails legal consequences in the relationships between States and other "subjects" of international law.

Article 37 [2]

Lex specialis

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Commentary*/

(1) Article 2 stipulates the residual character of the provisions of part 2. Indeed, States, when creating "primary" rights and obligations between them, may well at the same time—or at some later time before the established "primary" obligation is breached—determine the legal consequences, as between them, of the internationally wrongful act involved.

(2) Such predetermined legal consequences may deviate from those to be set out in part 2. Thus, for example, States parties to a multilateral treaty creating a customs union between them may choose another system of ensuring its effectiveness than the normal legal consequences of internationally wrongful acts (obligation of reparation, right to take countermeasures). However, States cannot, inter se, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security.

(3) The opening words of article 2 are intended to recall these limitations.***

* Yearbook ... 1983, vol. II (Part Two), p. 42 (commentary to paragraph 1 of the article (former article 1)); and Yearbook ... 1993, vol. II (Part Two), pp. 54-55 (commentary to paragraph 2).

** Yearbook ... 1983, vol. II (Part Two), pp. 42-43 (commentary to former article 2).
Article 38 [3]

Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Commentary*/

(1) The legal consequences of an internationally wrongful act may include consequences other than those directly relating to new obligations of the author State and new rights, or obligations, of another State or States. Thus, for example, article 52 of the 1969 Vienna Convention on the Law of Treaties declares:

*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.

Another example is provided by article 62, paragraph 2 (b), of the same Convention, which states:

* A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

These types of legal consequences will not be dealt with in part 2 of the present draft articles.

(2) In this connection, it should be recalled that the ICJ, in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970), expressed the opinion that most articles of the Vienna Convention were declaratory of already existing customary international law.

(3) In any case, part 2 may well not be exhaustive as to the legal consequences of internationally wrongful acts.

Article 39 [4]

Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

Commentary*/

(1) Part 2 will indicate the legal consequences of an internationally wrongful act in terms of new obligations and new rights of States.

(2) It cannot a priori be excluded that, under particular circumstances, the performance of such obligations and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security may require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude

*... that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.**

*/ Yearbook ... 1983, vol. II (Part Two), p. 43 (commentary to former article 3).

**I.C.J. Reports 1971, p. 16.

***In the opinion of the competent United Nations organ.

**+ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, article 2.

2* Yearbook ... 1983, vol. II (Part Two), p. 43 (commentary to former article 5, subsequently renumbered article 4).

The Commission recognized that, to the extent that articles are ultimately adopted in the form of a convention, the relationship of such a convention with the Charter is governed by Article 103 of the Charter. Given
Article 40 [5]

Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which,

that the provisions of the Charter prevail, many members of the Commission were apprehensive that a State's rights or obligations under the convention - that is based on the law of State responsibility - could be overridden by decisions of the Security Council taken under Chapter VII of the Charter which, under Article 25 of the Charter, Member States are bound to accept and carry out.

For example, would the Security Council, acting in order to maintain or restore international peace and security, be able to deny a State's plea of necessity (article 33), or a State's right to take countermeasures (articles 47 and 48), or impose an obligation to arbitrate (article 58)?

On one view the Security Council could not, as a general rule, deprive a State of its legal rights, or impose obligations beyond those arising from general international law and the Charter itself. Exceptionally, it might call on a State to suspend the exercise of its legal rights, as for example when requiring the suspension

in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

of countermeasures as a provisional measure under Article 40 of the Charter. Or the denial of legal rights might be more permanent in the case of a State determined to be an aggressor. But on this view the Security Council should in general act with full regard for the legal rights of States.

A different view would regard this approach as too restrictive, too "legalistic", and as minimizing the overriding interest of the entire community of States in preserving international peace.

The terms of article 39 do not seek to resolve this question, one way or the other. The Commission would welcome quite specific comments by States on the issues raised, so that, during the course of its second reading, the Commission could return to these important issues.
(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime*, all other States.

Commentary**

(1) An internationally wrongful act entails new legal relationships between States independently of their consent thereeto. These new legal relationships are those between the "author" State or States and the "injured" State or States. In order to describe such legal consequences it is necessary, at the outset, to define the "author" State and the "injured" State or States. Part I of the draft articles, in particular chapters II and IV thereof, define the "author" State. The present article is addressed to the determination of the "injured" State or States.

(2) Part I of the draft articles defines an internationally wrongful act solely in terms of obligations, not of rights. This was done on the assumption that to each and every State is, or those States are, entitled to invoke the new legal relationships and even which new legal relationships are entailed by such a breach.

(3) For the purposes of the articles of part 2 of the draft, it is necessary to determine which State or States are legally considered "injured" State or States, because only that State, or those States, are entitled to invoke the new legal relationship, as described in part 2, entailed by the internationally wrongful act.

(4) This determination is obviously connected with the origin and content of the obligation breached by the internationally wrongful act in question, in the sense that the nature of the "primary" rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States "injured" by the breach of an obligation under such "primary" rules.

(5) In this connection, reference must be made to article 2 of the draft stipulating the residual character of the provisions of part 2. Indeed, States when creating "primary" rights and obligations between them may well, at the same time, determine which State or States are to be considered the "injured" State or States in case of a breach of an obligation imposed by that "primary" rule, and thereby determine which State or States are entitled to invoke new legal relationships and even which new legal relationships are entailed by such a breach.

(6) Accordingly, article 5 can only make presumptions as to what legal consequences are intended by the scope and content of the "primary" rule involved.

(7) Paragraph I of article 5 states the general proposition which underlies part I of the draft articles (see paragraph (2) above). The "right" to which reference is made in the first part of the paragraph is, of course, a right under international law; in fact, this is implied by the second part of the paragraph, in conjunction with the first sentence of article 4 of part I of the draft.

(8) Paragraph 2 of article 5 sets out a number of situations in which the origin and content of the primary rule may determine - subject to what is stated in paragraph (5) above - the State or States legally to be considered "injured" State or States.

(9) Subparagraph (a) of paragraph 2 deals with the situation in which the obligation breached is one imposed on a State in a bilateral treaty; the right infringed in such a case is then the right of the other State party to that bilateral treaty, and consequently it must be presumed that the other State is an "injured State".

(10) According to article 36 of the 1969 Vienna Convention on the Law of Treaties, a right may arise from a provision of a treaty for a third State; this situation is dealt with in subparagraph (d) of paragraph 2, applicable to both bilateral and multilateral treaties.

(11) The operative part of a judgment or other binding dispute-settlement decision of an international court or tribunal may impose an obligation on a State. Such obligation is an independent one inasmuch as the judgment puts an end to a dispute precisely relating to the question whether or not the facts of the case and the rules, as considered applicable, result in an obligation having been breached and a right having been infringed.

(12) Normally, it will be clear from such operative part both which State, according to the judgment, is the author State and which State is the injured State. However, as stated in Article 59 of the Statute of the ICJ and in many other international instruments governing other international courts and tribunals, "the decision of the Court has no binding force except between the parties and in respect of that particular case". It follows that the judgment can determine rights and obligations only as between the parties to the dispute. Presumably, then, if any party to the dispute fails to perform the obligations incumbent upon it under the judgment, the other party to the dispute is the "injured State".

(13) In most cases there are only two States parties to a

* The term "crime" is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, inter alia, avoiding the penal implication of the term.

**/ Yearbook... 1985, vol. II (Part Two), pp. 25-27 (commentary to former article 5).
dispute brought before an international court or tribunal. There may, however, arise situations in which, by virtue of a common application or by virtue of an intervention permitted by the court or by its statute (compare, for example Articles 62 and 63 of the Statute of the ICJ), there are more than two States parties to the dispute. In such cases the question arises whether all those parties are to be considered injured States in case of non-performance of obligations imposed by the judgment. Normally, the operative part of the judgment will in so many words answer this question. If not, it will result from the other parts of the judgment which State or States parties to the dispute are entitled to the benefit of the right infringed by non-performance of the obligation imposed by the operative part.

(14) International courts and tribunals are often empowered by their statutes to "indicate" interim measures of protection as a part of their task of settling disputes. Whether or not an "order" of the court or tribunal indicating such measures is a binding dispute-settlement decision depends on the interpretation of its statute or other rule of international law binding on the parties to the dispute.

(15) Again, reference must be made to article 2 of part 2 of the draft. It is not excluded that the statute of a court or tribunal or other relevant rule of international law, binding on States, provides specifically for decisions of the court or tribunal binding on, and stipulating the "status" of "injured State", also for one or more States which are not, strictly speaking, parties to the dispute. In fact, Article 94, paragraph 2, of the Charter of the United Nations empowers the Security Council to widen the circle of States "injured" by non-performance of an obligation under a judgment of the ICJ (compare subparagraph (e) of paragraph 2); similar powers may be given to the international court or tribunal itself.

(16) Where as regards international courts and tribunals there clearly is a residual rule, as stated in subparagraph (b) of paragraph 2, the situation is somewhat different in respect of binding decisions of an international organ other than an international court or tribunal. Here, a reference to the constituent instrument of the international organization concerned is necessary to determine the injured State or States. Actually such constituent instrument is either a bilateral treaty, in which case subparagraph (a) of paragraph 2 applies, or a multilateral treaty, in which case subparagraph (e) applies.

(17) Particular questions arise in "multilateral" situations, where more than two States are bound by a rule of international law, conventional or customary, imposing obligations the breach of which constitutes the internationally wrongful act. In such situations it cannot always be presumed that all those States (other than the author State) are "injured" by the particular act. In fact, universal international customary law recognizes that the sovereign equality of States entails certain obligations the breach of which in a particular case in the first instance "injures" only the State whose rights are thereby infringed. The same applies in the case of certain multilateral treaties. Subparagraph (e) (i) of paragraph 2 deals with this type of situation.

(18) But the situation may be different, either by virtue of the facts or by virtue of the content and nature of the rule of international law involved.

(19) Thus subparagraph (e) (ii) of paragraph 2 deals with a situation of fact recognized as a special one also in the Vienna Convention of the Law of Treaties in so far as multilateral treaties are concerned (see e.g. article 41, paragraph 1 (b) (i), article 58, paragraph 1 (b) (i), and, in a somewhat different context and wording, article 60, paragraph 2 (c)). As is apparent from the use of the word "other" in the chapeau of paragraph 2 (e) and in paragraph 2 (e) (ii), the expression "act of a State" in that chapeau and in subparagraph (e) (ii) must be understood as meaning the act of a State party to the multilateral treaty or bound by the relevant rule of customary international law.

(20) Subparagraph (e) (iii) of paragraph 2 relates to the growing number of rules of international law concerning the obligation of States to respect human rights and fundamental freedoms. The interests protected by such provisions are not allocatable to a particular State. Hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State.

(21) The term "human rights and fundamental freedoms" is here used in the sense which is current in present-day international relations. It is meant to cover also the right of peoples to self-determination, which indeed is referred to in the two United Nations covenants on human rights.87

(22) Obviously the provision in subparagraph (e) (iii) cannot and does not prejudice the question to what extent "primary" rules of international law, either customary or conventional, impose obligations on States and create or establish rights of States for the protection of human rights and fundamental freedoms. While the Universal Declaration on Human Rights88 and other relevant instruments are certainly pertinent for the determination of the possible scope of this provision, it is clear that not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered as incompatible with the respect of such rights even if an isolated act or mission (which might not even be intentional), must necessarily be qualified as giving rise to the application of the present provision.

(23) Paragraph 2 (f) deals with still another situation. Even if, as a matter of fact, subparagraph (e) (ii) may not apply, the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty. Actually, and by way of example, the concept of a "common heritage of mankind", as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction, expresses such a collective interest.

(24) Obviously, in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application. Accordingly, subparagraph (f) is limited to multilateral treaties, and to express stipulations in those treaties.

88 General Assembly resolution 217 A (III) of 10 December 1948.
(25) However, subparagraph (f) does not and cannot exclude the development of customary rules of international law to the same effect.

(26) Paragraph 3 of article 5 deals with international crimes. While it is clear from the very wording of article 19 of part 1 of the draft articles that, in the first instance, all States other than the author State are to be considered "injured States", the Commission, at the outset, in provisionally adopting article 19, recognized that the "legal consequences" of an international crime might require further elaboration and distinctions.

(27) In particular, the question arises whether all other States, individually, are entitled to respond to an international crime in the same manner as if their individual rights were infringed by the commission of the international crime.

(28) Obviously, paragraph 3, while implying that all other States, individually, are entitled to invoke some legal consequences as "injured States" (including in any case the entitlement to require the author State to stop the breach), does not and cannot prejudice the extent of the legal consequences otherwise to be attached to the commission of an international crime. This is a matter to be dealt with within the framework of the particular articles of part 2 of the draft relating to international crimes. For this reason, the words "in the context of the rights and obligations of States under articles 14 and 15" are provisionally placed in square brackets.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 [6]

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Commentary*

(1) Article 6 is the first of a series of articles dealing with the new relations which arise from an international delict between the author State and the injured State. The Commission decided to consider separately the relations which may arise from international crimes under article 19. The present articles are without prejudice of the consequences of crimes. As indicated in paragraph (1) of the commentary to article 1 of part 2, the new relations referred to above involve, in the first place, new obligations of the author State and corresponding entitlements of the injured State which are dealt with in articles 6 to 10 bis and may also include new rights of the injured State or States, such as the right to take countermeasures, which is dealt with in articles 11 to 14, as adopted by the Drafting Committee at the current session.

* Yearbook ... 1993, vol. II (Part Two), pp. 55-58 (commentary to former article 6).

137 The text of paragraph 1 as provisionally adopted by the Commission in 1983 is set forth in paragraph 335 above. For the relevant commentary see Yearbook ... 1983, vol. II (Part Two), p. 42.

(2) The new obligations of the author State consist in the redress of the situation resulting from the breach of a primary obligation, that is to say an obligation contained in a primary rule. The most frequently invoked of these new obligations is the obligation to make reparation, dealt with in article 6 bis, which may be discharged in various forms as provided in articles 7, 8, 10 and 10 bis. A primary exigency in eliminating the consequences of a wrongful act is, however, to ensure cessation of the wrongful act, that is to say discontinuance of the specific conduct which is in violation of the obligation breached.

(3) The importance of cessation is not always clearly perceived for a variety of reasons. In the first place, an injured State will usually demand positive behaviour on the part of the author State such as liberation of persons or restitution of objects and will do so in the context of a broader claim to reparation for injury rather than in terms of cessation. Secondly, whenever resort is had to a third-party settlement procedure, such procedure often opens at a time when the commission of the wrongful act (whether instantaneous or more extended in time) has completed its cycle so that the dispute submitted for settlement is circumscribed to the forms or forms of reparation due. Thirdly, even when the parties appear before an international body at a time when the conduct complained of is still in progress, the claimant State will organize its demands not so much in terms of discontinuance of the wrongful conduct—wrongfulness itself being at that stage controversial—but rather in terms of provisional or conservative measures that the judge may indicate or, possibly, impose upon the alleged wrong-doing State. Notwithstanding the noted difficulties of perceptibility of cessation per se, the specific features of the claim to cessation justify the inclusion of a special article on this particular remedy.

(4) In terms of legal theory, cessation may be ascribed either to the continued normal operation of the "primary" rule of which the previous wrongful conduct constitutes a violation or to the operation of the "secondary" rule coming into play as an effect of the occurrence of the wrongful act. The Commission is of the view that the very distinction between primary and secondary rules is a relative one and that cessation is situated, so to speak, in between the two categories of rules. With regard to the former, it operates in the sense of concretizing the primary obligation, the infringement of which by the wrongdoer State is in progress. With regard to the latter, it operates in the sense of affecting—without providing directly for reparation—the quality and quantity of reparation itself and the modalities and conditions of the measures to which the injured State or States, or an international institution, may resort in order to secure reparation.

(5) Irrespective of whether, in theoretical terms, cessation falls outside the realm of the legal consequences of a wrongful act stricto sensu, its practical usefulness justifies that it be the subject of a separate provision in the present draft articles. Cessation is of far greater relevance within the international legal system—given the structure of inter-State society and the role of States in the making, modification and abrogation of rules—than within the legal systems of national societies. Its func-
tion is to put an end to a violation of international law which is in progress and to safeguard the continued validity and effectiveness of the infringed primary rule which may suffer in the long run from the continuation of the violation. The rule on cessation thus protects not only the interest of the injured State or States but also the interests of the international community in the preservation of, and reliance on, the rule of law. It should be recalled in this connection that cessation is the remedy which is most frequently resorted to by organs of international organizations, particularly the General Assembly and the Security Council of the United Nations, in the presence of the most serious breaches of international law.

(6) Another reason for devoting a separate article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as *restitutio in integrum*. None of the difficulties which may hinder or prevent restitution in kind are such as to affect the obligation to cease the wrongful conduct. This is an inescapable consequence of the fact that the difficulties or impossibility which may partly or totally affect restitution (or any other form of reparation) concern reparative measures which can only follow the accomplished wrongful act, namely the consummated violation of the primary rule. Cessation is not and should not be subject to such supervening conditions because its purpose is precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act in time and space. Unless the primary rule itself is modified or ceases to exist and unless the wrongful conduct is ceased at some stage by supervening circumstances that exclude wrongfulness, the obligation to discontinue the wrongful conduct must stand unlimited. Any limitation of such a basic obligation would call into question the binding force of the primary rules themselves and endanger the validity, certainty and effectiveness of international legal relations.

(7) As indicated above, cessation is often considered in more or less close connection with restitution in kind or other forms of reparation. Yet cessation is not part of restitution. It is targeted towards the wrongful conduct *per se*, irrespective of its consequences. Cessation could be described as future oriented, in other words, implying future compliance with a primary rule of international law, whereas reparation whose function, as defined by UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405), is to "wipe out all the consequences", in the relations between the author State and the injured State, of the factual and legal effects of a violation of an international obligation of the former *vis-à-vis* the latter is oriented towards a past infringement of the primary rule.

(8) The difficulty in isolating cessation from reparation is compounded by the fact that in practice the result of cessation may be indistinguishable from that of one specific form of reparation, namely restitution in kind. Reference is made here to cases involving the liberation of persons or the restitution of objects or premises. Such measures are often cited as examples of reparation in the form of restitution in kind. In fact, they aim at stopping the breach. What is demanded is the return to the attitude required by law, the cessation of the wrongful conduct. Indeed, the situations in which actions such as those re-

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141 Of significance, in that respect, is the claim of Greece in the *Forests in Central Rhodopia* case (Merits). The forests having been annexed by Bulgaria, Greece claimed rights of ownership and use acquired prior to the annexation which it considered to be as unlawful as the possession of the forests. However, the Greek claim was formulated not in terms of a return to the original lawful situation but in terms of *restitutio in integrum*, namely as a form of reparation (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405).

142 The predominant exigency of cessation over that of reparation in the case of wrongful apprehension, detention or imprisonment of human beings seems to emerge clearly in the case concerning *United States Diplomatic and Consular Staff in Tehran*. ICJ, after declaring that the conduct of Iran constituted a continuing wrongful act at the time of application, decided that the Government of that State "must immediately terminate the unlawful detention of . . . United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power . . . " (Judgment of 24 May 1980, F.C.J. Reports 1980, p. 44.) See footnote 87 above.


Article 10 of the Convention. The European Commission on Human Rights declared the application admissible to the extent to which the situation complained of continued to exist in the period subsequent to the entry into force of the Convention. A more recent example is that of the *Veurne* case,146 in which the European Court of Human Rights stated that by virtue of its former *Markx* judgement,147 Belgium had been under an obligation to repeal the laws discriminating against children born out of wedlock.

(11) An illustration of the duty of cessation is also provided by the procedure under article 169 of the Treaty establishing the European Economic Community.148 Under this procedure, the Court of Justice of the Community can make findings that a State has breached its obligations under the Treaty. In most cases, the Court has to pronounce itself on national legislation allegedly contrary to a rule of Community law. If a finding of inconsistency is made by the Court, this implies the duty for the defendant State to repeal the legislative act concerned.149

(12) The example of wrongful non-enactment or non-abrogation of internal legislation referred to by the Commission has also been cited in doctrine.150 Other examples mentioned cited in the case of a diplomat.

(13) Closely connected with the condition of the continuing character of the wrongful act is the condition that the violated rule is still in force at the time when cessation is sought. In this connection, the Arbitral Tribunal in the "*Rainbow Warrior*" case stated the following:

*The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.*

Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.

The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (Case concerning *The United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1979, p. 19-20; para. 38 to 41, and ibid., 1980, para. 95, No. 1; case concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), I.C.J. Reports 1984, p. 187, and ibid., 1986, para. 292, p. 149).

If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.151

(14) With regard to the timing of any claim for cessation on the part of the injured State or States, it is obvious that no such claim could be lawfully put forward unless the wrongful conduct had begun, namely unless the threshold of unlawfulness had been crossed by an allegedly wrongdoers State's conduct. A distinction should particularly be drawn between a State's conduct that "completes" a wrongful act (whether instantaneous or extended in time) and the State's conduct that precedes such conduct and does not qualify as a wrongful act. It should also be taken into consideration, on the other hand, that, unlike wrongful acts of national law, the internationally wrongful act of a State is quite often—and probably in most cases—the result of a concatenation of a number of individual actions or omissions which, however legally distinct in terms of municipal law, constitutes one compact whole so to speak from the point of view of international law. In particular, a legislative act whose provisions might open the way to the commission by a State of a wrongful act may not actually lead to such a result because it is not allowed by the administrative or judicial action "ordered by the legislator". Conversely, a legislative act which would per se be in conformity with the necessity of ensuring compliance by a State with its international obligations might prove insufficient because it is not (or is wrongly) applied by administrative or judicial organs. This complexity of most internationally wrongful acts is particularly obvious in the frequently occurring cases in which the initial steps leading to the commission of a wrongful act by a State are represented by an act of a private party or an act of subordinate organs, further steps by State organs being indispensable for an internationally wrongful act to be "perfect".152 This suggests that if it is true that a claim for cessation is admissible as a matter of right (or * faculté*) only from the moment at which the conduct of the author State has attained the threshold prior to which it is

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150 According to Triepel, "if at a given moment, States are under an international obligation to have rules of law of a specific content, the State which already has such rules is failing in its duty if it abolishes them and does not reinstate them whereas a State which does not yet have such rules is failing in its duty simply by not instituting them but both States are committing . . . a wölkerrechtliches 'Dauerdelikt'" (H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), p. 289).

Ago specifies, for his part, that "the basic element of the distinction between instantaneous and continuing wrongful acts "lies in the instantaneous or permanent nature of the action", so that one could distinguish between "wrongful acts in which the objective elements of a conduct that conflicted with one of the State's international obligations is immediate in nature" and "other violations of an international obligation which have a continuing character, the result being that when they become complete with all their constituent elements realized, they do not thereby cease to exist; rather they continue in identical form and become permanent" (R. Ago, "Le délit international", *Recueil des cours* . . . 1939-H (Paris, Sirey, 1947), vol. 68, pp. 519-521).

152 As regards the notion of the "complexity" and "unity" of an internationally wrongful act and, more generally, the notion that a unit of State conduct under international law (action, commission or act of will) is a "factually complex unit" from the point of view of international law, see G. Arango-Ruiz, "L'Etat dans le sens du droit des gens et la notion du droit international", in *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 26, Nos. 3-4 (May 1976), pp. 311-331.
not, and after which it became, a wrongful act, situations are conceivable in which an initiative of the prospec-
tively injured State might be considered useful and not
unlawful. Indeed, in the presence of conduct of another
State which manifestly appears to constitute the initial
phase of a course of action (or omission) likely to lead to
a wrongful act, the State could, with all the necessary
precautions, take the appropriate steps, with due respect
for the principle of non-intervention in the other party’s
domestic affairs, to suggest in an amicable manner an
adjustment of the former State’s conduct which might
avert liability.

(15) Unlike subsequent articles on reparation, article 6
provides for an obligation of the wrongdoer State, in
keeping with the Commission’s view that cessation is
not a form of reparation but rather the object of an obli-
gation stemming from the combination of wrongful con-
duct in progress and the normative strength of the pri-
mary rule of which the wrongful conduct is held in
breach. Whereas, as far as the various forms of repara-
tion are concerned, the preference for a formulation in
terms of rights of the injured State is justified in view of
the fact that it is by decision of the injured State that a
secondary set of legal relations is set in motion, the
situation is different with regard to cessation where, al-
though an initiative on the part of the injured State is
both lawful and opportune, the obligation to discontinue
the wrongful conduct is to be considered not only exist-
ent but in actual operation on the mere strength of the
primary rule, quite independently of any representation
or claim on the part of the injured State. Article 6 there-
fore emphasizes the continued, unconditional subjection
of the author State to the primary obligation, no claim to
respect thereof by the injured State being necessary. It
reflects the Commission’s view that subjecting the obli-
gation of cessation to a claim by an injured State which
may not be in a position to make such a claim or may be
under pressure not to make it would frustrate one of the
main functions of cessation, namely securing the discon-
tinuance of a violation of international law which may entail,
in addition to obvious direct and specific conse-
quences to the detriment of the injured State, a threat to
the very rule infringed by the wrongdoer’s unlawful con-
duct. Given the inorganic structure of inter-State society,
the norms of international law developed by States them-

153 See footnote 87 above.

selves are vulnerable, being exposed to destruction as a
result of breaches of those norms by States. The signifi-
cance of cessation of a wrongful act goes beyond the
level of bilateral relations to the level of relations be-

154 See footnote 142 above.

between wrongdoers and all the other States and members
of the international community.

(16) In keeping with article 3 of part 153 entitled
“Elements of an internationally wrongful act of a
State”, the term “conduct” covers both commissive and
omissive wrongful conduct. In the case of commissive
wrongful conduct, cessation will consist of the negative
obligation to “cease to do” or “to do no longer”. In the
case of omissive wrongful conduct, cessation will cover
the author State’s undischarged obligation “to do” or
“to do in a certain way”. The Commission is aware that
the dual sense it thus attributes to the expression “cessa-
tion” is not universally accepted in international theory
and that, in practice, States will rather demand specific
performance of a breached obligation than cessation of
non-compliance with an obligation to do. However,
omissive wrongful acts may well fall as well as, and per-
haps more frequently than, commissive wrongful acts in
the category of wrongful acts having a continuing char-
acter. As observed by the Arbitral Tribunal in the “Rain-
bow Warrior” case, cessation is relevant to all unlawful
acts extending in time “regardless of whether the con-
duct of State is an action or an omission . . . since there
may be cessation consisting in abstaining from certain
actions—such as supporting the contras—or consisting in
positive conduct such as releasing the United States
hostages in Tehran”.

As long as it is protracted beyond the date within which such an obligation is due to
be performed, non-compliance with an “obligation to
do” is a wrongful act of a continuing character to which
cessation should be applicable in isolation as well as in
conjunction with one or more of the forms of reparation,
and particularly with restitution in kind.

(17) The concluding phrase of the article “without
prejudice to the responsibility it has already incurred”
makes it clear that compliance with the obligation of ces-
sation in no way exonerates the wrongdoing State from
the responsibility it has incurred as a result of the wrong-
ful act prior to such compliance. Cessation does not can-
cel the legal or factual consequences of the wrongful act.
Its target is the wrongful act per se. It consists, so to
speak, in the draining of the source of responsibility to
the extent that it has not yet, as it were, operated. As
such, cessation does not affect the consequences—legal
or factual—of the past wrongful conduct.

Article 42 [6 bis]

Reparation

1. The injured State is entitled to obtain from the State which has
committed an internationally wrongful act full reparation in the form of
restitution in kind, compensation, satisfaction and assurances and
guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of
the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on

whose behalf the claim is brought;

which contributed to the damage.

3. In no case shall reparation
result in depriving the population of a
State of its own means of subsistence.

4. The State which has committed the
internationally wrongful act may not
invoke the provisions of its internal
law as justification for the failure to
provide full reparation.
(1) A State discharges the responsibility incumbent on it for breach of an international obligation by making good, that is to say, by making reparation for the injury caused.

(2) The word "reparation" is the generic term which describes the various methods available to a State for discharging, or releasing itself from, such responsibility. This term, employed in Article 36, paragraph 2 of the Statute of the International Court of Justice, appears also in PCIJ's formulation of the basic rules on the subject, as contained in the judgment rendered in the Chorzów Factory case:

"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular, by the decisions of arbitral tribunals— is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

In keeping with the above pronouncement of PCIJ, article 6 bis lays down the general rule that full reparation should be provided so as to wipe out, to the extent possible, all the consequences of the internationally wrongful act.

(3) In the Chorzów Factory case, material damage had been sustained and the Court therefore singled out only two methods of reparation, namely:

Restitution in kind, or, if impossible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.

There are however other methods of reparation which are appropriate to injuries of a non-material nature, namely satisfaction and assurances or guarantees of non-repetition. Article 6 bis accordingly provides that reparation may consist in restitution in kind, compensation, satisfaction and assurances or guarantees of non-repetition.

(4) Unlike article 6 which is couched in terms of an obligation for the reasons explained in paragraph (15) of the commentary thereto, the present article provides for a right for the injured State, taking into account the fact that it is by a decision of the injured State that the process of implementing this right in its different forms is set in motion.

(5) The phrase "as provided in articles 7, 8, 10 and 10 bis, either singly or in combination" makes it clear that the forms of reparation dealt with in those articles are, on the one hand, available to the injured State in accordance with and subject to the conditions laid down in the corresponding articles and, on the other hand, susceptible of combined application. Paragraph 1 of article 6 bis should therefore be interpreted in the light of the provisions dealing with each of the forms of reparation identified in the article.

(6) Under paragraph 1, a State which commits an internationally wrongful act is under an obligation to provide full reparation for the injury sustained as a result of the internationally wrongful act. The injury may however be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal links theory—an issue which is extensively dealt with in the commentary to article 8.

(7) Paragraph 2 singles out the negligence or the wilful act or omission of the injured State which contributed to the damage (subparagraph (a)) and the negligence or the wilful act or omission of a national of the injured State on whose behalf the claim is brought (subparagraph (b)) which contributed to the damage. States may bring claims on behalf of their nationals, namely national or juridical persons, both of which are covered by the term "national". This factor is widely recognized both in doctrine and in practice as relevant to the determination of reparation. In practice, it is in the assessment of pecuniary compensation that the relevance of the negligence or wilful conduct of the injured State or of a national of the injured State on whose behalf the claim is brought has been recognized and acted upon.

155 The possible implications for the provisions on reparation of the existence of a plurality of injured States, including the question of the so-called differently or indirectly injured States, will be considered at a later stage.


157 See footnote 140 above.


159 In the Delagoa Bay Railway case, the arbitrators were asked to settle a claim in the dispute between Portugal on the one hand and the United Kingdom and the United States of America on the other, over the cancellation of the franchise for a railway, 35 years before its expiry date.

"... All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government militate the latter’s liability and warrant ... a reduction in reparation." (Decision of 29 March 1900 (Martena, Nouveau Recueil, 2nd series, vol. XXX, pp. 329 et seq., at p. 407).)

In the S.S. "Wimbledon" case, the refusal to let the ship sail through the Kiel Canal having been found to be a source of liability, there remained to determine the amount of compensation. There was no doubt about the offending State's obligation to pay damages for the detour to which the ship had been forced as a consequence. A doubt, however, arose with regard to the injury represented by the fact that the ship had harboured at Kiel for some time, following refusal of passage, before taking an alternative course. Implicitly, the Court admitted that the ship captain's conduct in this respect had to be considered as a possible circumstance affecting the amount of compensation. While thus confirming the rule with its authority, the Court did not believe however that the captain's conduct left anything to be desired. Indeed, the Court stated: "... As regards the number of days, it appears to be clear that the vessel, in order to obtain recognition of its right, was justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage." (Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, p. 31.)

However, the factor in question can also be relevant in the case of other forms of reparation. If, for example, a State-owned ship is unlawfully seized by another State and while it is seized, sustains damage attributable to the negligence of the captain, the author State may be required merely to return the ship in its damaged condition. Negligence or wilful conduct can similarly be relevant to certain forms of satisfaction. The Commission has therefore deemed it appropriate to provide for the role of negligence or wilful conduct in the context of article 6 bis. The formulation it has adopted to that end in paragraph 2 of the article is fully consonant with the principle that full reparation is due for the whole damage—but nothing more than the damage—ascrivable to the wrongful act. The phrase "the negligence or the wilful act or omission . . . which contributed to the damage" is borrowed from article VI, paragraph 1, of the Convention on International Liability for Damage caused by Space Objects. Subparagraph (b) of paragraph 2 provides for the case where negligence or a wilful act or omission of a national of the injured State on whose behalf the claim is brought has contributed to the damage. Such a circumstance should affect the amount of the reparation to which the injured State is entitled, the underlying idea being that the position of a State which espouses a claim must not be more favourable than would the position of its national if he could bring the case himself.

8 (a) In the context of some of the specific forms of reparation (in particular, restitution in kind and satisfaction), the question has arisen whether there is any limit to the notion of full reparation. There are examples in history of the burden of "full reparation" being taken to such a point as to endanger the whole social system of the State concerned, for example in the context of a peace treaty following the defeat of a particular State. These are of course extreme cases, but within the whole spectrum of possible cases of responsibility the extreme case may not be excluded. Accordingly, paragraph 3 provides that reparation is not to result in depriving the population of a State of its own means of subsistence. This has, of course, nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized. But in other contexts—e.g. the payment of sums of money by way of compensation or satisfaction—the amounts required, or the terms on which payment is required to be made should not be such as to deprive the population of its own means of subsistence. The language of paragraph 3 is drawn from article I, paragraph 2 of the International Covenants on Human Rights of 1966, and reflects a legal principle of general application.

(b) Some members disagreed with the inclusion of paragraph 3. They were of the view that the provision was inappropriate and that in any event the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds.

(9) In substance, paragraph 3 states the general principle that the State which has committed an internationally wrong act could not invoke its internal law as justification for failure to provide reparation. The wording of this paragraph is modelled on article 27 of the Vienna Convention on the Law of Treaties. The concept of reparation should be understood in the light of paragraph 1 relating to the right of the injured State to obtain full reparation.

(10) Paragraph 6 deals with the impact of internal law on the obligation of the State which has committed an internationally wrong act to make reparation. Although it has usually been in response to claims of restitution in kind that States have invoked their internal law as a defence, the question may arise in relation to other forms of reparation and is therefore covered in the present article.

(11) It should first be pointed out that paragraph 6 is strictly concerned with municipal law obstacles. The question of jurisdictional impossibility deriving from international law itself is relevant to restitution in kind and is accordingly dealt with in article 7. One is confronted here with the problem of conflict between two incommensurable exigencies: (a) the principle that a State cannot escape its international obligations by invoking rules of its own legal system (article 4 of part I of the draft); and (b) the factual difficulty which the Government of the other State faces when confronted with an obstacle in the rules of the internal legal system under which it is bound to operate.

(12) Although it is not unanimously shared, the prevailing doctrinal view is that the difficulties which a State may encounter within its own legal system in discharging an international obligation in its relations with one or more other States are (at least per se) not decisive as a legal justification for failure to discharge such an obligation. In the view of the Commission, this general principle, universally accepted with regard to international obligations deriving from the primary rules, is equally applicable with regard to international obligations deriving from secondary rules. This view finds support in the fact that States have recourse to conventional law in order to exclude, modify or restrict the functioning of reparation in the cases where a specific remedy might give rise to difficulties of a certain magnitude for the other State. Of particular significance in this respect are articles 32 of the Revised General Act for the Pacific Ocean and articles 42 and 52 of the Convention on the Law of Treaties. The concept of reparation should be understood in the light of paragraph 1.
Settlement of International Disputes of 28 April 1949,163 article 50 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and article 30 of the 1957 European Convention for the Peaceful Settlement of Disputes. These provisions permit the Contracting States to reject the claim for reparation if it conflicts with their constitutional law or limit claims for reparation to those which can be satisfied through the administrative channel.164 The fact that States deem it necessary to agree expressly in order to prevent restitution measures from gravely affecting fundamental principles of municipal law seems to indicate that they believe that at the level of general international law a correct discharge of the author State’s obligation must prevail over legal obstacles.

(13) The above conclusion finds support in the practice of States and international decisions. An example of this is the dispute between Japan and the United States (1906) over the discriminatory policies of the Administration of California with regard to the availability of education institutions for children of Asiatic origin,165 a dispute that was settled in favour of the Japanese claim by the revision of the California legislation.166 Another example is that of the abrogation of article 61 (2) of the Weimar Constitution (Constitution of the Reich of 11 August 1919),167 wherein no less than a constitutional amendment was provided for in order to ensure the full discharge of the obligation deriving from article 80 of the Treaty of Versailles. Mention may also be made of the Crenner-Erkens case (1961) in which two Belgian diplomats were arrested and detained by the Katanga police and later expelled.168 The orders of expulsion were annulled following representations from the Vice-Dean of the Diplomatic Corps in Leopoldville. Also of relevance is the Peter Pâzmandy University case, in which PCIJ specified that the property to be returned should be “freed from any measure of transfer, compulsory administration, or sequestration.”169 In the Legal Status of Eastern Greenland case, it was decided that the declaration of occupation, promulgated by the Norwegian Government on 10 July 1931 and any steps taken in that respect by the Norwegian Government constituted a violation of the existing legal situation and were accordingly unlawful and invalid.170

(14) It is true that in a number of cases, arbitral tribunals have taken into account the internal situation of the wrongdoing State to deny a specific form of reparation. Thus, in the Walter Fletcher Smith case, the arbitrator, while maintaining that restitution should not be considered inappropriate, pronounced himself, in “the best interests of the parties, and of the public”, for compensation of States for damage done in their territory to the person or property of foreigner21, prepared by Harvard Law School in 1929 (art. 2) (reproduced in Yearbook . . . 1950, vol. II, p. 229, document A/CN 4/456, annex 9); the draft articles on the responsibility of States for damage caused in their territory to the person or property of foreigners, adopted on first reading by the Third Committee of the Conference for the Codification of International Law, held at The Hague in 1930 (art. 5) (League of Nations, document C.351(c). M.145(c).1930.V, reproduced in Yearbook . . . 1956, vol. II, p. 225, annex 3); and the draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930 (art. 9, para. 2) (reproduced in Yearbook . . . 1969, vol. II, p. 149, document A/CN 4/217 and Add 1, annex VIII).

164 See RGDP (Paris), vol. 14 (1907), pp. 636 et seq.
168 Appeal from a judgment of the Hungary-Czechoslovak Mixed Arbitral Tribunal (The Peter Pâzmandy University), judgment of 15 December 1933, P.C.I.J., Series A/B, No. 61, p. 208.
Similarly, in the Greek Telephone Company case (1935) the arbitral tribunal, while ordering *restitutio*, asserted that the author State could provide compensation instead "for important State reasons". Indemnification was also accepted in lieu of *restitutio* originally decided in the *Mélanie Lachenal* case, the Franco-Italian Conciliation Commission having agreed that *restitutio* would require difficult internal procedures. More recently, the parties in the *AMINOIL* case agreed that restoration of the *status quo ante* following the annulment of the concession by Kuwaiti decree would be impracticable in any event. The Commission would however tend to view those decisions as based on excessive onerousness or lack of proportion between the injury caused and the burden represented by a specific form of reparation rather than on obstacles deriving from municipal law.

It is undeniable that the legal system of a State which is bound up in close interaction with the political, economic and social regime of the nation may frequently be of relevance to the effective application of specific forms of reparation. Nevertheless, this should not be taken to mean that general international law recognizes any form of reparation as subject to the municipal legal systems of the author State and to the exigencies that such a system is intended to satisfy. Any State which is well aware of its international obligations—secondary as well as primary—is bound to see to it that its legal system, not being opposable to the application of international legal rules, is adapted or adaptable to any exigencies deriving from such rules. Of course, a State is entitled to preserve its political, economic or social system from any unlawful attempt against its sovereignty or domestic jurisdiction on the part of other States. Nevertheless, it cannot as well feel entitled to oppose its *interna corporis* as legal obstacles to the fulfilment of an international obligation to provide a specific form of reparation. The juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law. Hence they should not be treated as strictly legal obstacles in the same sense as obstacles deriving from international legal rules.

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171 UNRIAA, vol. II (Sales No. 1949.V.1), pp. 913 et seq., at p. 918.


173 Decision No. 172 of the Conciliation Commission, of 7 July 1954 (UNRIAA, vol. XIII (Sales No. 64.V.3), pp. 130-131).

only by the application of the rule by PCIJ in the Chorzów Factory case but also in the cases in which States or arbitral bodies have moved to reparation by equivalent only after the more or less explicit consent that, for one reason or another, restitution could not be effected.

Secondly and most importantly, the primacy of restitution in kind is confirmed by the attitudes of the parties. However conscious of the difficulties restitution in kind may encounter, and at times of the improbability of obtaining reparation in such form, they have often insisted upon claiming it as a matter of preference over reparation by equivalent. This being said, it would be theoretically and practically inaccurate to define restitution in kind as the unconditionally or invariably ideal or most suitable form of reparation to be resorted to in any case and under any circumstances. The most suitable remedy can only be determined in each instance with a view to achieving the most complete possible satisfaction of the injured State’s interest in the “wiping out” of all the injurious consequences of the wrongful act, in full respect, of course, of the rights of the author State. It is a rather frequent occurrence that the parties agree, or the injured State chooses, to substitute compensation, totally or in part, for restitution in kind. There is however no contradiction between acknowledging that reparation by equivalent is the most frequent form of reparation, on the one hand, and recognizing at the same time that restitution in kind, rightly indicated as naturalis restitutio, is the very first remedy to be sought with a view to re-establishing the original situation or the situation that would exist if the violation had not intervened. The flexibility with which restitution in kind must be envisaged in its relationship with the other forms of reparation is in no sense in contrast with the primacy that befits this remedy as a consequence of its most direct or immediate derivation from the fundamental principle recalled above.

(4) Concern for flexibility underlies the formulation of the opening paragraph of article 7 which is couched in terms of an entitlement of the injured State and makes the discharge of the duty of restitution in kind conditional upon a corresponding claim on the part of the injured State.

With regard to this factory, the Court decided that the author State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible", and that "the impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution" (judgment of 13 September 1928 (footnote 140 above), p. 48).

Mention must be made, however, of a different jurisprudential tendency which denies any primacy or priority to naturalis reparation. Reference is made to the decision of the Permanent Court of Arbitration in the Russian Indemnity case in which the court, as Jimenez de Aréchaga put it, “attempted to limit redress for breaches of international law to monetary compensation” (loc. cit. (footnote 176 above), p. 166), stating that:

"all State responsibility whatever its origin is finally valued in money and transferred into an obligation to pay; it all ends or can end, in the last analysis, in a money debt." (Decision of 11 November 1912 (Russia v. Turkey) (UNRIAA, vol. XI (Sales No. 61 V.4), p. 441.)

As it pre-dates the Chorzów Factory case, this dictum could be considered as set aside by PCIJ in the latter decision.

See in this regard the following cases: British claims in the Spanish zone of Morocco, decision of 1 May 1925 (United Kingdom v. Spain) (UNRIAA, vol. II (Sales No. 1049 V.1), pp. 621-625 and 631-742); Re- ligious Property (Expropriated by Portugal), decision of 4 September 1920 (ibid., vol. I (Sales No. 948 V.2), pp. 3-7 et seq.; Walter Fletcher Smith (ibid., vol. II (footnote 171 above), p. 918); Heirs of Lebas de Courmont decision No. 213 of 21 June 1957 of the Franco-Italian Conciliation Commission (ibid., vol. XIII (Sales No. 64 V.3), p. 764).

(5) The relationship of this duty to the original, primary obligation of the author State and the corresponding original right of the injured State is a matter of some controversy. According to one school, the obligation of restitution in kind would not so much be one of the modes of reparation—and as such one of the facets of the new relationship coming into being as a consequence of a wrongful act—as a continuing ‘effect’ of the original legal relationship. The majority view, which the Commission shares, is however that restitution in kind is one of the forms of a secondary obligation to provide reparation in a broad sense—an obligation which, in the words of one writer, “does not replace the primary obligation resulting from the fundamental legal relationship . . . but simply represents an addition to the original obligation, resulting from the failure to fulfil the latter, as a consequence or result of the non-fulfilment of the original obligation”.

This approach, which preserves the notion that the original obligation survives the violation, is consistent with the Commission’s position that cessation and restitution in kind are two distinct remedies against the violation of international obligations.

(6) A distinction is generally made in the literature, according to the kind of injury to which reparation is due, between material restitutio and legal or juridical restitutio. Examples of material restitution include the release of a detained individual or the handing over to a State of an individual arrested in its territory, the restitution of ships or other types of property including docu-
ments, works of art or even sums of money. The term "juridical restitution" is used with reference to the case where implementation of restitution requires or involves the modification of a legal situation either within the legal system of the author State or within the framework of the international legal relations between the author State and one or more other States. The term "material restitution", on the other hand, is reserved for cases involving the return of specific objects or services, such as the return of goods or the repetition of acts.

Along those lines, Graeff, after asking whether the term "material restitution" should be used as a synonym in general for the restoration of situations, concludes that, although "material restitution" is used as a synonym in general for the restoration of situations, it is not the case that the term "juridical restitution" should be used for the same purpose. However, the term "juridical restitution" is typically used to refer to the return of objects or services to the author State, whereas the term "material restitution" is used to refer to the return of specific objects or services, such as the return of goods or the repetition of acts.

Examples of material restitution including persons include the "Trent" case (1861) and the "Florida" case (1864, both involving the arrest of individuals on board ships (see Moore, Digest, vol. VII, pp. 768 et seq. and pp. 1090-1091) and the case concerning United States Diplomatic and Consular Staff in Tehran (in which it ordered the Government of Iran to immediately release each and every United States national held hostage in Iran (see footnote 142 above)).

An example is the "Giaffareli" case (1886), in which the Italian Ministry instructed the Italian Consul General at Cairo to "the act committed by the Giaffareli was an arbitrary deposition and we have the right to request, in addition to compensation for damages, restitution or reimbursement" (La prassi italiana, 1st series, vol. II, pp. 901-902).

An example of material restitution of objects is the Temple of Preah Vihear case (Merit III) in its judgment of 15 June 1962 (I.C.J. Reports 1962, pp. 6 et seq., at pp. 36-37), ICJ decided in favour of the Cambodian claim which included restitution of certain objects that had been removed from the area and the temple by the Thai authorities. Reference is also made to the Ancon case (1881), originating in the seizure of the property of Italian merchant by Chilean military occupation authorities in the Peruvian city of Callao during the conflict between Chile and Peru (see Le prassi italiana, 1st series, pp. 867-868). Mention may furthermore be made of a number of cases of restitution which were decided by the Franco-Italian Conciliation Commission instituted by the Treaty of Peace of 1847 including the Hôtel Métropole case (Decision No. 65 of 19 July 1950 (UNRIAA, vol. XIII (Sales No. 64 V.3), p. 219)), the Oneto case (Decision No. 85 of 18 September 1950 (ibid., p. 240)) and the Hinfen case (Decision No. 109 of 31 October 1951 (ibid., p. 240)). However since those decisions based upon conventional rules contemplating restitution of objects, it is of course doubtful whether they are applicable in determining the scope of a rule of customary law.

Examples include the "Macdonald" case (1863), in which King Leopold I of Belgium, who had been chosen as arbitrator, decided that "the Government of C. [Chile] shall restore to that of the U.S. [United States] 35 of the 70,400 piasters or dollars seized", plus 6 percent interest, namely the sum confiscated from a United States national by Chilean insurgents (Lapradelle-Politis, vol. II, pp. 182 et seq., at p. 204); the "Ancon" case (1864), in which the Italian Foreign Minister, admitting the error of Licata Customs in imposing the payment of a toll by the Norwegian ship Prestos, provided for restitution of the unduly paid sum (La prassi italiana, 1st series, pp. 878-879); and the Emanuele Chiesa case (1884), in which the Chilean Government returned, with interest, a sum unduly taken from an Italian claimant (Decision No. 109 of 31 October 1951 (ibid., p. 240)).

The Commission has not seen any need to reflect in the text of article 7 the doctrinal distinction between material and juridical restitutio which it considers, from the viewpoint of the relations deriving from an internationally wrongful act, as a relative one. In the first place, one can hardly conceive a restitution to be effected by a State—whether of territory, persons or movable objects—which would involve purely material operations. To return an unlawfully occupied or annexed territory, to withdraw a customs line unlawfully advanced, to restore to freedom a person unlawfully arrested and detained, or to re-establish in their homeland a group of persons unlawfully expelled and expropriated, legal provision must be made at the constitutional, legislative, judicial and/or administrative level. From that viewpoint restitutio will be essentially legal. Material restitutio will merely be in such cases a translation into facts of legal provisions. Except in rare instances, as in a trivial case of frontier guards casually and innocently trespassing on foreign territory or in a case of harassment of a diplomat by municipal policemen in the course of a traffic jam (two cases that would probably not even reach the threshold of an internationally wrongful act), it would seem rather difficult to imagine cases of purely material international restitutio. In practice, any international restitution in kind will be an essentially juridical restitutio within the legal system of the author State, accompanying or preceding material restitution. In the second place, it should be borne in mind that from the viewpoint of international law—in conformity with the generally accepted norms of international law, the State is the only person entitled to restitution, and the private litigant can only be treated as an accessory party in the international dispute and will not be party to any arrangement that involves restitution.
recognized separation between legal systems—rules of municipal law as well as administrative or judicial decisions must be viewed as mere facts. It is useful to recall what PCIJ states in that respect when it was confronted with the question whether and in what sense it would be appropriate for it to deal, within the framework of international adjudication, with a piece of the national legislation of a State:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

(8) The Commission concludes that, in so far as the distinction between material and legal restitutio may be of relevance within the national legal system of the author State, it merely stresses the different kinds of operation which the organs of the Author State should carry out in order to achieve restitution in kind. One set of actions, which may be placed under the heading of material restitutio, are those actions of State organs which, from the point of view of national law, do not require any modifications of a legal nature. Another group would consist of such actions of legislative, administrative, administrative or judicial organs as are of legal relevance from the point of view of the municipal law of the author State and in the absence of which restitution would not be feasible. It follows that, as a rule, material and legal restitutio should be viewed not so much as different remedies but as distinct aspects of one and the same remedy.

(9) In the hypothetical case where restitutio involves only international (instead of merely national) legal aspects, the distinction might appear to be of greater moment, as the necessary legal operation would entail the modification of an international legal relationship, situation or rule. One example could be a case where restitutio by author State A in favour of injured State B involved the annulment of a treaty relationship with State C. Another example would be a case where restitutio by State A in favour of State B involved the renunciation of a claim or the annulment or withdrawal of a unilateral act. In this context, the question arises whether, in what sense and under what conditions a third-party decision (of a permanent or ad hoc international body) could bring about directly—by the modification or annulment of legal situations, acts or rules—any form of legal restitutio within the national law of the author State or within international law itself. With regard to national law, reference can indeed be found in the literature to “invalidities” or “nullities” to be attached to national administrative and judicial acts or to legislative or constitutional provisions on the strength of international law. In practice, the Legal Status of Eastern Greenland case provides the best known example of the use of similar concepts. The Commission is of the view that all that international law—and international bodies—are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. As regards the question whether it is possible for an international tribunal to directly annul international legal rules, acts, transactions or situations, for the purpose of reparation in the form of restitution in kind, the Commission is inclined to answer it in the affirmative but observes that since the effects of decisions of international tribunals are normally confined to the parties, any act or situation the effects of which extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves, unless the relevant instruments provided otherwise.

(10) The injured State’s entitlement to restitution in kind is not unlimited. It is subjected to the exceptions listed in article 7, subparagraphs (a) to (d). The phrase “provided and to the extent that” which precedes the listing of exceptions makes it clear that if restitution in kind is only partially excluded under any one of the exceptions, then that part of it which is possible to provide is due.


194 See footnote 170 above.

195 Along those lines, Graeff states as follows:

“In general, however, the elimination of an internationally illegal act requires a new action, since wrongfulness according to international law does in general not entail invalidity under domestic law.” (Loc. cit. (footnote 159 above), p. 78.)

196 A case that seems to be rather close to an international legal restitution directly effected by judicial decision is that of the Free Zones of Upper Savoy and the District of Gex (Judgment of 7 June 1932, P.C.I.J., Series A/B, No. 46, p. 96) in which PCIJ, after deciding, in accordance with article 1 of the Special Agreement between Switzerland and France, that article 435, paragraph 2, of the Treaty of Versailles “neither has abrogated nor is intended to lead to the abrogation of the provisions” of the pre-existing international instruments concerning the “customs and economic regime” of the two areas, concluded (with regard to the further question referred to it under article 2 of the Special Agreement):

“In regard to the question referred to in Article 2, paragraph 1, of the Special Agreement:

“That the French Government must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties.” (Ibid., p. 172.)

Although the Court did not expressly qualify its decision as purporting a French obligation of restitutio, the withdrawal envisaged obviously implies, in addition to the cessation of a situation not in conformity with international law, the re-establishment of the status quo ante which is at least the main portion of the essential content of restitutio.

(11) The first exception to restitution in kind is impossibility and in the first place factual or material impossibility which is dealt with in subparagraph (a). In the case of material restitution, total or partial impossibility derives from the fact that the nature of the event and of its injurious effects have rendered _restitutio_ physically impossible. Such may be the case either because the object to be restored has perished, because it has irretrievably deteriorated or because the relevant state of affairs has undergone a factual alteration rendering physical _restitutio_ impossible. The rule is quite obviously an unavoidable consequence of _ad impossibilita nemo tenetur_.

(12) A second exception, dealt with in subparagraph (b), concerns the case where restitution in kind encounters an obstacle in a peremptory norm of international law. As has already been noted, the general question of legal impossibility to make restitution encompasses impossibility deriving from international legal obstacles and impossibility deriving from municipal law obstacles. The latter aspect has been dealt with in article 6 bis since, as indicated in paragraph (10) of the commentary to that article, it may arise in connection with any form of reparation, even though, in practice, it has usually come up in relation to restitution in kind. As regards impossibility deriving from international legal obstacles, subparagraph (b) of the present article gives it a narrow scope, limited to the case where making restitution in kind would violate a peremptory norm of international law. In the other instances of so-called legal impossibility "deriving from international law", it is not really a matter of an "impossibility" affecting the legal obligations to provide restitution in kind. The impossibility derives more precisely from the relativity of international legal situations. Clearly, if the State which should provide _restitutio_ could only do so by infringing one of its international obligations towards a "third" State, this does not really affect the responsibility relationship between the wrongdoing State and the injured State entitled to claim _restitutio_ to the injured State on the one hand and the "third" State on the other hand.

(13) In this context, the Commission has examined the question of the relationship between the general rule which puts the author State under the obligation to provide _restitutio in integrum_ and the concept of domestic jurisdiction. It has come to the conclusion that this concept cannot and should not put into question any other (primary or secondary) obligation deriving from international law. The very existence of an international obligation excludes that a claim to compliance therewith by any State could constitute an attempt against the domestic jurisdiction of that State. As regards in particular the domestic law of the author State, it should be kept in mind that there is hardly an international rule compliance with which does not imply some repercussion on the municipal law of the State which is bound by the rule. The belief that domestic jurisdiction, and the principle of non-intervention therein, may interfere in any sense with the obligation to provide restitution in kind or any other form of reparation or, for that matter, mere cessation or discontinuance of wrongful conduct derives from a confusion between, on the one hand, the right of the State to obtain _restitutio_ (or any form of redress other than _restitutio_), as a matter of substantive law, and, on the other hand, the right of an "unsatisfied" injured State to take measures aimed at securing cessation and/or reparation. Unlike the substantive rights to cessation or reparation, such measures must be subject, except in the case of crimes to be determined, to the limit of domestic jurisdiction. Respect for domestic jurisdiction, in other words, is a condition of the lawfulness of an action by a State or by an international body. It is not, and obviously could not be, a condition of lawfulness of an international legal rule or obligation.

(14) The third exception to which the right to obtain _restitutio_ is subjected, dealt with in subparagraph (c), is based on equity and reasonableness and seeks to achieve an equitable balance between the onus to be sustained by the author State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation. It finds support both in doctrine and in practice. A number of writers assert, in fact, that even if the re-establishment of the status quo ante or of the situation that would have existed if the wrongful act had not occurred would be physically and/or juridically possible, it would be, in the words of one of them, "unreasonable to allow a claim for restitution _in integrum_ if this mode of reparation would impose a disproportionate burden upon the guilty State and if the delinquency can also be atoned by a pecuniary indemnification". A similar approach is reflected in paragraph 3 of article 9 of the draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930, which reads as follows:

3. Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person.

Subparagraph (c) is similarly based on a comparison between the situation of the wrongdoing State and that of

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197 Doctrine is unanimous in noting that "there is no difficulty as to physical or material impossibility; it is evident that no _restitutio in integrum_ may be granted if, for instance, an unlawfully seized vessel has been sunk" (Juntas de Arquitectura, loc. cit. (footnote 176 above), p. 566); or if the object is permanently lost or destroyed (Balladore Pallieri, loc. cit. (footnote 181 above), p. 720); or, as suggested by Salvioli, "if there are no others of the same kind" (loc. cit. (footnote 159 above), p. 237). Alvarez de Eulate speaks of "irreversible situations" and indicates some hypotheses: "dissimilarity between the original situation and the existing situation, especially because of the passage of time ... disappearance or destruction of the property" (loc. cit. (footnote 161 above), pp. 268-269). For similar views, see D. P. O'Connell, _International Law_, 2nd ed. (London, Stevens, 1970), vol. II, p. 1115 and Schwarzzenberger, op. cit. (footnote 177 above), pp. 655 and 658. Mention of material or physical impossibility is also found in practice, especially after the Chorzów Factory case (see footnote 140 above).

198 Under paragraph 3 of article 6 bis, the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation.


the injured State. The Commission is aware that, for some writers, the comparison should be between the burden for the wrongdoing State and the gravity of the wrongful act. Viewed in this perspective, the limit of excessive onerousness would assume a different weight according to the qualitative and quantitative dimension of the wrongful act for which reparation is sought. Indeed in the case of the most serious wrongful acts such as aggression or genocide, it would be inequitable for the effort of reparation incumbent upon the author State— including specifically the fullest restitution in kind—to be considered excessive in proportion to the violation committed by that State. This is a point the Commission will explore in depth when it undertakes the analysis of the legal consequences of international crimes.

(15) The exception as formulated in subparagraph (c) may be considered to underlie a number of arbitral decisions including in particular those referred to in paragraph (14) of the commentary to article 6 bis. Mention should also be made in this context of the Forests in Central Rhodopia case, in which the judge, while admitting in principle a preference for restitution, considered it to be less practicable than indemnification, notwithstanding the difficulties the latter would also entail.

(16) The phrase “out of all proportion” makes it clear that the wrongdoing State is relieved of its obligation to make restitution only if there is a grave disproportional- ity between the burden which this mode of reparation would impose on that State and the benefit which the injured State would derive therefrom. The Commission is aware that, in practice, it may prove difficult to, on the one hand, compare the burden imposed on the wrongdoing State by restitution in kind and the benefit accruing to the injured State in obtaining restitution instead of compensation and, on the other hand, weigh the benefit which the injured State would derive from restitution in kind against the benefit it will derive from compensation. In practice however, the States concerned will normally come to an agreement on the issue, which will then be solved consensually. If third-party settlement had ultimately to be resorted to, an equitable balance between the conflicting interests at stake would have to be attained on the basis of the facts.

(17) Subparagraph (d) provides that restitution in kind is not mandatory for the wrongdoing State if it would seriously jeopardize its political independence and economic stability whereas failure to obtain restitution in kind would not have a comparable impact on the injured State. The text implies that if the terms of the comparison are equal, then the interest of the injured State would prevail and restitution in kind would have to be provided. The Commission realizes that subparagraph (d) refers to very exceptional situations and may be of more retrospective than current relevance. This is due in large measure to the rise in importance of bilateral investment agreements. The area of foreign investment, to which it principally refers, has been undergoing—also under the influence of a number of resolutions of the General Assembly—a rather marked evolution. The Commission submits that any provision concerning indemnification has really to do with the content of the primary rule and the conditions thereof rather than the content of the secondary rule on reparation. In the measure, however, in which the matter is of relevance for the purposes of the so-called secondary rules, the Commission believes that the quality and quantity of reparation depend, in the first place, on whether the nationalization was a lawful or an unlawful one. Lawful are the nationalizations conforming to the two basic requirements of public interest and non-discrimination. Unlawful are the nationalizations which do not meet both requirements. Unlike unlawful nationalization, which calls for full reparation (namely, restitution in kind and compensation), lawful nationalization would call for adequate compensation. Failure to meet such obligations would of course be, by itself, an internationally wrongful act.

**Article 45 (8)**

**Compensation**

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

**Commentary**

(1) Compensation is the main and central remedy resorted to following an internationally wrongful act. As stated by PCU in the Chorzow Factory case (Merits), it is "a principle of international law that the reparation of a wrong may consist of an indemnity . . . This is even the most usual form of reparation". Compensation is of course not the only mode of reparation consisting in the payment of a sum of money: nominal damages or damages reflecting the gravity of the infringement, both dealt with in article 10 on satisfaction are also of a pecuniary...
nature but they perform a function distinct from that of compensation, even considering that a measure of retribution is present in any form of reparation.

(2) The distinction between payment of moneys by way of compensation and payment of moneys for other purposes is generally recognized and frequently emphasized in the relevant literature. Explicit indications in the same sense are also to be found in jurisprudence. In the "Lusitania" case, for example, the umpire expressed himself clearly when he stated:

The fundamental concept of "damages" is ... reparation for a loss... suffered, a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought... 204

Another instance is the case concerning the Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war, in which the arbitral tribunal unambiguously separated the compensatory and punitive consequences of the German conduct. 207

(3) In formulating the rules governing compensation, the Commission has taken cognizance of the natural tendency of arbitral tribunals and commissions to have recourse to rules of private law, particularly of Roman law. 208 It has at the same time recognized, in line with the majority of the doctrine, 209 that it was impossible, in view of the number and variety of concrete cases to find even conceive very detailed rules applying mechanically or indiscriminately to any cases or groups of cases. It has therefore concluded that the rules on compensation were bound to be relatively general and flexible, even though they could be formulated so as to set forth the rights of the injured State and the corresponding obligations of the wrongdoing State.

(4) Paragraph 1 provides that the injured State is "entitled" to obtain from the wrongdoing State compensation for the damage "caused" by that act, "if and to the extent that the damage is not made good by restitution in kind". The concept of entitlement, the requirement of a causal link and the relationship between compensation and restitution in kind will now be dealt with in the above order.

(5) Like all the articles on reparation, article 8 is couched in terms of an entitlement of the injured State and makes the discharge of the duty of compensation conditional upon a corresponding claim on the part of the injured State.

(6) The requirement of a causal link between the wrongful act and the damage calls for more extensive comments. While the requirement itself is universally taken for granted, the distinction between the consequences that may be considered to have been caused by a wrongful act, and hence indemnifiable, from the ones not to be considered as such and therefore not indemnifiable has attracted considerable attention in doctrine and in practice. For some time in the past, this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the scant utility of such a distinction. 211 In international jurisprudence, 211 the expression "indirect damage" has been used to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and losses that would justify

204 See, for instance, C. Eagleton, The Responsibility of States in International Law (New York, New York University Press, 1928):

"The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment... It has usually been said that the damages assessed should be for the purpose only of paying the loss suffered, and that they are thus compensatory rather than punitive in character..." (p. 189.)

Along the same lines, see Jiménez de Arechaga, loc. cit., (footnote 176 above).


208 See, for instance, Nagy, loc. cit. (footnote 160 above), pp. 33-34. See, for instance, Nagy, loc. cit. (footnote 160 above), pp. 33-34.


211 The "Alabama" case is cited by A. Hauriou ("Les dommages indirects dans les arborages internationaux", RGDP (Paris), vol. 31 (1924), p. 209) as the most striking application of the rule excluding "indirect" damage.
their qualification as “indirect”. Also worthy of mention in this context are two statements of the United States-German Mixed Claims Commission. The first, which is to be found in the decision taken by the Commission in the South Porto Rico Sugar Company case describes the term “indirect” used with regard to damage as “inapt, inaccurate and ambiguous” and the distinction between “direct” and “indirect” damage as “frequently illusory and fanciful”. The second is taken from administrative decision No. II of the Commission, dated 1 November 1923, and reads:

It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of.

(7) Rather than the directness of the damage, the criterion is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage it caused. Although the conditions of normality and predictability nearly always coexist (in the sense that the causation of the damage could also have been predicted if it were within the norm), they receive varying degrees of emphasis in practice. Predictability prevails in judicial practice. One clear example is the decision in the Portuguese Colonies case (Naulilaa incident). The injuries caused to Portugal by the revolt of the indigenous population in its colonies were attributed to Germany because it was alleged that the revolt had been triggered by the German invasion. The responsible State was therefore held liable for all the damage which it could have predicted, even though the link between the unlawful act and the actual damage was not really a “direct” one. On the contrary, damages were not awarded for injuries that could not have been foreseen:

... it would not be equitable for the victim to bear the burden of damage which the author of the unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should not necessarily rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author’s will and not foreseeable on his part.

(8) The Commission does not consider it correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the “normality” or “naturalness” which seems to be an undeniable prerequisite for identifying the causality link. Administrative decision No. II of the United States-German Mixed Claims Commission, mentioned above, once again provides a valuable example of the way in which the test of normality is applied in identifying the causality link:

... It matters not how many links there may be in the chain of causation concerning Germany’s act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany’s act.

(9) The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice, one notes a tendency to identify the criterion in question with the principle of proxima causa as used in private law. Brownlie, referring to the Dix case, says that:

... There is some evidence that international tribunals draw a similar distinction, and thus hold governments responsible “only for the proximate and natural consequences of their acts”, denying “compensation for remote consequences, in the absence of evidence of deliberate intention to injure”.

Following the disintegration of the Cosmos 954 Soviet satellite with a nuclear power source on board over its territory in 1978, Canada stated in its claim:

In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.

(10) It seems therefore that an “judicious use of the adjective “proximate” (with reference to “cause”) in order to indicate the type of relation which should exist between an unlawful act and indemnifiable injury is not without a certain degree of ambiguity. That adjective would seem utterly to exclude the indemnifiability of damage which, while linked to an unlawful act, is not close to it in time or in the causal chain.

213 This was one of the War-Risk Insurance Premium Claims cases; decision of 1 November 1923 of the Mixed Claims Commission (UNRIAA, vol. VII (Sales No. 1956.V.5), pp. 62-63).
214 Ibid., p. 29.
215 In this sense, see Personnaz, op. cit. (footnote 162 above), p. 136; and Egleton, op. cit. (footnote 205 above), pp. 202-203.
216 See, for example, Salvioli, loc. cit. (footnote 159 above), p. 251; and Reitzer, op. cit. (footnote 208 above), p. 183.
218 Ibid., p. 1031.
219 The United States-German Mixed Claims Commission added: “Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany’s act as a proximate cause?” (UNRIAA, vol. VII (Sales No. 1956.V.5), p. 30).
just a few, may contribute to a damage as concomitant causes. Other hypotheses concern the concurrent quiescence and the fact creator of the damage. The solution should be the payment of damages in article 6 to hold the author State liable for parties and economic, political and natural factors are produced also by concomitant causes among which the wrongful act plays a decisive but not exclusive role. One possibility, already dealt with in the context of article 6 bis, is that the damage may be partly due to the negligence or to a deliberate act or omission of the injured State. Other hypotheses concern the concurrent wrongdoing of several States and the intervention of an independent cause external to the wrongdoing State resulting in an aggravation of the harm that would have otherwise resulted from the wrongful act.

Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases, as in the case dealt with in paragraph 2 of article 6 bis, to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability. In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would, in its view, be absurd to think in terms of laying down in a universally applicable formula the various hypotheses of causal relationship and to try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due. The application of the principles and criteria discussed above can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors.

Consideration must be given to cases in which injuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the wrongful act plays a decisive but not exclusive role. One possibility, already dealt with in the context of article 6 bis, is that the damage may be partly due to the negligence or to a deliberate act or omission of the injured State. Other hypotheses concern the concurrent wrongdoing of several States and the intervention of an independent cause external to the wrongdoing State resulting in an aggravation of the harm that would have otherwise resulted from the wrongful act.

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The concluding clause of paragraph 1 "if and to the extent that the damage which the injured State has suffered is not made good by restitution in kind" clarifies the relationship between restitution in kind and compensation as forms of reparation. Restitution in kind, despite its "primacy" as a matter of equity and legal principle, is very frequently inadequate to ensure a complete reparation: it may be partially or entirely ruled out either on the basis of subparagraphs (a) to (d) of article 7 or because the injured State prefers to have reparation provided in the form of compensation; it may also be insufficient to ensure full reparation. The role of compensation is to fill in any gaps, large, small or minimal.

224 As observed by Reitzen: "... Causality is the chain of an infinite number of causes and effects: the injury sustained is due to a multitude of factors and phenomena. An international judge must say which of them have produced the injury, in the normal course of things, and which, indeed, are extraneous. He must, more particularly, decide whether, according to the criterion of normality, the injury is or is not attributable to the act in question. This calls for a choice, a selection, an assessment, of the facts which, in themselves, are all of equal value. In this work of selection, an arbitrator is compelled to do things according to his own lights. It is he who breaks the chain of causality, so as to include one category of acts and events and to exclude another, guided by his wisdom and his perspicacity alone. Whenever the arbitrator finds nothing useful in the precedents, his freedom of judgement takes over." (Op. cit. (footnote 208 above), pp. 184-185.)

Also relevant are the remarks made by Personnaz according to whom: "The existence of relationships (of causality) is a question of fact and must be established by the judge; it cannot be locked in formulas, for it is a case-by-case matter." (Op. cit. (footnote 162 above), p. 129.)

The same writer states further on: "It is a question that cannot be resolved by principles, but solely in the light of the facts of the particular case, and in examining them the judge will, if there are no restrictions in the 'compromis', have full powers of appraisal." (Ibid., p. 135.)
which may be left in full reparation by the noted frequent inadequacy of restitution in kind.

(15) Since both articles 7 and 8 are couched in terms of an entitlement of the injured State, the Commission considers it unnecessary, in the case of a bilateral situation, to expressly provide for the injured State’s freedom to choose between restitution in kind and compensation. At the same time, the Commission is aware that, where there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course.

(16) Paragraph 2 of article 8 deals with the scope of compensation. Consisting as it does in the payment of a sum of money substituting for or integrating restitution in kind, compensation is the appropriate remedy for “economically assessable damage” that is to say damage which is susceptible of being evaluated in economic terms. As such, it is often described as covering all the “material” injury suffered by the injured State. Correct in a sense, this description calls for important qualifications. It is true that compensation does not ordinarily cover the moral (non-material) damage to the injured State, this function being normally performed by another form of reparation, namely satisfaction as dealt with in article 10. It is not true however that compensation does not cover moral damage to the persons of the injured State’s nationals or agents as human beings. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State’s nationals or agents receive different treatment from the point of view of internation law.

(17) The most frequent among internationally wrongful acts are those which inflict damage upon natural or juridical persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the injury is sustained by nationals or agents as human beings, is not always an exclusively material one. On the contrary, it is frequently also, or even exclusively, moral damage—and a moral damage which, no less than material damage, is susceptible of a valid claim for compensation.

(18) One of the leading cases in that sense is the “Lusitania” case, decided by the United States-German Mixed Claims Commission in 1923.228 The case dealt with the consequences of the sinking of the British liner by a German submarine. In regard to the measure of the damages to be applied to each one of the claims originating from the American losses in the event, the umpire stated that both the civil and the common law recognized injury caused by “invasion of private right” and provided remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius’ statement that “money is the common measure of valuable things” 229 Dealing in particular with the death of a person, he held that the preoccupation of the tribunal should be to estimate the amounts

(a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties*, as claimant may actually have sustained by reason of such death*. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.230 Apart from the umpire’s considerations regarding the damages under points (a) and (b), it is of interest to note what he stated with regard to the injuries described under point (c). According to him, international law provides compensation for mental suffering, injury to one’s feelings, humiliation, shame, degradation, loss of social position or injury to one’s credit and reputation. Such injuries, the umpire stated,

are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated... 231 These kinds of damages, the umpire added, were not a “penalty”.

(19) The “Lusitania” case should not be considered as an exception. Although such cases have not occurred very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties.232 Practice therefore shows that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated as an integral part of the principal damage suffered by the injured State. The Commission however refrained from expressly providing in article 8 for compensation of the moral damage to

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228 See footnote 206 above.


230 Ibid.

231 Ibid., p. 40.

232 Examples are the Chevreau case (Decision of 9 June 1931 (France v. United Kingdom) (UNRIA, vol. II (Sales No. 1949.V.1), pp. 1113 et seq.; English translation in AJIL, vol. 27 (1933), pp. 153 et seq.); the Gage case (Decision handed down in 1903 by the United States-Venezuela Mixed Claims Commission (UNRIA, vol. IX (Sales No. E/F.5.V.5), pp. 226 et seq.; and the Di Carlo case (Decision handed down in 1903 by the Italian-Venezuelan Mixed Claims Commission (ibid., vol. X (Sales No. 60.V.4), pp. 597-598). In the latter instance, which concerned the killing of an Italian shopkeeper in Venezuela, the Italian-Venezuelan Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with (ibid., p. 598).

Another clear example of pecuniary compensation of moral damage suffered by a private party is the Heirs of Jean Maninat case (Jesuits of 31 July 1905 of the Franco-Venezuelan Mixed Claims Commission (ibid., pp. 55 et seq.). Rejecting the claim for compensation of the material-economic damage, which he deemed to be insufficiently proved, the umpire awarded to the sister of Jean Maninat (victim of an aggression) a sum of money by way of pecuniary compensation for the death of her brother (made by the Grim case decided by the Iran-United States Claims Tribunal, but only to that part of the tribunal’s decision in which moral damages seem to be referred to and in principle to be considered as a possible object of pecuniary compensation (decision of 18 February 1983 (ILR (Cambridge), vol. 71 (1986), pp. 650 et seq., at p. 653).
nations of the injured State since this is part of the material damage to the State.

(20) In the light of the above, the phrase "economically assessable damage" covers both:

(a) Damage caused to the State’s territory in general, to its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft, spacecraft, and the like (so-called "direct" damage to the State);

(b) Damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State).234

The latter class of damage embraces both the "patrimonial" loss sustained by private persons, physical or juridical, and the "moral" damage suffered by such persons. It also includes, a fortiori, the personal injury caused to the said private parties by the wrongful act. This refers, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, and so on.

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(22) Injuries of the latter kind, in so far as they are susceptible of economic assessment, are treated by international jurisprudence and State practice according to the same rules and principles as those applicable to the pecuniary compensation of material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries the treatment afforded to strictly "patrimonial" damages. A typical example is that of the death of a private national of the State concerned. In awarding pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods and services, susceptible of economic evaluation. One should recall in this respect the first two points made by the umpire in the "Lusitania" case. According to the umpire, the damage to be compensated in case of death should be calculated on the amount: "(a) which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision."235 This approach to reparation was clearly followed by ICJ in the Corfu Channel case (United Kingdom v. Albania).236 The Court upheld the United Kingdom's claims in respect of the casualties and injuries sustained by the crew and awarded a sum covering "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc."237 The Corfu Channel case shows that pecuniary compensation is awarded not only in cases of death but also in cases of physical or psychological injury. Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the William McNeil case,238 where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities while in prison. The British-Mexican Claims Commission pointed out that:

... It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression.239

(23) Having noted that after his recovery, McNeil had practised a rather lucrative profession, the Commission took the view that "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained".240 This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the "Topaze" case, decided by the British-Venezuelan Mixed Claims Commission. In view of the personality and the profession of the private victims, the Mixed Claims Commission decided in that case to award a sum of US$100 a day to each injured party for the whole period of their detention.241 The same method was followed in the Faulkner case by the Mexico-United States General Claims Commission, ex-

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233 Examples of "direct" damage to the State are found in such cases as the Corfu Channel case (Merits), Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4, and the case concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980 (see footnote 142 above), p. 3. In the literature, see in particular Brownlie, op. cit. (footnote 221 above), pp. 236-240.

234 That the damage suffered by the State through its nationals (and, it should be added, through its agents in their private capacity) is a "direct" damage to the State itself—notwithstanding its frequent qualification as "indirect" damage—is explained in masterly fashion by Retster:

... the modern State socializes all private assets by taxation, as it socializes part of private expenditures by taking over health costs or part of the risks attached to human existence. In an even more general way, the State now actually picks up all the elements of economic life. All property and all income, all debts and all expenditures, even of a private character, are set down in a system of national accounts and its teachings are one of the tools of the economic policy of all governments and thus under its sway."

"Nowadays, therefore, it can no longer be said that the damage sustained by private individuals is attributed to the State by a purely formal mechanism; economically that is so: it is the Nation, represented by the State, that bears the burden, at least to some extent, of the loss first suffered by a private individual." ("Le dommage comme condition de la responsabilité internationale", in Estudios de Derecho Internacional: Homenaje al Profesor Mijaíl de la Muela (Madrid, Tecnos, 1979), vol. II, pp. 841-842.)

235 Private individuals include, as well as the State's nationals, agents of the State in so far as they are privately affected by the internationally wrongful act.

236 Judgment of 15 December 1949 (Assessment of amount of compensation), I.C.J. Reports 1949, p. 244.

237 Ibid., p. 249.


239 Ibid., p. 168.

240 Ibid.

cept that this time the daily rate was estimated at US$150 in order to take account of inflation.242

(24) Paragraph 2 of article 8 provides that compensation "may include interest". This formulation makes it clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the injured State.243 The Commission, however, recognizes that the awarding of interest seems to be the most frequently used method for compensating the type of loss stemming from the temporary non-availability of capital. In the words of one writer:

... interest, an expression of the value of the utilization of money is something more than a means open to the judge for a priori determination of the injury sustained by a creditor from the non-availability of the principal for a given period".244

(25) International practice seems to be in support of awarding interest in addition to the principal amount of compensation. The only case in which interest has been denied as a matter of principle (and not because of the circumstances of the case) seems to have been the "Montijo" case.245 By way of examples of the prevailing jurisprudence, reference may be made to the case of Illinois Central Railroad Co. v. Mexico,246 to the Lucas case247 and to administrative decision No. III of the United States-German Mixed Claims Commission dated 11 December 1923.248

(26) In line with its general position that the awarding of interest depends on the circumstances of each case, the Commission considers that the determination of dies a quo and dies ad quem in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis. It is comforted in its position by the diversity of the solutions advocated in the literature or adopted in judicial practice on all these issues. It will be for the judge or other third party involved in the settlement of the dispute to determine in each case whether interest should be paid, bearing in mind the overriding principle of "full reparation" of the damage laid down in article 6 bis.

(27) The same remarks apply to compensation for loss of profits even though the concluding part of paragraph 2 of article 8, by qualifying the reference to loss of profits by the phrase "where appropriate", recognizes that compensation for lucrum cessans is less widely accepted in the literature and in practice than is reparation for damnum emergens. If loss of profits is to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest and be notionally employed in earning profits at one and the same time. However, interest would be due on the profits which would have been earned—but which have been withheld from the original owner. The essential aim is to avoid "double recovery" in all forms of reparation.

(28) The main problems arising with regard to lucrum cessans are those connected with the role of causation and with the correct determination of the extent of profits to be compensated, particularly in the case of wrongful acts affecting property rights or "going concerns" of an industrial or commercial nature.

(29) As regards the first point, the prevailing doctrine, opposing notably the dictum of the arbitral tribunal in the "Alabama" case,249 whereby "prospective earnings cannot properly be made the subject of compensation inasmuch as they depend in their nature upon future and uncertain contingencies",250 contends that for the purpose of indemnification, it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act; it is sufficient—as also and especially for lucrum cessans—to be able to presume that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not been committed.251

(30) The majority of court decisions also seems to move in favour of the indemnifiability in principle of lucrum cessans. The decision in the "Cape Horn Pigeon" case252 is a classic example. The case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility, and the only thing the arbitrator had to do was establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occa-

242 Decision of 2 November 1926 (ibid., vol. IV (Sales No. 1951.V.I), pp. 67 et seq., at p. 71).


245 Decision of 26 July 1875 (United States of America v. Columbia) (Moore, Digest, 2nd ed., p. 421 et seq.).

246 Decision of 6 December 1926 (UNRIA A, vol. IV (Sales No. 1951.V.I), pp. 134 et seq.).


249 Decision of 14 September 1872 (United States of America v. Great Britain) (Moore, Digest, 2nd ed., p. 653 et seq.).

250 Ibid., p. 658.

251 In this sense, see Salvioli, loc. cit. (footnote 159 above), pp. 256-257; Bollecker-Stern, op. cit. (ibid.), p. 199; Reitzer, op. cit. (footnote 208 above), pp. 188-189; Noble, op. cit. (footnote 205 above), pp. 197-203; and Jiménez de Aréchaga, loc. cit. (footnote 176 above), pp. 569-570.

252 Decision of 29 November 1902 (United States of America v. Russia) (UNRIA A, vol. IX (Sales No. E/F.39.V.5), pp. 63 et seq.). Similar conclusions were reached in the Delagoa Bay Railway case (footnote 160 above), the "William Lee" case (decision handed down on 27 November 1867 by the Lima Mixed Commission (United States v. Peru) (Moore, Digest, 2nd ed., pp. 3405-3407) and the Tuilie, Shortridge and Co. case (see footnote 225 above).
sioned but also the profits which the injured party had been deprived of because of the seizure. Dramatically opposed conclusions were however reached in the 'Canada'253 and Lacaze255 cases. Lucrum cessans also played a role in the Chorzów Factory case (Merits). PCJU decided that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.255

(31) Of course, a right to compensation for loss of earnings may also arise when individuals are deprived of making use of their working capacity, either as self-employed or as employed persons. This situation can occur, in particular, when an alien is unlawfully deported from his country of residence. In two judgements, the European Court of Human Rights affirmed in principle that the damages owed to the victim of such a measure included also compensation for loss of earnings, although in both cases it found that a causal link had not been established.256

(32) As for the correct determination of the extent of profits to be compensated, two distinct methods have emerged which are widely used to determine lucrum cessans: the so-called "in abstracto" and "in concreto" methods. The in abstracto method, which is more commonly used, consists in attributing interest on the amounts due by way of compensation for the principal damage. Paragons other than interest which may be used in the case of business activities are the amounts of the profits earned by the same physical or juridical person in the period preceding the unlawful act, or the amount of the profits earned during the same period by similar business concerns. The so-called in concreto system is used when the estimate is "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question".258

(33) The determination of lucrum cessans involves naturally the most problematic choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial or industrial concern. A proper analysis of the relevant practice should also take into account in a measure that part of international jurisprudence which has dealt with the lawful expropriation of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation—and notably compensation for lost profits—in case of unlawful taking.

(34) The precedent most frequently recalled is PCJU’s judgment in the Chorzów Factory case (Merits), in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation.259 It was after formulating that distinction (and assuming the case before it to be one of unlawful expropriation) that PCJU set forth that famous principle of full compensation according to which the injured party was entitled to be re-established in the same situation which would, in all probability, have existed if the wrongful taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of restitutio in integrum, as distinguished from the technical and narrow sense in which the expression is sometimes used to indicate naturalis restitutio. According to the Court, full compensation could be achieved by different means. Whenever possible, one should apply naturalis restitutio or restitutio in integrum stricto sensu. Whenever and to the extent that such a remedy did not ensure full compensation (namely restitutio in integrum in the broad literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby, up to the amount necessary for such full compensation.

(35) It is on the same principle that the Permanent Court of Arbitration decided the Lighthouses case.260 Considering the activity which was the object of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to compensation equivalent to the profits the company would have earned from the concession for the rest of the duration of the contract. This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It depended notably, it seems, on the fact that the contract article contemplating the possibility of the "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventualities, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree".261 Within such a contractual

253 Decision of 11 July 1870 (United States of America v. Brazil) (Moore, Digest, vol. II, pp. 1733 et seq.).
254 Ibid., p. 1746.
255 See footnote 140 above. The Court made the following observations on this point:
"...Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts...should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded." (p. 53.)
257 A typical example is the Fabiani case (decision of 30 December 1896 (France v. Venezuela) (Martens, Nouveau Recueil, 2nd series, vol. XXVII, pp. 663 et seq.), in which the arbitrator awarded a lump sum for lucrum cessans which was approximately twice the amount that would have been awarded by way of compound interest.
258 Gray, op. cit. (footnote 160 above), p. 26. One example is the Cheek case (decision of 21 March 1898 (United States of America v. Siam) (Moore, Digest, vol. V, p. 5068), in which the arbitrator awarded damages explicitly in order to place the estate of the injured party as far as possible in the same position as it would have been in without the unlawful act, which involved complicated calculations and valuations "to arrive at a probable figure for lost profits".
259 See footnote 140 above.
261 Ibid., p. 246.
context, any question with regard to compensation was bound to be settled by the discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay if it exercised its agreed right of redemption).

(36) The same principle of full compensation was the basis of the decision handed down in 1963 in the Sapphine International Petroleum Ltd. v. National Iranian Oil Company (NIIOC) case,

262 in which the injured party obtained compensation for both the loss corresponding to the expenses incurred for the performance of the contract and the net lost profits. As regards the assessment of such lost profits, the arbitrator noted, however, that it was "a question of fact to be evaluated by the arbitrator"; and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles—such as wars, disturbances, economic crises or slumps in prices—which could affect the operations during the several decades during which the agreement was to last", the arbitrator awarded compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the company. In this case, while lucrum cessans was decidedly included in the compensation, the arbitrator did not indicate any preference of principle for one or the other of the possible methods of evaluation.

(37) Although the LIAMCO v. Government of Libya case concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to naturalis restitution, some considerations were made concerning "cases of wrongful taking of property". The arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a concession agreement "entitles Claimant in lieu of specific performance to full damages including damnum emergens and lucrum cessans". Again, however, nothing was specified with regard to the method by which lucrum cessans should, in such cases, be assessed. Something more seems to emerge from AMINOIL v. Kuwait. Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF), which was unsuitable for the calculation of lost profits compensation in a case of lawful take-over, might be adequate in a case of unlawful expropriation—this in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. A confirmation comes from AMCO Asia Corporation v. Indonesia a case of unlawful taking. After recalling the principle of full compensation as being inclusive of damnum emergens and lucrum cessans—the latter not to exceed the "direct and foreseeable prejudice"—the tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in the AMINOIL case: namely, that DCF should be considered one of the most appropriate methods of evaluation of a going concern unlawfully taken.

(38) The latter conclusion does not find confirmation, however, in the Amoco International Finance Corporation v. Iran case, partly decided by an award of 14 July 1987 by the Iran-United States Claims Tribunal,

263 part of which is devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation. In evaluating the parties' contentions, the tribunal confirmed the distinction between lawful and unlawful expropriations, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking".

The study of that case might suggest that the tribunal saw a certain discrepancy between the evaluation of lucrum cessans in the case of unlawful taking (such evaluation to be confined in any case to the profits lost up to the time of settlement), on the one hand, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession, on the other. The tribunal, however, does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand. In Starret Housing on the other hand, the Tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits. In Phillips Petroleum Co. Iran v. Iran, the tribunal stated:

The Tribunal believes that the lawful/unlawful taking distinction, which in customary international law flows largely from the Case concerning the Factory at Chorzów (Claim for indemnity) (Merits), P.C.I.J. Judgment No. 13, Ser. A., No. 17 (28 September 1928), is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of taking and the date of the judicial or arbitral decision awarding compensation. The Chorzów decision provides no basis for any assertion that a lawful taking requires less compensation than that which is equal to the value of the property on the date of taking.

(39) In view of the divergences of opinion which exist with regard to compensation for lucrum cessans, the Commission has come to the conclusion that it would be

263 Ibid., pp. 187 and 189.
265 Ibid., pp. 202-203.
268 Ibid., p. 1037, para. 271 of the award.
270 Ibid., pp. 81 et seq., paras. 189-206.
271 Ibid., p. 82, para. 192.
272 Ibid., p. 105, para. 240.
extremely difficult to arrive in this respect at specific rules commanding a large measure of support. The relative uncertainty in the case-law discloses three questions which give rise to controversy: (a) In what cases are loss of profits recoverable? (b) Over what period of time are they recoverable? and (c) How should they be calculated? As regards the first question, it seems fairly clear that the problem arises with "going concerns" which have a profit-making capacity. The major uncertainty relates to the question whether loss of profits are recoverable for a lawful, as opposed to unlawful taking (this is the uncertainty reflected in the difference of emphasis in Amoco International Finance Corp. v. Iran275 as compared with the Phillips case276). As regards the second question, the central question, again unsettled, is whether that period of time ends at the date of judgement or should be extended to the original termination date for the contract or concession which has been terminated. The third question raises the whole question of the method of calculation, in particular whether the DCF (Discounted Cash Flow) method is appropriate. The state of the law on all these questions is, in the Commission's view, not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them. It has therefore felt it preferable to leave it to the States involved or to any third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid. The decisive element in reaching a decision on this point is the necessity of ensuring full reparation of the damage as provided in article 6 bis.

Article 45 [10]

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral "image", caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;
(b) nominal damages;
(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Commentary:

(1) While compensation is the main and central remedy resorted to following an internationally wrongful act, the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from restitution in kind and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally designated by the terms "satisfaction" and "guarantees of non repetition". They are dealt with in articles 10 and 10 bis respectively.

(2) The term "satisfaction" is used in article 10 and in much of the literature in a technical "international" sense as distinguished from the broader non-technical sense in which it is merely a synonym of reparation. It has thus moved away from its etymological meaning, even though it is precisely this etymological meaning of the verb to satisfy which is to fulfil, to settle what is owed"277 that the term recurs at times in the practice and the literature.278

(3) Although rather widely recognized, the distinction between satisfaction and compensation is not without problems. A minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense referred to above. Another difficulty derives from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage or loss respectively covered by pecuniary compensation and satisfaction: "material" and "moral". The two adjectives however fail to give an exact picture of the areas of injury covered respectively by compensation and satisfaction.

(4) As made clear in the commentary to article 8, pecuniary compensation is intended to compensate not only material damage but also moral damage suffered by private nationals or agents of the offended State.279 Satisfaction on the other hand is normally understood to

2/ Yearbook ... 1993, vol. II (Part Two), pp. 76-81 (commentary to former article 10).

275 See footnote 269 above.
276 See footnote 274 above.
277 See footnote 160 above, p. 248.
278 Dominic, for example, writes that "In fact, satisfaction is not a form of reparation, it is reparation that is one of the forms of satisfaction." ("La satisfaction en droit des gens", Mélanges Georges Perrin (Lausanne, Payot, 1984), p. 121.)
279 Even though situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than "restitution," this, in the well-known "Janes" case (decision of 16 November 1923 (UNRIAA, vol. IV (Sales No. 1951.V.I), pp. 82 et seq.), the Mexico United States General Claims Commission thought that "giving careful consideration to all elements involved ... an amount of ... without interest, is not excessive as satisfaction" for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of "Janes" (para. 26 of the decision (ibid., p. 90)). In the Francisco Mallén case, the same Commission, while awarding "compensatory damages" for the "physical injuries inflicted upon Mal lén", decided that "an amount should be added as satisfaction for the dignity suffered, for lack of protection and for denial of justice" (decision of 27 April 1927 (ibid., pp. 173 et seq. at pp. 179-180)). The same Commission made an identical point in the Stephens Brothers case (decision of 15 July 1927 (ibid., pp. 205 et seq.)). The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature; see, for instance, Personaliz, op. cit. (footnote 162 above), pp. 197-198 and Gray, op. cit. (footnote 160 above), pp. 33-34.
cover only the non-material damage to the State. This is the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige and which is considered at times to be a consequence of any wrongful act regardless of material injury and independent thereof. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State’s right in which any wrongful act consists, regardless of any more specific damage. According to Anzilotti, for example:

... The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element, honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that is not required to tolerate, even if material consequences do not ensue; in no part of human life is the truth of the well-known saying “Wer sich Wurm macht er muss getreten werden” so apparent...

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as “political damage”, this expression being used, preferably in conjunction with “moral damage”, in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably “moral and political damage”: a language in which it seems difficult to separate the “political” from the “moral” qualification. The term “political” is probably intended to stress the “public” nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the “moral” damage to the State (which is exclusive of inter-State relations) from the “moral” damage more frequently referred to (at national as well as international level) in order to designate the non-material or moral damage to private parties or agents which affects the State, so to speak less immediately at the level of its external relations.

(5) In formulating paragraph 1 of article 10, the Commission did not find it necessary to go into the above-mentioned issues or the distinctions made in the literature between the various components of the moral damage to the State, particularly as injury to the State’s dignity, honour and prestige and “legal” or “juridical” damage tend to be fused into a single “injurious effect”. The all-embracing phrase “damage, in particular moral damage” is intended to convey the notion that the kind of injury for which satisfaction operates as a specific injury consists in any non-material damage suffered by a State as a result of an internationally wrongful act.

(6) Like the corresponding provision of the draft articles on restitution in kind and compensation, paragraph 1 is couched in terms of an entitlement of the injured State. At the same time, the text acknowledges the rather exceptional character of this remedy by making it clear that satisfaction may be obtained “if and to extent necessary to provide full reparation”. This phrase recognizes, on the one hand, that there may be circumstances in which no basis exists for granting satisfaction and, on the other hand, that the test in assessing a claim for satisfaction is the principle of full reparation. The following survey of the relevant international jurisprudence and diplomatic practice is intended to provide indications as to the circumstances in which satisfaction may be obtained.

(7) That satisfaction is an exceptional remedy clearly emerges from the awards rendered in the “Miliani”, “Stevenson”, “Carrage” and “Manoura” and “Lusitania” cases. That the obligation to compensate the injured State for the material damage sustained is distinct from the obligation to provide satisfaction for other types of damages is equally apparent from a number of jurisprudential cases. A famous instance is that of...
"I'm Alone", a Canadian vessel owned by United States nationals sunk by the United States Coast Guard. The Commissioners decided not to award any compensation for the loss of the vessel, but stated that

The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amends in respect of the wrong the United States should pay the sum of $25,000.00 to His Majesty's Canadian Government; and they recommend accordingly. 287

Other examples include the Arends 288 and Brower 289 cases.

(8) In diplomatic practice, satisfaction has been claimed for various types of injurious behaviour including insults to the symbols of the State such as the national flag, 290 violations of sovereignty or territorial integrity, 291 attacks on ships or aircraft, 292 ill-treatment of, or attacks against heads of State or Government or diplomatic or consular representatives or other diplomatically protected persons, 293 and violations of the premises of embassies or consulates (as well as the residences of members of foreign diplomatic missions). 294 Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were private citizens of a foreign State. 295

(9) Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy, it is also identified by the typical forms it assumes, of which paragraph 2 of article 10 provides a non-exhaustive list. "Apology", mentioned in subparagraph (a) encompasses regrets, excuses, saluting the flag, etc. It is mentioned by many writers and occupies a


288 In whch the umpire stated that: "The damages consequent upon the detention of this vessel are necessarily small, but it is the belief of the umpire that the respondent Government is willing to recognize its responsibility for the unbecoming act of its officers ..." (UNRIAA, vol. X (Sales No. E/D.60.V.4), p. 730).

289 The case concerned a United States national who had bought six small islands of the Fiji archipelago. For not having recognized Brower's rights when it acquired sovereignty over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The Great Britain-United States Arbitral Tribunal, referring to a report of the British Colonial Secretary according to which: "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them." decided to follow: "In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages." (Decision of 14 November 1923 (ibid., vol. VI (Sales No. 1955.V.3), pp. 109 et seq.).

290 Examples are the Magree case (1874) (Whiteman, Damages, vol. I, p. 64), the Petit Vaisseau case (1863) (La prassi italiana, 1st series, vol. II, No. 1010) and the case that arose from the insult to the French flag in Berlin in 1920 (Eagleton, op. cit. (footnote 205 above), pp. 186-187).

291 A well-known example is that of the "Rainbow Warrior" (footnote 120 above). See, for instance, R. Pinto, "L'affaire du Rainbow Warrior" (footnote 120 above), pp. 810-811). For similar episodes, see F. Przetacznik, "La responsabilita internazionale de l'Etat a raison des prejudices de caractere moral et politique causes a un autre Etat", RGDIP (Paris), vol. 78 (1974), pp. 951 et seq.

292 Worth of special mention since it concerns an international organization is the case relating to the killing in 1948, in Palestine, of Count Bernadotte while he was in the service of the United Nations (Whiteman, Digest, vol. 8, pp. 742-743).

293 More recent examples are the incidents that took place during a visit of President Georges Pompido de France to the United States in 1970 ("Chronique", RGDIP, vol. 75 (1971), pp. 177 et seq., at p. 181) and the searching of the luggage of President Soleiman Frangie of Iran on guard at the French Embassy in Berlin (P. Fauchille, Traiti de droit international public (Paris, 1932), vol. 1, p. 928) and of a 1924 incident in which the Vice-Consul of the United States in Tehran was killed by the crowd for having tried to take photographs of a religious ceremony (Whiteman, Damages, vol. I, pp. 732-733). Above relevant is the case concerning the killing in 1923, near Janina, of General Tallini, an Italian officer commissioned by the Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania. Greece, held responsible for the murder, received particularly onerous requests from the Conference of Ambassadors (see Eagleton, op. cit. (footnote 205 above), pp. 187-188).

294 Other recent examples are included in the attack by demonstrators, in 1851, of the Spanish Consulate in New Orleans (More, Digest, vol. VI, pp. 811 et seq., at p. 812), the violation by two Turkish officials, in 1883, of the residence of the Italian Consul in Tripoli (La prassi italiana, 1st series, vol. II, No. 1018) and the failed attempt of two Egyptian policemen, in 1888, to violate the Italian Consulate at Alexandria (ibid., 2nd series, vol. III, No. 2558).


296 A well-known case concerns the Italian protests over the lynching in 1891 of 11 Italians who had been imprisoned further to the murder of the chief of police of New Orleans. The United States de-ported the occurrence, and awarded Italy a sum of $125,000,000, to be distributed by the Italian Government to the families of the victims (La prassi italiana, 2nd series, vol. III, No. 2571).

Another example concerns the murder in 1904 of the Reverend Lahme, a United States missionary, the Persian Government paid a sum of $30,000 and punished the Kurds who were responsible for the murder (Whiteman, Damages, vol. I, pp. 725 et seq.).
significant place in international jurisprudence. Examples are the "I'm Alone", \(^{296}\) Kellett\(^{297}\) and "Rainbow Warrior" \(^{298}\) cases. In diplomatic practice, insults to the symbols of the State or Government, or attacks on diplomatic or consular representatives or other diplomatically protected agents, or against private citizens of a foreign State, \(^{300}\) have often led to apologies or expressions of regret, as have also attacks on diplomatic and consular premises \(^{300}\) or on ships. \(^{303}\) Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely requests for apologies or offers thereof seem to have increased in importance and frequency.

(10) It should be stressed that the resonance effect of public apologies can be achieved not only by involving the press or other mass media. It can be pursued even more effectively by the choice of the level of the wrongdoing State's organization from which the apologies emanate. \(^{304}\) In this context, mention should be made of a form of satisfaction which has a place both in literature \(^{305}\) and in international jurisprudence, \(^{306}\) namely recognition by an international tribunal of the unlawfulness of the offending State's conduct.

(11) Another form of satisfaction, dealt with in subparagraph (b) of paragraph 2, is that of nominal damages through the payment of symbolic sums. Several examples are to be found in international jurisprudence. \(^{307}\)

(12) Much more complex is the form of satisfaction dealt with in subparagraph (c) namely "damages reflecting the gravity of the infringement". Such damages are of an exceptional nature as indicated by the phrase "in cases of gross infringement of the rights of the injured State". They are given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. \(^{308}\) This definition brings to light the specific function of satisfaction vis-à-vis restitution in kind and compensation. This aspect is dealt with in the latter part of this commentary.

(13) The international jurisprudence of recent years provides an interesting example of "damages reflecting the gravity of the infringement" namely the case of the "Rainbow Warrior" \(^{309}\) involving the sinking of a ship in Auckland harbour in 1985 by agents of the French security services who had used false Swiss passports to en

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\(^{296}\) See footnote 287 above.

\(^{297}\) Decision of 20 September 1897 (United States of America v. Siam). The arbitral commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government" (Moore, Digest, vol. 1, p. 1862 et seq., at p. 1864).

\(^{298}\) See footnotes 120 and 291 above. In his ruling, the Secretary-General of the United Nations decided that France should present formal apologies to New Zealand.

\(^{299}\) In March 1949, a sailor in the United States Navy who was on leave in Havana climbed on to the statue of José Martí, a hero of Cuban independence. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets (Bissonnette, op. cit. (footnote 164 above), pp. 67-68).

Cases involving insult to the national flag have been relatively frequent during the period preceding the Second World War. A form of satisfaction which is typical of those cases consists in a ceremony during which the offending State salutes the flag of the offended State. \(^{300}\) Examples are to be found in footnote 293 above.

\(^{300}\) Examples are to be found in footnote 295 above.

\(^{301}\) Following the looting of the French Embassy in Saigon by Vietnamese students in 1964, the Government of Viet Nam issued a communiqué to the local press presenting apologies and suggesting that the damage caused by persons and property be assessed in order to allow the payment of compensation. ("Chronique", RGDP, vol. 68 (1964), p. 944). When, in 1967, attempts were made to blow up the Yugoslav Embassy in Washington, D.C., and the Yugoslav Consulates in New York, Chicago and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement (ibid., vol. 71 (1967), p. 775).

The Chinese Government requested public excuses from the Indonesian Government for the looting in 1966 of the Chinese Consulates at Jakarta, Macassar and Medan during anti-communist riots (ibid., vol. 70 (1966), pp. 1013 et seq.). The same Government requested and obtained public excuses following incidents at Ulan Bator railway station, where Chinese diplomats and nationals were ill-treated by the local police (ibid., vol. 71 (1967), pp. 1067-1068).

\(^{303}\) Examples are the Panay incident (footnote 292 above) and the incident including the damaging of the "Stark" by an Iraqi missile in 1987. In the latter incident, the President of Iraq immediately wrote to the President of the United States. He explained the attack as an accident and expressed his "heartfelt condolences" for the death of the United States sailors who had been killed, adding that "sorrow and regrets are not enough".

\(^{304}\) For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister of Japan presented apologies to the United States Ambassador and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies ("Chronique", RGDP, vol. 68 (1964), p. 736).


\(^{306}\) In the "Manukau" case for instance, the arbitral tribunal, inter alia, declared that: "... in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction" (see footnote 284 above).

In the "Carthage" case, an almost identical decision was made by the same tribunal.

Even more significant, in the same sense, is the judgment of ICJ in the Corfu Channel case (Merits). Addressing the question: "Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction?" (I.C.J. Reports 1949 (see footnote 233 above), p. 12), the Court stated: "... that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." (Ibid., p. 36.)

\(^{307}\) In the Arendt case (see footnote 288 above), the umpire of the Netherlands-Venezuelan Mixed Claims Commission indicated satisfaction as consisting in the expression of regrets by the payment of $100. Other examples are the Brower case (see footnote 289 above) and the Lighthouses case, in which the Permanent Court of Arbitration, referring to one of the claims of France against Greece, stated: "The Tribunal considers the basis for this claim sufficiently proven, so that only the amount of the damage sustained by the Company needs to be established. In view of the inconsistency of the French claim, which fixed the amount of the damage at 10,000 francs Poincaré and then declared that the amount could not be set in figures, the Tribunal, while recognizing the validity of the claim, can only award a token indemnity of 1 franc." (UNR/AA (footnote 260 above), p. 216.)

\(^{308}\) In common law, this type of damages is known as "exemplary damages".

\(^{309}\) See footnotes 120 and 291 above.
ter New Zealand. New Zealand demanded that France present a formal apology and pay US$10 million—a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the Secretary-General of the United Nations, who *inter alia* decided that France should pay a sum of US$7 million to New Zealand.

(14) The last of the forms of satisfaction listed in paragraph 2 concerns the sanctioning of responsible officials dealt with in subparagraph (d). This mode of satisfaction is emphasized in literature and has frequently been requested and granted in diplomatic practice in the form of the disavowal (désaveu) of the action of its agent by the wrongdoing State, the setting up of a commission of inquiry and the punishment of the responsible individuals. A variant is provided by the "Rainbow Warrior" case in which the Secretary-General decided that the two responsible French agents should be handed over to France and later be restricted to the island of Hao for at least three years.

(15) The Commission is aware that extensive application of this form of satisfaction might result in undue interference in the internal affairs of States. It has therefore limited the scope of application of subparagraph (d) to criminal conduct whether from officials or private individuals and to serious misconduct of officials.

(16) The opening phrase of paragraph 2 makes it clear that the paragraph provides an exhaustive list of the forms of satisfaction, which may be combined. A case in point is the "Rainbow Warrior" case, in which the Secretary-General ordered formal apologies, damages and restrictions on the freedom of movement of the responsible officials.

(17) The specificity of satisfaction as a consequence of an internationally wrongful act manifests itself not only in the types of injury with regard to which it operates and in the particular forms which it takes but also, and even more importantly, in the specific function which it performs.

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(18) A school of thought as well as some jurisprudence and practice tend to attribute to satisfaction as a form of reparation an affective nature—distinct from compensatory forms of reparation such as *restitutio* and compensation. Of course the distinction is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in inter-individual relations, a role that cannot be deemed to be purely compensatory. Though its role is certainly not a punitive one, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts.

(19) The distinction between satisfaction, on the one hand, and *restitutio* and compensation, on the other, does not exclude the possibility that two of those forms, or all three, may come into play together in order to ensure a combined, complete reparation of the material as well as the moral/political/juridical injury. In fact, both in jurisprudence and in diplomatic practice, satisfaction is frequently accompanied by compensation.

(20) The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the "Rainbow Warrior" case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the value of the material loss. Other examples include the case concerning the lynching of 11 Italians in New Orleans and the Labaree case. One may doubt, at first sight, whether those instances involved satisfaction *stricto sensu*. The element of satisfaction is, however, equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the compensation exceeded to a greater or lesser degree the extent of the material loss. And there were instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

(21) The Commission, while agreeing on the content and formulation of the provisions of article 10, did not find it necessary to pronounce itself on the question of whether an affective nature should be attributed to satisfaction.

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310 For cases of désaveu during the period from 1850 to 1939, see Bissounette, op. cit. (footnote 164 above), p. 104 et seq.

A case of désaveu involved Bolivia and the United States. Following the publication in the American magazine *Time* in March 1939 of an article attributing to the spokesman of the United States Embassy in La Paz remarks which were considered to be offensive to Bolivia, the State Department of the United States immediately corrected those statements (Whiteman, *Digest*, vol. 5, pp. 169-170).

311 Punishment of the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (see footnote 293 above) and in the case of the killing of two United States officers in Tehran in 1975 ("Chronique", KGDIP, vol. 80 (1976), p. 257).

312 See footnote 120 above. According to Palinsiano, the confinement of two French agents should be understood (contrary to the scarce doctrine on the subject) not as satisfaction in the proper sense but rather as the result of an *ex aequo et bono* settlement of a "political" dispute between the parties, a distinct dispute from the legal dispute over the French liability for the attack on the "Rainbow Warrior" (op. cit. (footnote 291 above), pp. 900-901).

313 See footnote 295 above.


315 See footnote 295 above.

316 Ibid.
faction as a form of reparation, a question on which doctrinal opinions are divided.

(22) It was argued that the affective nature of satisfaction would contravene the principle of the sovereign equality of States and was not compatible either with the composition or with the structure of a "society of States" on the grounds that:

(a) punishment or penalty does not "become" persons other than human beings, and particularly sovereign States; and

(b) the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon—if ever—in the "society of States".

(23) On the other hand, it was maintained that the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offences committed by States makes even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of such institutions. The affective nature of satisfaction, according to this view, was not in contrast with the sovereign equality of the States involved. It was also considered that satisfaction was a matter of atonement. To confine the consequences of any international delict whatever its gravity) to restitution in kind and compensation for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage.

(24) The Commission finds it all the more important to recognize the positive function of satisfaction in the relations among States as it is precisely by resorting to one or more of the various forms of satisfaction that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. This conclusion is of considerable importance as a matter of both codification and progressive development in this field.

(25) On the other hand, the Commission also finds it important to draw the lessons of the diplomatic practice of satisfaction which shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality. The need to prevent abuse has been stressed by a number of authors. It underlies paragraph 3 of article 10 which, by making it clear that demands that would impair the dignity of the wrongdoing State are unacceptable, provides an indispensable indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by such a State.

Article 46 [10 bis]

Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

Commentary

(1) The study of practice and the literature shows that the consequences of an internationally wrongful act may include guarantees against its repetition. This particular consequence is however generally dealt with in the framework of satisfaction or other forms of reparation.

It is of course true that all remedies—whether affective or compensatory—are themselves more or less directly useful in avoiding repetition of a wrongful act and that satisfaction in particular can have such a preventive function, especially in two of its forms, namely damages reflecting the gravity of the infringement, dealt with in paragraph 1 (c) of article 10 and disciplinary action against, or punishment of, officials responsible for the wrongful act, dealt with in paragraph 1 (d) of the same article. Yet assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to re-establish a past state of affairs, they are future-oriented.


319 According to Brownlie, for example, the "objects" of satisfaction are three and are often cumulative. These are "apologies or other acknowledgement of wrongdoing by means of a salute to the flag or payment of an indemnity, the punishment of the individuals concerned; and the taking of measures to prevent a recurrence of the harm" (op. cit. (footnote 221 above), p. 208). Bissonnette similarly observes that "a demand for security for the future ... must be considered as one of the forms of satisfaction" (op. cit. (footnote 164 above), p. 121). See also Graefrath (loc. cit. (footnote 159 above), p. 87) and García Amador, Principios de derecho internacional que rigen la responsabilidad—Análisis crítico de la concepción tradicional (Madrid, Escuela de funcionarios internacionales, 1963), pp. 447-453.

320 In the words of Personnaz:

"...the effect of pecuniary indemnification may be to encourage States to take the necessary measures in future to avoid a return to such a situation .... The implicit intention of such indemnification, which may or may not be compensatory, may include the idea that, by means of such penalties, the delinquent government may be induced to improve its administration of justice and give the claimant the assurance that such breaches and injustice in regard to its citizens will be avoided in the future." (Op. cit. (footnote 162 above), p. 323.)

See also García Amador, sixth report on international responsibility (footnote 314 above), para. 145.

9/ Yearbook ..., 1983, vol. II (Part Two), pp. 81-83 (commentary to former article 10 bis).
They thus have a preventive rather than remedial function. They furthermore presuppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which, in the view of the Commission, should not be automatically available to every injured State, particularly in the light of the broad meaning of that term under article 5 of part 2 of the draft. In this context, the question arises whether the injured State’s entitlement to guarantees of non-repetition bears a relationship to the nature of the obligation breached and the gravity of the wrongful act. Such guarantees might be of special relevance in the case of violations of obligations deriving from peremptory norms of international law. The Commission intends to address this issue when it applies itself to the study of the consequences of crimes.

(2) A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient. For example, following demonstrations against the United States Embassy in Moscow in February 1965 (less than three months after those of November 1964), the President of the United States affirmed that:

The United States Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection. 

In other words, the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily.

(3) With regard to the kind of guarantees that may be requested, international practice offers two casuistipcal. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification or, when the wrongful act affects its nationals, that a better protection of the persons and property be ensured. In both cases, the wrongdoing State would appear to be placed under an obligation of result. In the face of the injured State’s demand for guarantees, the choice of the measures most apt to achieve the aim of preventing repetition remains with the wrongdoing State.

(4) It is however possible for the injured State to ask the wrongdoing State to adopt specific measures or act in certain ways considered to be apt to avoid repetition. In such a case, the wrongdoing State would seem to find itself under an obligation of conduct. Three possibilities are to be envisaged here: the injured State may (a) demand formal assurances from the wrongdoing State that it will in future respect given rights of the injured State or that it will recognize the existence of a given situation in favour of the injured State; (b) ask the wrongdoing State to give specific instructions to its agents; or (c) ask the wrongdoing State to adopt a certain conduct considered to be apt to prevent the creation of the conditions...
which had allowed the wrongful conduct to take place.\textsuperscript{329} Such conduct consisting, for instance, in the adoption or abrogation by the wrongdoing State of specific legislative provisions.\textsuperscript{330} Recent practice does not record explicit demands to modify or issue legislation. Similar requests are however made by international bodies. For example, it is frequent that ad hoc international bodies request States responsible for violations of human rights to adopt their legislation in order to prevent the repetition of violations. These requests include those by the Human Rights Committee in its decisions on individual complaints. In the \textit{Torres Ramirez} case, for instance, the Committee, after ascertaining that Uruguayan law was not in conformity with the International Covenant on Civil and Political Rights, came to the following conclusion:

\begin{quote}
The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future".\textsuperscript{331}
\end{quote}

(5) On the basis of the above analysis, it appears that assurances and guarantees of non-repetition are a \textit{sui generis} remedy to be distinguished from satisfaction and other forms of compensation. The text adopted by the Commission provides that the injured State is entitled, where appropriate, to obtain from the wrongdoing State assurances or guarantees of non-repetition. It therefore recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant. Circumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act. The phrase "where appropriate" makes it clear that it will be for the judge (or other third party called upon to apply the rule) to determine if the conditions for the granting of what the Commission considers as an exceptional remedy are met and also to deny abusive claims which would impair the dignity of the wrongdoing State.

\textsuperscript{329} Examples of explicit demands to modify or issue legislation include the Cutting's case in 1886 in which the United States, following the conviction in Mexico, in accordance with the Mexican legislation then in effect, of an American national for having published in the United States an article considered to be defamatory of a Mexican citizen, demanded that the legislation in question be modified—which was subsequently done (J. Dumas, "La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", \textit{Recueil des cours . . . 1931-Il} (Paris, Sirey, 1932), vol. 36, pp. 189-190); the case of the lynching of Italian nationals in Erwin, Mississippi, in 1901, in which Italy asked the United States to modify the law concerning the jurisdiction of federal courts which in practice prevented the punishment of the authors of crimes against foreigners (Moore, \textit{Digest}, vol. VI, pp. 848-849); and the "Alabama" case, in which United States protests led Great Britain to modify the 1819 Act by the Act of 9 August 1870, which made it a statutory offence to build in British territory any ship intended for a belligerent, authorized the detention of any suspect ship and required any ship that had infringed British neutrality to hand over any prizes of war which it had brought into a British port (N. Politis, \textit{La justice internationale} (Paris, Hachette, 1924), p. 41).

\textsuperscript{330} In the \textit{Trail Smelter} case, for instance, the arbitral tribunal, in deciding on question No. 3, contained in article III of the Convention of 15 April 1935 between the United States of America and Canada (\textit{League of Nations, Treaty Series}, vol. CLXII, p. 75) and reading as follows:

\begin{quote}
"(3) In the light of the answer to the preceding question, what measures or regimes, if any, should be adopted or maintained by the Trail Smelter?"
\end{quote}

mentioned specifically a series of measures (at first provisional and later definitive) apt to "prevent future significant fumigations in the United States" (\textit{UNRISA}, (see footnote 57 above), pp. 1954 et seq.)

CHAPTER III
COUNTERMEASURES

General Commentary*

(1) Chapter III sets out a series of articles dealing with perhaps the most difficult and controversial aspect of the whole regime of State responsibility, namely countermeasures. 250/ In a decentralized international system lacking compulsory methods for the settlement of most disputes, States resort to unilateral measures of self-help (referred to in these draft articles as countermeasures). Countermeasures take the form of conduct, not involving the use or threat of force, which - if not justified as a response to a breach of the rights of the injured State - would be unlawful as against the State which is subjected to them. 251/ The wrongfulness of acts constituting countermeasures is precluded under article 30. Countermeasures may be necessary in order to ensure compliance with its legal obligations on the part of a wrongdoing State. But at the same time they should not be viewed as a wholly satisfactory legal remedy, both because every State considers itself as, in principle, the judge of its rights in the absence of negotiated or third party settlement, and also because of the unequal ability of States to take or respond to them. In short the system is rudimentary. Recognition in the draft articles of the possibility of taking countermeasures - warranted as such recognition may be in the light of long-standing practice - ought accordingly be subjected to conditions and restrictions, limiting countermeasures to those cases where they are necessary in response to an internationally wrongful act.

(2) Whatever conditions and restrictions may be imposed on them, countermeasures involve a unilateral assessment of, on the one hand, the


250/ See the discussion of the 1992 debates on countermeasures in the Commission and in the Sixth Committee contained in the fifth report on State responsibility, document A/CN.4/453, paras. 30-36.

251/ Countermeasures are to be distinguished from acts which, although they may be seen as "unfriendly", are not actually unlawful - for example, rupture of diplomatic relations. Such acts of retortion are not dealt with in the present articles.
injured State’s right and its infringement and, on the other hand, the legality of the reaction, a reaction which in turn can provoke a further unilateral reaction from the State which has committed the internationally wrongful act. Indeed the potentially negative aspects of countermeasures are such that some members of the Commission questioned the desirability of providing any legal regime of countermeasures within the framework of State responsibility pointing, in particular, to potentially unjust results when applied between States of unequal strength or means. Two considerations pointed, however, in the direction of the inclusion of countermeasures. First, there is sufficient evidence that the practice of countermeasures is admitted under customary international law as a means of responding to unlawful conduct. The Commission had, indeed, already dealt with the question of countermeasures in the context of Part One. Second, one should not underestimate the importance of circumscribing the ability of an injured State to resort to countermeasures, that is to say, of defining the conditions under which countermeasures are a lawful response to unlawful conduct. To include provisions on countermeasures in the present articles is thus both necessary and useful.

**Article 47**

**Countermeasures by an injured State**

1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.
(1) The basic notion of countermeasures is the entitlement of the injured State not to comply with one or more of its obligations towards the wrongdoing State. \(252/\) The fundamental prerequisites for any lawful countermeasures is the existence of an internationally wrongful act, infringing a right of the State taking the countermeasure. \(253/\) While this does not necessarily require a definitive third party determination of the existence of such an act, a mere good faith belief on the part of the injured State which turns out not to be well-founded would not be sufficient to justify the taking of countermeasures. Thus, an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment. Although such a good faith belief or mistake on the part of the allegedly injured State may be relevant in evaluating the degree of responsibility, it will not preclude the unlawfulness of the measures taken.

(2) Any decision by an injured State to resort to countermeasures is circumscribed by the permissible functions or aims to be achieved by such measures. \(254/\) State practice indicates that in resorting to countermeasures the injured State may seek the cessation of the wrongful conduct, as well as reparation in a broad sense. On the other hand, the

\(252/\) Mr. Riphagen as Special Rapporteur had advocated a distinction between "reciprocal countermeasures" and other measures; see Yearbook ..., vol. II (Part One), p. 10, article 8 and commentary thereto. Reciprocal countermeasures are countermeasures taken in relation to the same obligation or class of conduct as that which is the subject of the initial unlawful act. This category has not been maintained in the draft articles. The essential criterion should be the necessity and proportionality of the particular countermeasure in the circumstances in order to obtain cessation and reparation. To require, in addition, that countermeasures should be reciprocal would operate unequally where, as will often be the case, the injured State is not in a position to take measures of the same description.

\(253/\) While most writers believe that a lawful resort to countermeasures presupposes an internationally wrongful act of an instantaneous or a continuing character, a few scholars seem to believe that resort to measures could be justified even in the presence of a good faith conviction, on the part of the acting State, that it has been or is being injured by an internationally wrongful act. For a detailed discussion of the doctrine, see the third report on State responsibility, document A/CN.4/440, paras. 37 et seq.

\(254/\) The relevant State practice is considered throughout the fourth report on State responsibility, document A/CN.4/444 and Add.1. For a detailed discussion of the doctrine concerning the functions of countermeasures and the aim to be pursued, see the third report on State responsibility, document A/CN.4/440, paras. 39 et seq.
function of countermeasures may not go beyond the pursuit by the injured State of cessation and reparation. Any measures resorted to by an injured State that exceeds those lawful functions or aims would constitute an unlawful act. In particular, an injured State may not take measures in order to inflict punishment on the alleged lawbreaker.

(3) The essence of the injured State's entitlement to take countermeasures is conveyed in article 47 by the words "not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act". This language was considered to be preferable to the phrase "to suspend the performance of" which might restrict the scope of application of countermeasures to obligations of a continuing character and exclude obligations requiring the achievement of a specific result.

(4) In addition to defining the essential element of the notion of countermeasures, article 47 circumscribes the entitlement of the injured State to take countermeasures in three respects. It first requires the failure of the wrongdoing State to comply with its obligations under articles 41 to 46. The sentence is structured so as to place at the very beginning of the article this basic requirement for lawful resort to countermeasures. Secondly, the text makes the injured State's entitlement to take countermeasures subject to the conditions and restrictions set forth in articles 48, 49 and 50. These provide a number of safeguards against abuse. Thirdly, and perhaps most importantly, it requires that resort to countermeasures be necessary in order to induce the wrongdoing State to comply with its obligations under articles 41 to 46. This language is intended to limit the permissible functions or aims of countermeasures and clearly implies that there are cases where resort or continuing resort to countermeasures may not be necessary. More specifically, the term "as necessary" performs a dual function. It makes it clear that countermeasures may be applied only as a last resort where other means not involving non-compliance with the injured State's obligations have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicates that the decision of the injured State to resort to countermeasures is to be made reasonably and in good faith, and at its own risk.

(5) The injured State's evaluation of the "necessity" to resort to countermeasures must be made - initially by the injured State itself but also by the wrongdoing State itself and by any involved third party (and see article 58 (2) on arbitration) - "in the light of the response to its demands
by the State which has committed the internationally wrongful act". This language is intended to emphasize the desirability of, and to maximize the opportunity for, dialogue between the injured State and the wrongdoing State. The phrase serves a dual purpose by encouraging the injured State to take due account of the wrongdoing State's response in assessing the need for countermeasures. It is reasonable to expect that in devising its reaction the injured State should take account of the manner in which the wrongdoing State is responding to the injured State's demands for cessation and reparation. The situation created by the wrongful act calls for different reactions according to whether the allegedly wrongdoing State responds to the injured State's demands by a fin de non recevoir, a curt denial of responsibility or, on the contrary, offers to make adequate and timely reparation or to submit the matter to binding third party settlement or even explains, to the satisfaction of the injured State, that no internationally wrongful act attributable to it was committed.

(6) Requiring the injured State to take into account the extent to which the wrongdoing State's response to its demands is "adequate" is intended to strike a proper balance between the position of the injured State and that of the wrongdoing State. It seeks to avoid giving the injured State excessive latitude - to the possible detriment of the wrongdoing State - in the use of countermeasures. Countermeasures are only lawful if they are "necessary" in the circumstances. With regard to cessation, the injured State might otherwise apply countermeasures without any opportunity being given to the wrongdoing State to explain, for example, that there has been no wrongful act or that the wrongful act is not attributable to it. By initiating a dialogue and assessing the response of the allegedly wrongdoing State before taking countermeasures, the injured State may avoid committing an internationally wrongful act by taking such measures on the basis of incomplete or inaccurate information. As regards reparation, the wrongdoing State might otherwise continue to be the target of countermeasures even after admitting its responsibility and even while in the process of providing reparation and satisfaction. The necessity of countermeasures diminishes in inverse proportion to the achievement of their legitimate aims. Thus, it is incumbent

255/ The notion of an "adequate response" is discussed by the Special Rapporteur in his fourth and sixth reports, document A/CN.4/444, paras. 17-23, and document A/CN.4/461, para. 69, respectively.
on the injured State to assess the continuing necessity of the countermeasures in the light of the wrongdoing State’s response to its demands.

(7) Paragraph 2 of article 47 recognizes that the rights of States not involved in the responsibility relationship between the injured State and the wrongdoing State cannot be impaired by countermeasures taken by the former against the latter. The Commission felt that it was appropriate to deal with this matter in the present article rather than article 50 on prohibited countermeasures, since the latter alternative would appear to deny the legitimacy of any countermeasures incidentally affecting the position of third States. This approach was viewed as too sweeping in an interdependent world where States are increasingly bound by multilateral obligations. In the light of those considerations, the Commission opted for ensuring the protection of the rights of third States by relying on one of the essential characteristics of countermeasures, viz., that the unlawful character of conduct resorted to by way of countermeasures is precluded only as between the injured State and the wrongdoing State. As stressed by the Commission in paragraph (18) of its commentary to article 30 of Part One of the draft articles, “the legitimate application of a sanction against a given State can in no event constitute per se a circumstance precluding wrongfulness of an infringement of a subjective international right of a third State against which no sanction is "justified". 256/

(8) Accordingly, paragraph 3 of article 47 provides that, if a countermeasure involves a breach of an obligation towards a third State, the wrongfulness of such a breach is not precluded by reason of its permissibility in relation to the wrongdoing State. Paragraph 3 will serve as a warning to the injured State that any measure violating the rights of a third State will be a wrongful act as far as that third State is concerned. This warning is of particular relevance in cases of possible violation by the injured State of rules setting forth erga omnes obligations. It will also serve as an encouragement to the injured State to take such precautionary steps as consulting with the third States concerned, weighing the consequences of alternative courses of action and ascertaining that no other choice is available.

Article 48

Conditions relating to resort to countermeasures

"1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

Commentary*

(1) The entitlement to take countermeasures, as delimited in article 47, is subject to certain conditions, qualifications and exclusions, which are spelt out in the following three articles. Specifically, certain conditions relating to the settlement of the dispute apply to lawful countermeasures; these are the subject of article 48. In addition, countermeasures must always be proportionate; this basic requirement is spelt out in article 49. And finally, certain kinds of conduct are excluded entirely from the realm of countermeasures by article 50.

(2) Of these three articles, the most controversial and debated was article 48, that relating to the requirement to pursue the peaceful settlement of the dispute. 257/ While the Commission as a whole agreed that negotiations and all other available procedures for the peaceful settlement of disputes should be pursued, there was disagreement as to whether this needed

* / Report ... forty-eighth session, pp. 159-164 (commentary to article 48).

257/ For full discussion of state practice and doctrine in relation to the requirement of recourse to other remedies, see Mr. Arangio-Ruíz's fourth report on State responsibility, document A/CM.4/444, pp. 20-33.
to be prior to the taking of countermeasures. The difficulty here is twofold. First, negotiations or other forms of dispute settlement can be lengthy, and could be almost indefinitely drawn out by a State seeking to avoid the consequences of its wrongful act. Secondly, some forms of countermeasures (including some of the most readily reversible forms, for example, the freezing of assets) can only be effective if taken promptly. For these reasons it was felt that to require as a precondition to countermeasures the exhaustion of all the procedures available in accordance with Article 33 of the United Nations Charter would put the injured State at a disadvantage. Rather than requiring the exhaustion of all available procedures as a precondition, article 48 focuses on making available to a State which is a target of countermeasures an appropriate and effective procedure of resolving the dispute. Moreover it allows the allegedly wrongdoimg State to require a suspension of the countermeasures if that State cooperates in good faith in a binding third party dispute settlement mechanism, and even though that State may continue to contest that its initial act was unlawful. But on the other hand, it does require that the injured State, before taking countermeasures, should seek to resolve the problem through negotiations. This requirement is, however, without prejudice to the taking of urgent interim or provisional measures required to preserve the rights of the injured State. Certain members of the Commission held the view that an injured State’s obligation to negotiate, prior to taking countermeasures, as provided in paragraph 1 of this article does not apply in the case of international crimes, especially in the case of genocide.

(3) This essential and central element to the articles on countermeasures, viz., the obligation to pursue a resolution of the dispute, is given effect to in a graduated way, based on a distinction between initial measures taken in response to the unlawful act by way of "interim measures of protection", and other countermeasures. As soon as an allegedly wrongful act has come to its notice, the injured State may find it necessary to take measures to preserve its legal rights. At the same time the Commission eventually concluded that full-scale countermeasures should not be taken without an initial attempt to resolve the dispute by negotiation. Paragraph 1 strikes the balance between these considerations in the following way. On the one hand, the injured State is under an obligation, pursuant to article 54, to seek to settle the dispute by negotiation with the other State concerned at its request. On the other hand, and notwithstanding this obligation, it is immediately entitled to take
interim measures of protection which otherwise comply with the requirements of this chapter and which are necessary to preserve its legal position, pending the outcome of the negotiations provided for in article 54.

(4) The term "interim measures of protection" is inspired by procedures of international courts or tribunals which have or may have power to issue interim orders or otherwise to indicate steps that should be taken to preserve the respective rights of the parties in dispute. The difference here however is that at the relevant time - immediately upon the occurrence of the wrongful act - no such court or tribunal with jurisdiction over the dispute may exist. Moreover some measures have to be taken immediately or they are likely to be impossible to take at all - for example, the freezing of assets (which can be removed from the jurisdiction within a very short time). A feature of such interim measures in the sense of the present paragraph is that they are likely to prove reversible should the dispute be settled: the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation.

(5) The extent of the obligation to negotiate during this first phase is not subject to any specific time-limit. What is a reasonable time for negotiations depends on all the circumstances, including the attitude of the wrongdoing State, the urgency of the issues at stake, the likelihood that damages may increase if a speedy resolution is not achieved, etc. Given this diversity of situations, to fix a specific time-limit would be impracticable.

(6) If it becomes clear that negotiations are unlikely to succeed, countermeasures may be taken which go beyond interim measures of protection in the sense explained above, although they must none the less comply with the various requirements of Chapter III. In particular, paragraph 2 of article 48 makes it clear that existing third party dispute settlement mechanisms remain in force notwithstanding a dispute which has given rise to countermeasures, and that the injured State itself must continue to comply with its obligations in relation to dispute settlement. Thus a State is not entitled, by way of countermeasures, to suspend or not comply with obligations in relation to dispute settlement. Such obligations have a distinct legal character and practical purpose, and must remain in force even in a context of worsening relations. 258/

(7) In addition to preserving "any other binding dispute settlement procedure in force" between the States concerned (such as, for example, their mutual acceptance of the Optional Clause, Article 36 (2) of the Statute of the International Court of Justice, in relation to the dispute or an arbitration clause in a bilateral treaty), paragraph 2 of article 48 also refers to the dispute settlement obligations arising under Part Three of the present articles. The reference to Part Three has particular significance for disputes arising in the context of countermeasures, since under paragraph 2 of article 58, where a dispute "arises between States Parties to the present articles, one of which has taken countermeasures against the other", the allegedly wrongdoing State - i.e. the State the subject of the countermeasures - may at any time unilaterally submit the dispute to an arbitral tribunal to be constituted in conformity with annex II. Thus where a State takes countermeasures under article 48, it thereby in effect offers to the allegedly wrongdoing State the opportunity to resolve their dispute by a binding third party procedure of arbitration. And this is the case even if there is no other binding third party dispute settlement obligation in force between them.

(8) In this context, paragraph 3 of article 48 uses the term "a tribunal which has the authority to issue orders binding on the parties". The reference here is to orders which are binding on the parties as to the substance of the dispute. The tribunal must also have power to order interim measures of protection.

(9) In practice the two issues (the legality of the initial conduct and the legality of countermeasures) are likely to be intertwined. The jurisdiction of the tribunal would not be excluded merely because the State party taking the countermeasure refrained from qualifying its conduct as a "countermeasure". The jurisdiction of an arbitral tribunal under article 58, paragraph 2 arises in respect of any dispute "between States Parties to the present articles, one of which has taken countermeasures against the other". Whether a particular measure constitutes a countermeasure is an objective question: as explained in paragraph (3) of the commentary to article 47, it is not sufficient that the allegedly injured State has a subjective belief that it is (or for that matter is not) taking countermeasures. Accordingly, whether a particular measure in truth was a countermeasure would be a
preliminary issue of jurisdiction for the arbitral tribunal under article 58, paragraph 2, and in accordance with general principle would be a matter for the tribunal itself to determine. 259/

(10) Resort to binding third party dispute settlement in disputes in which countermeasures have been taken has several effects. In the first place, and most importantly, it provides a procedure for the resolution of the dispute, even in cases where no such procedure was otherwise available. But in addition, pursuant to paragraph 3 of article 48, the right of the injured State to continue to take countermeasures is suspended while the dispute settlement procedure is being implemented. The only conditions precedent to the suspension are, first, that the internationally wrongful act must have ceased (i.e. the injured State is not suffering a continuing injury as a result of a continuing wrongful act), and, secondly, that the wrongdoing State is implementing the dispute settlement procedure in good faith. Reference to a dispute settlement procedure has this suspensive effect if it involves submission to "a tribunal which has the authority to issue orders binding on the parties"; this is true, for example, of the International Court of Justice, as well as of the arbitral tribunal provided for in article 58 of the present articles.

(11) To summarize, if the basic conditions for countermeasures laid down in article 47 are met, and if initial negotiations have failed to produce a solution the injured State may take countermeasures without any prior resort to third party dispute settlement procedures. But if it does take countermeasures, the State against whom they are taken may resort to binding arbitration under article 58, paragraph 2, or to other applicable binding third party settlement of the dispute. If the allegedly wrongdoing State does resort to such a procedure, and implements it in good faith, and provided the wrongful act itself has ceased, the countermeasures must be suspended.

(12) There is, however, one further necessary refinement to the procedural system embodied in article 48. Although the injured State must suspend countermeasures pending good faith submission to binding third party dispute settlement, the question of interim measures of protection may arise, and the injured State should not be left without a remedy if the wrongdoing State fails to comply with any orders or indications issued by the court or tribunal.

259/ The issues raised in paragraph (9) are discussed more fully in the commentary to article 58 on arbitration where this paragraph would eventually move.
for interim measures of protection. Thus paragraph 4 of article 48 provides that a failure by the wrongdoing State to honour a request or order emanating from the court or tribunal concerned "shall terminate the suspension of the right of the injured State to take countermeasures". This would be so even if the request or order emanating from the court or tribunal is technically non-binding. However, a failure by the wrongdoing State to comply with an indication of interim or provisional measures, although it may render it liable to a resumption of the countermeasures, has no other specific effect. In particular, the court or tribunal retains its jurisdiction over the dispute, and its procedures remain available to deal with the dispute so far as both parties are concerned.

(13) In the Commission's view, this system marks an important advance on the existing arrangements for the resolution of disputes involving countermeasures. It gives the parties, in addition to all existing possibilities for the resolution of their dispute by diplomatic or other means, the option of resolution of the dispute by arbitration, and of thereby avoiding the aggravation of the dispute and of their relations which continuing countermeasures can produce. In the longer term it will reduce that element of the system of countermeasures which tended to a spiralling of response.

(14) As noted, the effect of paragraph 2 of article 48 is to preserve existing binding dispute settlement procedures as well as to provide the additional procedure envisaged in article 58, paragraph 2 at the election of the State which is the subject of countermeasures. Article 48 does not specify any priority as between two or more applicable procedures for binding dispute settlement, leaving it "to the agreement of the parties (expressed in advance or ad hoc) or the decision of the tribunals concerned to resolve any problem of overlap."
Article 49 [13]

Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Commentary*/

(1) The relevance of proportionality in the regime of countermeasures is widely recognized in both doctrine and jurisprudence. The notion of proportionality was already present more or less explicitly in the seventeenth, eighteenth and nineteenth century doctrine. 130/ Most


130/ This notion was clearly implied in the doctrinal position taken, for example, by Grotius, Vattel and Phillipmore, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the reprisal; the residue is to be returned to the Government of the subjects against whom reprisals have been put in force". (Sir Robert Phillipmore, Commentaries upon International Law, vol. III, (London, 1885), p. 32). Add: Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, Book III, Chapter 2 s., viii 3, The Classics of International Law, International Peace, Division of International Law, J.B. Scott, ed. (Washington, 1925), p. 629; and E. De Vattel, The Law of Nations or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns, Book Two, Chapter XVIII 342, J. Chitty, ed. (London, 1834), p. 283.
twentieth century authors, although not all of them, are of the opinion that a State resorting to countermeasures should adhere to the principle of proportionality.

(2) The prevailing doctrinal view thus recognizes the principle of proportionality as a general requirement for the legitimacy of countermeasures or reprisals. Proportionality is a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States. It takes into account situations of inequality in terms of economic power, political power, etc., which may be relevant in determining the type of countermeasures to be applied and their degree of intensity. The principle of proportionality

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132/ In this regard, Oppenheim takes the position that "[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation" (L. Oppenheim, *International Law*, vol. II (London, 1952), p. 141). In Guggenheim’s words "[d]as moderne Völkerrecht weist sodann eine Verpflichtung zur Proportionalität der Repressalie auf" (P. Guggenheim, *Lehrbuch des Völkerrechts*, vol. II (Genève, 1954), p. 585).

provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State using such measures.

(3) The principle of proportionality has assumed a more precise content in the present century following the First World War, a development concomitant with the outlawing of the use of force. There is no uniformity, however, in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed.

(4) Article 13 lays down the rule of proportionality in providing that a countermeasure "shall not be out of proportion" to the relevant criteria. It adopts the "negative" formulation used, for instance, in the Naulila and Air Services Agreement awards. 134/ The text does not specify the degree of proportionality or the extent to which a countermeasure might be disproportionate. While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the use of expressions such as "manifestly disproportionate" could have the effect of suggesting that some disproportion was acceptable and thus introducing an element of excessive uncertainty and subjectivity in the construction and application of the principle.

134/ According to the award in the Naulila case, "même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées" (United Nations, Reports of International Arbitral Awards, vol. II, p. 1028). In the Air Services Agreement award the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France" (Case Concerning the Air Services Agreement of 27 March 1946, International Law Reports, vol. 54, 1979, p. 338). The negative formulation also appears in section 905 (1) (b) of the Third Restatement of the Law, according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures ... (b) are not out of proportion to the violation and the injury suffered" (American Law Institute, Restatement of the Law Third - The Foreign Relations Law of the United States (St. Paul, Minn., 1987), vol. 2, p. 381). According to draft article 9, para. 2, proposed by W. Riphagen, "[t]he exercise of [the right to resort to reprisals] by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed." (Yearbook ... 1985, vol. II (Part One), p. 11, document A/CN.4/389).
principle. 135/ A countermeasure which is disproportionate, no matter what the extent, should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse.

(5) Notwithstanding the need for legal certainty, the Commission has opted for a flexible concept of the principle of proportionality. Reference to equivalence or proportionality in the narrow sense by either the reacting State or by the State against which measures are being taken is unusual in State practice. 136/ The task of assessing the proportionality of the countermeasure as against the corresponding wrongful act is complicated to some extent by the fact that it requires weighing lawful measures in relation to an unlawful act. A flexible concept of proportionality seems to emerge from the Air Services Agreement award, according to which "[i]t is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach" and "[i]t has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can at best be accomplished by approximation". 137/ On the basis of this flexible concept, the arbitrators concluded that "[t]he measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France". 138/

(6) As regards the relevant criteria, considering the need to ensure that the adoption of countermeasures does not lead to any inequitable results, proportionality should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the

135/ The same holds true for the expressions "hors de toute proportion" used in the Naulilaa award and "clearly disproportionate" used in the Air Services Agreement award.


138/ Ibid., pp. 319 ff.
seriousness of the breach. Therefore, the degree of gravity 139/ and the
effects 140/ of the wrongful act should be taken into account in
determining the type and the intensity of the countermeasure to be applied.
This dual criterion is consistent with the position emerging from the 1934
International Law Institute resolution on reprisals. 141/

(7) The rule of proportionality set forth in article 13 requires that a
specific countermeasure be proportionate first to the degree of gravity of the
wrongful act and second, to the effects of that wrongful act on the injured
State. The use of the word "degree" in the formulation of the first criterion
indicates that the text encompasses wrongful acts of varying degrees of

139/ In the award in the Naulilaa case, the notion of proportionality
was linked to "l'acte qui ... a motivé[s]" the reprisals (United Nations,
Reports of International Arbitral Awards, vol. II, p. 1028). In the doctrine,
this position is supported by P. Guggenheim, op. cit., pp. 585-586; H. Kelsen,
Principles of International Law, op. cit., p. 21; S.K. Kapoor, A Textbook of
International Law (Allahabad, 1985), p. 625; and Sereni, Diritto

140/ Reference to proportionality in relation to the damage suffered is
found in, inter alios, J.C. Venezia, "La notion de représailles en droit
international public" in Revue générale de droit international public,
vol. 64, 1960, p. 476; A. De Guttry, La rappresaglie non comportanti la
coercizione militare nel diritto internazionale (Milano, 1985), p. 263;
Elagab, The Legality of Non-Forcible Countermeasures in International Law
(Oxford, 1988), p. 94; L. Fisler Damrosch, "Retaliation or arbitration - or
both? The 1978 U.S.-France aviation dispute" in American Journal of
International Law, 1980, p. 796; K. Zemanek, "The Unilateral Enforcement of
International Obligations", in Zeitschrift für ausländisches öffentliches
Recht und Völkerrecht, vol. 47, 1987, p. 87; and in the reports of two
previous Special Rapporteurs, R. Ago (Yearbook ..., 1972, vol. II (Part One)
document A/CN.4/318 and Add.1-4, para. 82) and W. Riphagen (Yearbook ..., 1985,
vol. II (Part One), p. 11, draft article 9, para. 2 and commentary thereto,

141/ The position of the International Law Institute (ILI) seems to
require that the measure be proportional to the gravity of the offence and to
the damage suffered. According to the resolution of the ILI, the acting State
must "proportionner la contrainte employée à la gravité de l'acte dénoncé
comme illicite et à l'importance du dommage subi" (article 6, para. 2 in
Yearbook ILI, vol. 38, 1934, p. 709). See the more recent award in the
Air Services Agreement case in which the arbitrators held that "it is
essential, in a dispute between States, to take into account not only the
injuries suffered by the companies concerned but also the importance of the
questions of principle arising from the alleged breach" (International Law
Reports, vol. 54, 1979, p. 338). See also the proposal made by the previous
Special Rapporteur (article 9, para. 2), op. cit; and American Law Institute,
Restatement of the Law Third, op. cit., section 905 (1) (b).
gravity. It would be insufficient, however, to limit the test of proportionality to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State are not necessarily in proportion to the degree of gravity of the wrongful act.

(8) The requirement that a countermeasure should also be proportionate to the effects of the wrongful act on the injured State should not be restrictively interpreted to rule out the taking of countermeasures against a State violating its international obligations relating to the human rights of its nationals on the ground that such violation did not entail material damage to the injured State. Such an interpretation could have a negative effect on the development and enforcement of human rights law and would not be consistent with the broad concept of injury adopted by the Commission in article 5.

(9) The concluding phrase "on the injured State" is not intended to narrow the scope of the article and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations erga omnes, for example violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, would be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.

(10) Proportionality is concerned with the relationship between the alleged wrongful act and the countermeasure. The purpose of countermeasures, namely to induce the wrongdoing State to comply with its obligations under articles 6 to 10 bis, is of relevance in deciding whether and to what extent a countermeasure is lawful. This issue, however, is different from that of proportionality and is addressed in article 11.

Article 50 [14]

Prohibited countermeasures

An injured State shall not resort by way of countermeasures to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.
(d) any conduct which derogates from basic human rights; or
(e) any other conduct in contravention of a peremptory norm of
general international law.

**Commentary***/

(1) As indicated in the introductory phrase of article 14, an injured State is precluded from resorting to certain types of conduct by way of countermeasures. The notion of prohibited countermeasures is the result of the continuing validity of certain general restrictions on the freedom of States notwithstanding the special character of the relationship between the injured State and the wrongdoing State. Subparagraphs (a) to (e) identify the broad areas where non-compliance with applicable norms by way of countermeasures is impermissible and circumscribe the limitations on the measures available to an injured State with respect to each of these areas. Although some of the prohibited countermeasures addressed in subparagraphs (a) to (d) are covered by peremptory norms referred to in subparagraph (e), it was considered preferable to deal with them separately in view of the importance acquired, in particular, in contemporary international society by the prohibition of the use of force and the protection of human rights.

(2) Subparagraph (a) prohibits resort, by way of countermeasures, to the threat or use of force as provided for under the United Nations Charter. The trend towards the restriction of resort to force which started with the Covenant of the League of Nations and the Briand-Kellogg Pact has culminated in the expressed prohibition of force contained in Article 2, paragraph 4 of the United Nations Charter. The obvious relevance of this prohibition to the use of force by an injured State in the pursuit of its rights is consistent with the intention of the framers of the Charter. 142/ The consequent prohibition of armed reprisals or countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly of the United Nations proclaimed that "States have a duty to refrain from acts of reprisals involving the use

*/ Report ... forty-seventh session, pp. 149-173 (commentary to former article 14).

142/ The framers of the Charter intended to condemn the use of force even if resorted to in the pursuit on one's rights, as reflected in the proceedings of the San Francisco Conference: see P. Lamberti Zanardi, La legittima difesa nel diritto internazionale (Milan, 1972), pp. 143 ff., and R. Taoka, The Right of Self-defence in International Law, (Osaka, 1978), pp. 105 ff.
of force. That armed reprisals are recognized as prohibited is further evidenced by the fact that States resorting to force attempt to demonstrate the lawfulness of their conduct by characterizing it as an act of self-defence rather than as a reprisal.

(3) The prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4, of the Charter is also consistent with the decidedly prevailing doctrinal view; as well as a number of authoritative

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pronouncements of international judicial and political bodies. The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission. Indeed, armed reprisals

Hague Rec., vol. 137, 1972-III, p. 536). It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to measures not involving the use of force. See, in particular, A. De Guttry, La rappresaalie non comportanti la coercizione militare nel diritto internazionale (Milano, 1985); E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures (Dobbs Ferry, New York, 1984); and O.Y. Elagab, The Legality of Non-Forcible Countermeasures in International Law (Oxford, 1988). These authors obviously assume that "the prohibition to resort to reprisals involving armed force has acquired the rank status of a rule of general international law" (A. De Guttry, op. cit., p. 11). See also the Third Restatement of the Law, Section 905 of which states that "[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1)". The subsection in question specifies that "a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered" (American Law Institute, Restatement of the Law Third, op. cit., p. 380).

The condemnation of armed reprisals and the consolidation of the prohibition into a general rule are supported by the statement of the International Court of Justice in the Corfu Channel case with respect to the recovering of the mines from the Corfu Channel by the British navy ("Operation Retail") (I.C.J. Reports 1949, p. 35; see also Yearbook ... 1979. vol. II (Part One), para. 89) and, more recently, by the decision of the Court in the Military and Paramilitary Activities in and against Nicaragua case (I.C.J. Reports 1986, paras. 248-249).

See, for example, Security Council resolution 3538 (1956), resolution 5111 (1962) and resolution 188 (1964).

The authors representing this minority trend maintain that some forms of unilateral resort to force either have survived the sweeping prohibition of Article 2, paragraph 4, to the extent that they are not used against the territorial integrity or political independence of any State or contrary to the purposes of the United Nations but rather to restore an injured State's rights, or have become a justifiable reaction under the concepts of armed reprisals or self-defence based on the realities of persistent State practice and the failure of the collective security system established by the Charter to function as envisaged in practice. They include E.S. Colbert, Retaliation in International Law (New York, 1948); J. Stone, Aggression and World Order. A Critic of United Nations Theories of Aggression
do not present those requirements of immediacy and necessity which would only justify a plea of self-defence. \footnote{As recalled in the fifth report of the Special Rapporteur (A/CN.4/453/Add.1, paras. 80 and 81 and footnote 114), the Commission has expressed itself clearly on the concept of self-defence.}

According to a prevailing view in the literature which is consistent with international jurisprudence, the prohibition of armed reprisals or countermeasures has acquired the status of a customary rule of international law of a peremptory character.

(4) The prohibition of the threat or use of force by way of countermeasures is set forth in terms of a general reference to the Charter rather than to the specific provisions of Article 2, paragraph 4. Furthermore, the Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized as such by the International Court of Justice.

(5) \footnote{The admissibility of economic countermeasures is recognized by the Commission in the commentary to article 30 of Part One of the present draft in stating "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)" (Yearbook ..., 1979, vol. II (Part Two), p. 116, para. 5.)} Subparagraph (b) restricts the extent to which an injured State may resort to economic or political coercion by way of countermeasures. A great variety of forms of economic or political measures are frequently resorted to and are considered admissible as countermeasures against internationally wrongful acts. \footnote{For a critical review of the literature, see R. Barsotti, "Armed Reprisals", in A. Cassese ed., The Current Legal Regulation of the Use of Force (Dordrecht, Boston, Lancaster, 1986), pp. 81 ff.} Their admissibility, however, is not totally exempt

from restriction since extreme economic or political measures may have consequences as serious as those arising from the use of armed force.

(6) There are divergent views in the literature concerning the possible relevance of the condemnation of the use of force, under Article 2, paragraph 4 of the Charter or general international law, in determining the lawfulness of economic or political coercion as a form of countermeasure. According to the most widely accepted interpretation, the prohibition of the use of force is limited to military force and, therefore, objectionable forms of economic or political coercion could only be condemned under a distinct rule prohibiting intervention or particular forms thereof. Noting the absence of any other Charter provision condemning individual coercive measures, some authors maintain that Article 2, paragraph 4 applies not only

to armed reprisals but also to economic coercion measures. In their view, such measures do not differ in aim or result from the resort to armed force when the consequences of those measures are in effect the economic "strangulation" of the target State.

(7) The consideration of relevant State practice is particularly important in light of the divergent doctrinal views. During the San Francisco Conference, the Latin American States put forward a proposal to extend the condemnation contained in Article 2, paragraph 4, of the Charter to the use of economic or political force. The defeat of this proposal may have been due to the broad definition of economic or political force rather than categorical opposition to any prohibition of actions of this nature. More recently, there were unsuccessful attempts to link a condemnation of economic or political coercion to the prohibition of the threat or use of force in the context of both the Friendly Relations Declaration and the resolution on the Definition of Aggression.

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153/ General Assembly resolution 3314 (XXIX) (1974). Some countries attempted to achieve this link during the lengthy negotiations concerning the definition of aggression. See the proposal put forward by Bolivia according to which "unilateral action whereby a State is deprived of its economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defence or to cooperate in the collective defence of peace" should have been considered a form of aggression (doc. A/AC.66/L.9 (1953)). Here again the Western States opposed an express provision on economic coercion mainly due to the extremely flexible formulation proposed: see the statement of the representative of the United Kingdom in Official Records of the General Assembly, Seventh Session, Annexes, agenda item 54, p. 74. See also the more recent statement of El Salvador expressing dissatisfaction with the proposed definition of aggression for its failure to include indirect economic aggression (Official Records of the General Assembly, Twenty-ninth Session.
Although State practice does not appear to warrant the conclusion that certain forms of economic or political coercion are equivalent to forms of armed aggression, this practice reveals a separate and distinct trend restricting the extent to which States may resort to economic or political measures. 154/ The General Assembly clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" in its Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. 155/ The Declaration further provides that "No State may use or encourage the use of economic, political or any type of measures to coerce another State to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind". Similarly, the Friendly Relations Declaration proclaims that "[n]o State may use or encourage the use of economical, political or any other type of measure 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".

State practice at the regional level also provides support for the prohibition of extreme economic or political coercion. The 1948 Bogota Charter establishing the Organization of American States contains a broad

Plenary Meetings, vol. I, 2239th meeting, para. 157). The Special Committee on the Definition of Aggression declared that a provision in that sense would have been an obstacle to the adoption of the resolution by consensus.


155/ General Assembly resolution 2131 (XX) of 21 December 1965 adopted by 109 votes to none, with one abstention, the relevant provisions of which were later incorporated in the Friendly Relations Declaration.
formulation of the principle of non-intervention 156/ and expressly prohibits "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." 157/ A similar prohibition is contained in another significant regional instrument, the Helsinki Final Act of 1975, under the specific title of non-intervention. 158/

(10) All of these international and regional instruments condemn resort to economic or political coercion when it infringes the principle of non-intervention. Thus, there appear to be different regimes prohibiting the use of force, on the one hand, and the use of extreme economic or political coercion, on the other, by way of countermeasures. 159/ In contrast with the general prohibition of armed countermeasures in any circumstances, the prohibition against economic or political coercion is limited to those measures that are aimed at unacceptable ends such as the subordination of the exercise of the sovereign rights of the target State or securing advantages of any kind. Therefore, the condemnation of coercive measures, other than those involving the threat of use of force, only extends to measures of an economic

156/ United Nations, Treaty Series, vol. 119, p. 3. According to the principle of non-intervention set forth in article 15, there is no "right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." It is further stated that this principle "prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." For a bibliography on the principle of non-intervention in the Americas, see Ch. Rousseau, Droit international public, vol. IV (Paris, 1980), pp. 53 ff.

157/ Ibid., article 16.

158/ According to principle VI, all States will "in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind". See G. Arangio-Ruiz, "Human Rights and Non-Intervention in the Helsinki Final Act", op. cit., pp. 274 ff.

159/ This is consistent with the jurisprudence of the International Court of Justice which recognized the unlawfulness of economic measures in the context of the principle of non-intervention in the case concerning Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports 1986, pp. 108 ff., para. 126).
or political nature which are likely to result in very serious if not disastrous consequences for the State concerned. 160/

(11) That the seriousness of the potential consequences of the non-forcible coercive measures should be taken into account in determining their prohibited character is confirmed by other elements of State practice. In the numerous cases in which economic measures have been resorted to, the complaints of the targeted States have been based not so much on the nature of the act per se but rather on the alleged resulting "economic strangulation" or other catastrophic effects. 161/

160/ These consequences are not necessarily different from those that may occur as a result of the unlawful use of force. This has led some authors to question the distinction between the two prohibitions in a meaningful and practical sense. For a discussion of this question in relation to the Friendly Relations Declaration, see G. Arangio-Ruiz, The Normative Role of the General Assembly, op. cit., pp. 528-530.

161/ This was the position taken by Bolivia with regard to the sea dumping of tin by the former Soviet Union in 1958 (see McDougal-Feliciano, Law and Minimum World Public Order - The Legal Regulation of International Coercion (New Haven and London, 1961), p. 194, note 165) and by Cuba with regard to the drastic reduction of United States sugar imports in 1960 (Cuba qualified this action as a "constant aggression for political purposes against the fundamental interests of the Cuban economy". See American Journal of International Law, vol. 55, 1961, pp. 822 ff.).

Those cases did not however involve countermeasures in a strict sense inasmuch as it is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even if a prior unlawful act was missing, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. One must bear in mind that, in economic matters, the line between retortion and reprisal is not always clear since the rights and duties are usually conventional and their interpretation is often debated. Some Latin American countries, including Argentina, alleged before the Security Council that the trade sanctions resorted to by Western countries following the outbreak of the Falkland/Malvinas crisis qualified as acts of "economic aggression carried out in blatant violation of international law". According to Argentina, the measures adopted by the EEC would amount to an economic aggression openly violating the principles of international law and the law of the United Nations (see A. De Guttry, "Le contromisure adottate nei confronti dall'Argentina da parte della Comunità europee a dei terzi Stati ed il problema della loro liceità internazionale", in N. Ronzitti ed., La questione delle Falkland-Malvinas nel diritto internazionale (Milan, 1984), p. 35. See also the statement by Venezuela, in S/PV.2362, 22 May 1982, pp. 23-25; the statements by El Salvador, in S/PV.2362, 23 May 1982, p. 47; Nicaragua, ibid., and Ecuador, in S/PV.2360, 21 May 1982, p. 71). The former Soviet Union accused the United States of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982.
The prohibition of economic or political coercion by way of countermeasures contained in subparagraph (b) is based on the extreme nature of the measures as determined by the seriousness of their potential consequences in terms of endangering "the territorial integrity or political independence" of the State concerned. By incorporating this phrase taken from Article 2, paragraph 4, of the Charter, the Commission recognizes that forcible and non-forcible measures may have equally serious effects, while avoiding the controversial question of whether that provision of the Charter should be interpreted as referring only to the use of armed force or as encompassing other forms of unlawful coercion. The Commission is aware that if formulated too broadly, subparagraph (b) might amount to a quasi-prohibition of countermeasures. It has therefore narrowed the scope of the text first by limiting prohibited conduct to "extreme economic or political coercion" and second by using the term "designed" which connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State.

Subparagraph (c) limits the extent to which an injured State may resort, by way of countermeasures, to conduct that is contrary to diplomatic or consular law. An injured State could envisage action at three levels. To declare a diplomatic envoy persona non grata, the termination or suspension of diplomatic relations and the recalling of ambassadors are pure acts of retortion, not requiring any specific justification. At a second level,
measures may be taken affecting diplomatic rights or privileges, not
prejudicing the inviolability of diplomatic or consular agents or of premises,
archives and documents. Such measures may be lawful as countermeasures if all
requirements set forth in the present draft articles are met. However, the
inviolability of diplomatic or consular agents as well as of premises,
archives and documents is an absolute rule from which no derogation is
permitted.

(14) The scope of prohibited countermeasures is delineated to those rules of
diplomatic law which are designed to guarantee the physical safety and
inviolability of diplomatic agents, premises, archives and documents in all
circumstances, including armed conflict. 162/ This minimum guarantee of
protection is essential to the communication and interaction between States in
times of crisis as well as under normal conditions. In situations involving
an unlawful act, which are by definition conflictual in nature, it is
particularly important to preserve the channels of diplomacy, on the one hand,
and to protect highly vulnerable persons and premises from countermeasures, on
the other.

(15) While the State practice concerning the restrictions on the ability of an
injured State to derogate by way of countermeasures from obligations affecting
the treatment of diplomatic envoys is relatively scarce, 163/ there is
widespread support in the doctrine for the prohibition of reprisals or
countermeasures against persons enjoying protection as a matter of diplomatic

162/ See, for example, articles 22, 24, 29, 44 and 45, Vienna Convention
De Guttry is of the view that the unlawfulness of reprisals against diplomatic
envoys covers essentially measures directed against the physical persons of
diplomats, such measures consisting essentially but not exclusively, in a
breach of the rule of personal inviolability. In his view, the raison d'Être
of the restriction is the necessity to safeguard, in any circumstances, the
special protection which is reserved to diplomatic envoys in view of the
particular tasks they perform (op. cit. pp. 282-283).

163/ For example, in 1966, Ghana arrested the members of the delegation
of Guinea to the OAU Conference, including the Foreign Minister. The arrest,
which took place on board an aircraft of an American airliner in transit at
Accra, was justified by the Government of Ghana as a means to secure
reparation for a number of wrongful acts committed by Guinea, including a raid
on the premises of the Ghanaian Embassy at Conakry and the arrest of the
Ambassador with his wife (Keesing's, op. cit., pp. 21738-40).
law. 164/ While some authors believe that this prohibition is derived from the primary rules concerning the protection of diplomatic envoys which they characterize as peremptory norms, 165/ others find its basis in the

164/ For example, Oppenheim states that "Individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of reprisals, although this has occasionally been done in practice" (L. Oppenheim, International law, vol. II, 7th ed., p. 140). This opinion was expressed by Hugo Grotius, De Jure Belli Ac Pacis Libri II, The Classics of International Law, J.B. Scott ed., Washington, 1925, chap. 18, S.iii, S.viii. According to Twiss, diplomatic agents "cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection (T. Twiss, The Law of Nations considered as Independent Political Communities (London and Oxford, 1963) p. 39). See also Ph. Cahier, Le droit diplomatique contemporain (Genève, 1962), p. 22; Ch. Tomuschat, "Repressalie und Retorsion, Zu einigen Aspekten ihrer innerstaatlichen Durchführung", op. cit., p. 187; and Ch. Dominicé, "Représailles et droit diplomatique", in Recht als Prozess und Gefüge. Festschrift für Hans Huber zum 80. Geburtsstag (Bern, 1981), p. 547.

165/ Discussing the criteria used in the ICJ judgment in the Case concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (I.C.J. Reports 1980, p. 3), Rölling stated that "it would have been a good thing if the Court had had or taken the opportunity to make a clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law - total immunity of diplomats because of the great importance attached to unhindered international communication - prevail". (B.V.A. Rölling, "Aspects of the Case concerning U.S. Diplomats and Consular Staff in Teheran", in Netherlands Yearbook of International Law 1980, p. 147.) The same opinion is held by Dominicé who wonders, "Que deviendraient les relations diplomatiques, en effet, si l'État qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquestrer un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?" (Ch. Dominicé, "Observations ...", op. cit., p. 63.) L.A. Sicilianos, op. cit., p. 351, states that "il y a certainement un noyau irreductible du droit diplomatique ayant un caractère impératif - l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives - qui est de ce fait réfractaire aux contrremesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contremesures proportionnées".
particular nature of diplomatic law as a "self-contained" regime, 166/ as recognized by the International Court of Justice in the Case concerning United States Diplomatic and Consular Staff in Tehran case. 167/ A few authors, however, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys. 168/

(16) An explicit reference to multilateral diplomacy was considered to be unnecessary since representatives to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations, no retaliatory step taken by a host State to their detriment could ever qualify as a countermeasure since it would involve non-compliance - not with an obligation owed to the wrongdoing State - but with an obligation owed to a third party, namely the international organization concerned.

(17) Subparagraph (d) prohibits the resort, by way of countermeasures, to conduct derogating from basic human rights. This prohibition, which is dictated by fundamental humanitarian considerations, initially developed in the context of the law of war since such considerations were most frequently sacrificed as a result of the exceptional circumstances existing in time of war. 169/ As early as 1880, the Institute of International Law attempted to regulate reprisals in its Manual of the Laws of War on Land which provided that such measures "must conform in all cases to the laws of humanity and


167/ In this regard, the Court expressed the following view:

"[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse" (I.C.J. Reports 1980, p. 3, at p. 40, para. 86).


169/ The development of humanitarian limitations to the right of adopting reprisals is thoroughly illustrated by F. Lattanzi, op. cit., pp. 295-302.
morality". The human suffering caused by reprisals during the First World War led to the adoption of a rule prohibiting reprisals against prisoners of war in the Geneva Convention of 1929. Since the Second World War, reprisals against protected persons or property have also been unanimously prohibited by the Geneva Conventions of 1949 as well as the Additional Protocol I thereto of 1977. Furthermore, the absolute character of this prohibition is indicated in the Vienna Convention on the Law of Treaties which expressly provides that the termination or suspension of a treaty in response to a material violation shall not be resorted to with regard "to provisions relating to the protection of the human

170/ See Resolutions of the Institute of International Law, Oxford Session of 1880, The Laws of War on Land, Articles 85 and 86.

171/ Article 2 of the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, League of Nations, Treaty Series, vol. 118, pp. 343-411. There is no similar provision in the 1929 Convention concerning the wounded and sick. However, it has been suggested that this omission was due to an oversight and that, in any event, the Convention implicitly prohibits reprisals by requiring respect for the Convention "in all circumstances" under article 25. "The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick - not explicitly, that is to say, for it follows by implication from the principle of the respect to which they are entitled - can only have been due to an oversight. The public conscience having disavowed reprisals against prisoners of war, that disavowal is a fortiori applicable to reprisals against military personnel who, like the wounded and sick, are defenceless and entitled to protection." (J. Pictet, Commentary to Geneva Convention I for the amelioration of the condition of the wounded and sick in armed forces in the field (Geneva, 1952), p. 344).

172/ Article 46 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (United Nations, Treaty Series vol. 75, p. 31); article 47 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (ibid., p. 85); article 13, para. 3, of Geneva Convention III relative to the Treatment of Prisoners of War (ibid., p. 135); article 33, paragraph 3, of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (ibid., p. 287).

person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". 174/

(18) In addition to the prohibition of certain belligerent reprisals, the development of international humanitarian law is also significant in its recognition of the existence of imprescriptible and inviolable rights conferred on individuals by international law. 175/ The requirement of humane treatment based on the principle of respect for the human personality 176/ extends to internal armed conflicts by virtue of common article 3 of the 1949 Geneva Conventions as well as Additional Protocol II


175/ See J. Pictet, Commentary to Geneva Convention I, op. cit., commentary to article 7, p. 82, which states as follows:

"In the development of international law the Geneva Convention occupies a prominent place. For the first time, with the exception of the provisions of the Congress of Vienna dealing with the slave-trade, which were themselves still strongly coloured by political aspirations, a set of international regulations was devoted, no longer to State interests, but solely to the protection of the individual. The initiators of the 1864 and following Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights were attached to it even when hostilities were at their height (citations omitted)."

176/ "The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them." (J. Pictet, Commentary to Geneva Convention I, op. cit., p. 39.)
thereto of 1977. 177/ According to the commentary to the first Geneva Convention, this common provision "makes it absolutely clear that the object of the Convention is a purely humanitarian one ... and merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself." 178/ Thus, common article 3 prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts 179/ as well as any other reprisal incompatible with the absolute


178/ J. i^ctet, Commentary to Geneva Convention I, op. cit., p. 60.

179/ The first paragraph of common article 3 provides as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."
requirement of humane treatment. 180/ The requirement of humane treatment in non-international armed conflicts applies to all protected persons without discrimination, including foreign nationals notwithstanding the absence of a specific reference to nationality in the non-discrimination clause contained in paragraph 1 of common article 3. 181/

(19) The recognition of essential rules of humanity and inviolable rights which led to the prohibition of reprisals in time of international or internal armed conflict led to similar restrictions on reprisals in time of peace. 182/ The general character of the humanitarian limitation on reprisals was recognized in the award in the Naulilaa case which stated that a lawful reprisal must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States". 183/ Similarly,

180/ See, for example, J. Pictet, Commentary to Geneva Convention I, op. cit., p. 55, which states as follows:

"Reprisals ... do not appear here in the list of prohibited acts. Does that mean that reprisals, while formally prohibited under article 46, are allowed in the case of non-international conflicts, that being the only case dealt with in article 3? As we have seen, the acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the 'humane treatment' demanded unconditionally in the first clause of subparagraph (1)."

181/ See J. Pictet, Commentary to Geneva Convention I, op. cit., p. 56, stating as follows:

"To treat aliens in a civil war in a manner incompatible with humanitarian requirements, or to believe that one was justified in letting them die of hunger or in torturing them, on the grounds that the criterion of nationality had been omitted, would be the very negation of the spirit of the Geneva Conventions."

182/ See F. Lattanzi, op. cit., pp. 293-302; similarly A. De Guttry, op. cit., pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice. He listed a number of actions condemned by the laws of warfare, although constituting a minus as compared to warfare itself, and concluded that these actions were to be condemned a fortiori in peacetime (Corso di diritto internazionale pubblico, vol. III (Rome, 1915), pp. 166-67).

the International Law Association in its 1934 resolution stated that in the
exercise of reprisals a State must "s'abstenir de toute mesure de rigueur qui
serait contraire aux lois de l'humanité et aux exigences de la conscience
publique". 184/ More specifically, the League of Nations Assembly's
debates on the implementation of article 16 of the Covenant emphasized that
the economic measures to be applied in case of aggression should not endanger
humanitarian relations. 185/

(20) The inhumane consequences of a reprisal may be the direct result of
measures taken by a State against foreign nationals 186/ within its
territory or the indirect result of measures aimed at the wrongdoing State.
The following cases, while purely illustrative and cited without prejudice to
the positions of the States concerned, may be considered as examples of
humanitarian limitations on measures with direct consequences for foreign
nationals in the territory of the acting State. As early as 1888, following
the violation by the United States of the 1880 Treaty on the establishment of
Chinese nationals (the "Chinese Exclusion Act"), China, while suspending
performance of its treaty obligations towards the United States, decided
nevertheless to respect, for reasons of humanity, the rights of United States
nationals under Chinese jurisdiction. 187/ More recently, during the
Falkland-Malvinas crisis, the United Kingdom froze Argentinean assets in the
country, but with the specific exception of the funds which would normally be
necessary for "living, medical, educational and similar expenses of residents
of the Argentine Republic in the United Kingdom" and for "payments to meet
travel expenditures by residents of the Argentine Republic leaving the
United Kingdom". 188/


185/ League of Nations, Reports and Resolutions on the Subject of
Article 16 of the Covenant, 13 June 1927, pp. 11 ff.

186/ In this regard, the comment to article 905 of the Third Restatement
of the Law expresses the view that "Self-help measures against the offending
State may not include measures against the State's nationals that are contrary
to the principles governing human rights and the treatment of foreign
nationals" (Restatement, op. cit., p. 381).


188/ Notice of the Bank of England issued on 3 April 1982, in British
With regard to humanitarian limitations on measures with indirect consequences on the nationals of the target State, mention may be made of the following examples, which again are cited without prejudice to the positions of the States concerned. After the killing of 85 young people on 15 May 1979, at Bangui, by the personal security forces of Bokassa, ruler of the Central African Republic, France, in retaliation, suspended a financial cooperation agreement with that country, but excluded from the measure financial assistance in the fields of education, food and medicine. In declaring, in 1986, a total blockade of trade relations with Libya, the United States prohibited the export "to Libya of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes". Following the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly intended for humanitarian assistance".

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189/ Some authors are of the view that humanitarian considerations prevent an injured State from terminating or suspending any part of a treaty providing forms of economic assistance to the offending State with a view to improving the conditions of a part of the latter's population: see A. Cassese, Il Diritto internazionale, op. cit., p. 271; and L. Boisson de Chazournes, op. cit., Chapter III, Part A, Section 3, para. 3.3, p. 153. Similarly, O.Y. Elagab, op. cit., p. 194, is of the opinion that consideration should be given to the "factor of dependence and reliance" by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in the case of measures directed against developing countries. However, not all authors favour such a broad interpretation of the humanitarian restriction on countermeasures. For example, see B. Conforti, op. cit., p. 360.


191/ American Journal of International Law, vol. 80, 1986, p. 630. A very similar provision is contained in Executive Order No. 12722, by which the United States took measures against Iraq following the invasion of Kuwait (text in American Journal of International Law, vol. 84, 1990, p. 903, particularly Section 2 (b)).

(22) The fact that humanitarian considerations are taken into account by States even in applying measures of mere retortion, in view of the fact that they consider the interest infringed not to be legally protected, makes the restriction for humanitarian reasons even more significant than it would be if it were limited to reprisals. 193/ The general applicability of this restriction is also a consequence of the character of countermeasures as essentially a matter between the States concerned and of the need to ensure that such measures have minimal effects on private parties in order to avoid collective punishment. 194/

(23) The humanitarian constraint on the ability of an injured State to resort to countermeasures is essentially determined by the fundamental requirements of humane treatment. As a result of its unprecedented development in recent years, the law of human rights provides a minimum standard of humane treatment by identifying certain inviolable human rights which may not be suspended or

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193/ The prohibition of reprisals in time of war contained in the Geneva Conventions does not necessarily extend to measures of retortion. See, for example, the commentary to article 46 of Geneva Convention I, op. cit., p. 347 which, after recognizing the apparent desirability of prohibiting such measures, states as follows at p. 342:

"What matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum. In the case of benefits which go beyond this minimum, it is admissible that a belligerent should not agree to accord them except on a basis of reciprocity. There might even be a risk of discouraging the granting of such benefits, if it were insisted that they should in no case be subject to retortion. It therefore appears more prudent to conclude that article 46 applies only to reprisals as defined at the beginning of the commentary on the present article."

194/ The collective punishment aspect of prohibited reprisals is discussed indirectly in the commentary to common article 3 of Geneva Convention I, op. cit., p. 54, as follows: "The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish."
derogated from even in time of war or other public emergency. 195/ In this regard, the International Covenant on Civil and Political Rights recognizes the inviolability of certain rights by excluding them from the scope of application of the clause authorizing States Parties to derogate from their obligations under the Covenant in case of "public emergency which threatens the life of the nation". 196/ The Covenant excludes derogations from article 6 on the right to life, article 7 on the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, article 8 on the right not to be held in slavery or in servitude, article 11 on the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, article 15 on the right flowing from the principle nullum crimen sine lege, nulla poena sine lege, article 16 on the right to recognition as a person before the law, and article 18 on the right to freedom of thought, conscience and religion. Regional human rights instruments, such as the American Convention on Human Rights 197/ and the

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197/ Article 27 of the American Convention on Human Rights prohibits the suspension of certain rights, even in time of war or public emergency, namely the right to juridical personality (article 3), the right to life (article 4), the right to humane treatment (article 5), freedom from slavery (article 6), the right not to be subjected to ex post facto laws (article 9), freedom of conscience and religion (article 12), the rights of the family (article 17), the rights of the child (article 19), the right to nationality (article 20), the right to participate in government (article 23), "or of the other judicial guarantees essential for the protection of such rights" (ILM, vol. 9, 1970, p. 101).
European Convention on Human Rights, 198/ as well as doctrine 199/ provide further support for the notion of essential or core human rights from which no derogation is permissible, although there are some differences in the enumeration of such rights.

(24) The phrase "basic human rights" limits the scope of the text to the "core" of human rights which may not be derogated by way of countermeasures or otherwise. The Commission preferred the phrase "basic human rights", chosen by the International Court of Justice in its judgment in the Barcelona Traction case, 200/ to the phrase "fundamental human rights" which appears in Article 1, paragraph 3 of the United Nations Charter and the interpretation of which might be undesirably influenced by its use in the present context.

198/ Article 15 of the European Convention on Human Rights prohibits derogations, even in time of war or other public emergency, from article 2 on the right to life, article 3 on the right not to be subjected to torture, other inhuman or degrading treatment, article 4, para. 1, on the right not to be subjected to slavery or servitude, or article 7 on the principle nullum crimen sine lege, nulla poena sine lege (United Nations, Treaty Series, vol. 213, p. 221).

199/ For a discussion of non-derogable rights as a matter of conventional law, see F. Lattanzi, op. cit., pp. 15 ff. According to Buergenthal, "an international consensus on core rights is to be found in the concept of 'gross violations of human rights' and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, torture, mass killings and massive arbitrary deprivations of liberty are gross violations" (Th. Buergenthal, "Codification and Implementation of International Human Rights" in Human Dignity, The Internationalization of Human Rights, L. Henkin ed., Aspen Institute for Humanistic Studies, New York, 1979, p. 17). In El Kouhene's opinion there is an "absolute minimum of the rights of a human being" which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude (El Kouhene, Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme (Dordrecht-Boston-Lancaster, 1986, p. 109.)) Medina-Quiroga also believes that some human rights qualify as "core rights" (C. Medina-Quiroga, The Battle of Human rights. Gross, Systematic Violations and the Inter-American System (Dordrecht-Boston-London, p. 13.)) Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "... except in a few cases (e.g. the right to life or to freedom from torture), to choose which rights are more important than others is exceedingly difficult" (T. Meron, "On a hierarchy of international human rights", American Journal of International Law, vol. 80, 1986, p. 4). The most essential among human rights may be those the promotion and observance of which are the object of customary international law.

Furthermore, the Commission used the phrase "derogate from" rather than "not in conformity with" to avoid duplicating the idea of prohibition which is the essence of article 14.

(25) Subparagraph (e) concerns the general restriction on the right of an injured State to resort to countermeasures resulting from the legal necessity to comply with a peremptory norm of international law. The Commission has implicitly recognized the existence of this restriction in Part One of the project: firstly, by including among the circumstances precluding wrongfulness the fact that "the act constitutes a measure legitimate under international law ... in consequence of an internationally wrongful act" (article 30); secondly, when it has stressed the inviolability of peremptory norms even when there is the consent of the State in favour of which the infringed obligation exists (article 29, para. 2); and thirdly, in case of a state of necessity (article 33, para. 2 (a)). This is consistent with the Vienna Convention on the Law of Treaties which recognizes the unique character of a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Furthermore, the peremptory norm restriction on the ability of an injured State to resort to countermeasures is widely recognized in the contemporary doctrine since the Second World War.

(26) The formulation and structure of subparagraph (e) are intended to indicate its non-exhaustive character and to avoid undesirable a contrario interpretations. Thus, the phrase "any other conduct" is intended to indicate that some types of conduct covered by subparagraphs (a) to (d), notably the threat or use of force, depart from peremptory norms but does not specify whether all the types of conduct listed in those subparagraphs depart from such norms. The Commission is aware that subparagraph (e) may not be strictly necessary since, by definition, jus cogens rules may not be departed from by way of countermeasures or otherwise. The Commission, however, felt that a reference to jus cogens would ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose.

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Article 51

Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Commentary

(1) This article is essentially a chapelle to Chapter IV. The effect of the introduction of article 19 of Part One has been to recognize a category of wrongful acts to which, because of their seriousness, special consequences should attach. Whether that category is called "crimes", or "exceptionally grave delicts" is immaterial in the sense that, however termed, special consequences should attach: otherwise there is no point in distinguishing this category from other internationally wrongful acts. Some members maintained their reservation about the utility or the wisdom of the concept of crime by a State.

(2) An initial problem facing the Commission was to decide how this distinction should be made or by whom. The Commission considered a variety of innovative proposals to overcome this difficulty but finally decided to confine itself to the mechanisms for dispute settlement in Part Three and to the provision of article 39 "Relationship to the Charter of the United Nations".

(3) Thus, in the first instance it would be for the injured State or States to decide that a crime had been committed. This view would be reflected in their demands for reparation for, as article 52 provides, they would be free of certain limitations applying in respect of ordinary delicts as regards their entitlements to both restitution and satisfaction. The Commission would expect the injured States to make clear their view that the conduct they complained of constituted a crime in claiming reparation, if not in earlier protests.

(4) As regards the obligations imposed on all States under article 53 (Obligations of non-recognition, etc.) these would arise for each State as and when it formed the view that a crime had been committed. Each State would bear responsibility for its own decision although, it may be added, there may be cases in which the duty of non-recognition, or the duty of non-assistance, for example, might flow from mandatory resolutions of the Security Council or from other collective actions duly taken.

(5) In any event, if the wrongdoing State chose to challenge the decisions of other States that it had committed a crime, then a dispute would arise. That dispute could then be pursued via the procedures for settlement of disputes in Part Three. The options of negotiations, conciliation, arbitration - or, indeed, reference to the International Court of Justice under its existing Statute - would all be available to the State accused of the crime.

*/ Report ... forty-eighth session, pp. 164-167.
(6) The Commission recognizes that the State so accused might seek a speedier resolution of its dispute than the procedures in Part Three would allow, particularly recourse to those in the Charter of the United Nations.

(7) Nevertheless, it should be pointed out that a number of members of the Commission favoured different proposals. The Commission believes Member States should be aware of these proposals and comment on them specifically should they so wish. In the event that either proposal received wide support, the Commission could return to it during the second reading.

(8) One such proposal was that contained in the draft articles submitted by the Special Rapporteur in his seventh report (1995) and referred by the Commission to the Drafting Committee following the debate on that report. 260/

(9) Another such proposal envisaged two stages. In the first stage either party could require the Conciliation Commission to state in its final report whether there was prima facie evidence that a crime had been committed. This would require an addition to article 57.

(10) An affirmative view by the Conciliation Commission would "trigger" the second stage, allowing either party unilaterally to initiate arbitration. This could be achieved by amending article 58, in effect making arbitration compulsory for crimes, as for countermeasures.

(11) The first stage would act like a filter, preventing abuse, and the second stage involving compulsory arbitration could bear a certain analogy to the requirement of compulsory jurisdiction for the International Court of Justice over disputes arising from pleas of jus cogens under articles 53 or 64 of the Vienna Convention on the Law of Treaties.

(12) The proposals dealt with in the preceding paragraphs (8 to 11) envisaging a two-step procedural mechanism for determining disputes as to whether a crime has been committed are based on the idea that such disputes are too important to be left to the general procedures of Part Three. In order to avoid any possible abuse, these proposals provided that disputes to which the application of article 19 might give rise should be submitted to an impartial third party with decision-making power.

(13) On the other hand, some members of the Commission felt that the analogy with jus cogens under article 66, subparagraph (a) of the Vienna Convention on

the Law of Treaties, referred to in paragraph (11), should be taken to its conclusion, and that the only appropriate body to fulfil this task was the International Court of Justice, a principal organ of the United Nations, to whose Statute virtually all States are parties, and in whose proceedings other States could intervene. Others found the analogy to jus cogens misleading and unconvincing.

(14) Particular consequences of crimes are of two kinds. The first, which is dealt with in article 52, concerns the relationship between the wrongdoing State and each injured State, it being recalled that under article 40 (2) (g) all other States are defined as "injured States" for this purpose. The second concerns what may be described as the minimum collective consequences of a crime and is dealt with in article 53.

Article 52
Specific consequences

Where an internationally wrongful act of a State is an international crime:

(a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Commentary*/

(1) The specific consequences for the relationship between a wrongdoing State and an injured State in the context of crimes are, for the most part, adequately expressed in articles 41 to 45 dealing with reparation. Of course, the application of those articles to the gravest breaches of international law, such as crimes, will entail serious consequences: it is simply that for the most part the formulation of articles 41 to 45 is adequate to respond to the most serious, as well as lesser, breaches of international law.

(2) In two respects, however, the limitations imposed on reparation by articles 41 to 45 seem to be inappropriate in the case of international crimes and some adjustment is necessary. These adjustments concern article 43 (restitution in kind) and article 45 (satisfaction).

(3) As to restitution in kind, there are two limitations on the entitlement of an injured State to this remedy, contained in subparagraphs (c) and (d) of paragraph 1 of article 43, which the Commission believes ought not to apply in

*/ Report ... forty-eighth session, pp. 167-169.
the case of a crime. The first, subparagraph (c) normally limits the entitlement to restitution where the wrongdoing State can show that to grant restitution (as opposed to an award of compensation) would impose on it, the wrongdoing State, a burden disproportionate to the benefit secured by the injured State in obtaining restitution. The Commission believes this limitation ought to be removed in the case of a crime. Restitution is essentially the restoration of the situation as it existed prior to the unlawful act, and the Commission believes a wrongdoing State ought never to be able to retain the fruits of its crime, or benefit from a wrongdoing that is a crime, however painful or burdensome restoration might be.

(4) The Commission would emphasize that, in removing this limitation it is not eliminating "proportionality" which, as a general concept, pervades the whole field of remedies. In the Commission's view, the restoration of the original situation can hardly be said to be "disproportionate" in the majority of cases, and should never be so regarded in the case of crimes.

(5) The second limitation, in subparagraph (d) of article 43, excludes restitution where this would "seriously jeopardize the political independence or economic stability" of the wrongdoing State. The Commission does not believe this to be a valid reason for refusing restitution when the wrongdoing State is being required to give up the results of a crime.

(6) As to satisfaction, the effect of paragraph 3 of article 45 is to exclude demands for satisfaction which would "impair the dignity of" the wrongdoing State. The Commission would exclude this limitation in relation to satisfaction for a crime simply because, by reason of its crime, the wrongdoing State has itself forfeited its dignity. The Commission would note, however, that the limitation in paragraph 2 (c) would remain, so that a claim for damages would have to remain proportionate to the gravity of the crime.

(7) The Commission sees no need to alter or qualify the other legal consequences of crimes as formulated in articles 41 to 45. The obligation of cessation must apply equally to wrongful acts and crimes. So, too, must the obligation to make full reparation. The Commission equally has no doubts that the injured State's entitlement to compensation should be unaffected. Thus articles 41, 42 and 44 would appear to require no modification.

(8) The Commission wondered whether "punitive damages" or "exemplary damages" may be appropriate in the case of a crime. According to some members article 45, on satisfaction, already allows for this possibility in so far as satisfaction may include "in cases of gross infringement of the rights of the
injured State, damages reflecting the gravity of the infringement*. And, finally, the entitlement to an assurance or guarantee of non-repetition is appropriate to both crimes and other wrongful acts.

**Article 53**

Obligations for all States

An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;
(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

**Commentary***/

(1) By virtue of this text obligations are imposed on all States and the involvement of all States is believed to reflect the interest of all States in the prevention and suppression of international crimes which, by definition (in article 19), impair "fundamental interests of the international community".

(2) The obligations are both negative and positive. In the first category there are obligations of non-recognition and obligations to refrain from assisting the wrongdoing State: these are contained in paragraphs (a) and (b). These reflect an already well-established practice. The requirement of non-recognition can be seen, for example, in Security Council resolutions on Rhodesia (e.g. Security Council resolution 216 (1965)) and on Kuwait (e.g. Security Council resolution 661 (1990)). The obligation not to aid or assist a wrongdoing State finds reflection in Security Council resolutions on South Africa (e.g. Security Council resolution 301 (1971), 418 (1977) and 569 (1985)) and on Portuguese colonial territories (e.g. Security Council resolution 218 (1965)). Assistance to a State committing a crime would itself be an unlawful act, and is therefore properly prohibited.

(3) In the second category are the positive obligations to cooperate with other States in carrying out their obligations under (a) and (b), and in any measures they may take to eliminate the consequences of a crime. All these

*/ Report ... forty-eighth session, pp. 169-170.
obligations rest on the assumption of international solidarity in the face of an international crime. They stem from a recognition that a collective response by all States is necessary to counteract the effects of an international crime. In practice, it is likely that this collective response will be coordinated through the competent organs of the United Nations — as in the case of the resolutions referred to above. It is not the function of the present draft articles to regulate the extent or exercise of the constitutional power and authority of Charter organs — nor, in view of Article 103 of the Charter, is it even possible to do so. But apart from any collective response of States through the organized international community, the Commission believes that a certain minimum response to a crime is called for on the part of all States. Article 53 is drafted so as to express this minimum requirement, as well as to reinforce and support any more extensive measures which may be taken by States through international organizations in response to a crime.
SECRETARIAT NOTE

The draft articles contained in Part Two and Part Three were provisionally adopted from 1983 to 1996 and were originally numbered independently of the numbering of the preceding draft articles contained in Part One. During the completion of the first reading of Part Two and Part Three in 1996, the Commission agreed to various drafting changes in these articles to ensure consistency of terminology and renumbered them to follow sequentially the numbering of the draft articles contained in Part One. The commentaries to the draft articles contained in Part Two and Part Three that were provisionally adopted before 1996 were not amended to reflect these subsequent changes. Thus, the commentary refers to the draft articles as originally adopted and as originally numbered. The original number of each draft article appears between square brackets after the newly numbered draft article to facilitate the use of the references and the cross-references to the articles as previously numbered which are contained in the commentaries.
PART THREE 203/

Settlement of disputes

Article 54 [1]

Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Commentary*/

(1) Article 1 provides for negotiations as a possible first step in the general dispute settlement system. The broad reference to "a dispute
regarding the interpretation or application of the present draft articles" indicates that this provision is part of the general dispute settlement provisions. The consideration of negotiation in the first article of Part Three identifies this method of dispute settlement as the first step in the general dispute settlement system. Negotiation is often the first step in any dispute settlement process either as a means of settling the dispute or reaching agreement on an appropriate dispute settlement procedure or implementing a pre-existing dispute settlement arrangement, for example, by determining the factual issues and the legal issues that constitute the dispute that is to be resolved. The term "negotiation" is used in the broadest possible meaning and encompasses the phase of consultations.

(2) Article 1 provides for negotiation at the request of any party to a dispute relating to the interpretation or the application of the present draft articles. This article recognizes that such a dispute may arise "between two or more States Parties to the present draft articles". The phrase "upon the request of any of them" is used to indicate that the negotiations may be instituted upon the unilateral request of either an injured State or an allegedly wrongdoing State.

(3) The compulsory nature of the negotiation procedure is indicated by the use of the phrase "they shall". The request by one party to the dispute gives rise to the obligation on the part of all parties to the dispute to participate in the negotiations in good faith with a view to settling the dispute. The initiation of the negotiations by "request", a formality that is not usually required for negotiations, is intended to avoid any ambiguity as to the event that gives rise to the obligations of all parties to endeavour to resolve it by negotiation. The phrase "seek to settle it amicably by negotiation" indicates that the obligation to negotiate is one of means rather than result. The parties to the dispute are obligated only to negotiate and not to settle the dispute by means of negotiation. The term "amicably" is used to indicate the conditions that should prevail between the parties in conducting the negotiations with a view to reaching an agreed settlement of their dispute.

(4) The procedural obligation to negotiate provided for in the present article represents a possible restriction on the freedom of choice of the parties to the dispute with respect to settlement procedures in the absence of a more rigorous agreed procedure. However, the parties retain complete control over the compulsory negotiation procedure because of the absence of any third party participation. Furthermore, the results of the negotiations are binding on the parties only to the extent that they agree on a settlement or on a settlement procedure.
Article 55 [2]

Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Commentary*/

(1) Article 2 provides for good offices or mediation as a possible further step in the general dispute settlement system. This provision applies to the same broad category of disputes as contemplated in the preceding article.

(2) There are two ways in which the good offices or mediation procedure envisaged in the present article may be initiated. First, a State which meets the two criteria required to perform the role of the third party in these procedures "may, upon its own initiative ... tender its good offices or offer to mediate". The State must be a party to the draft articles on State responsibility. Any state which is a party to a convention has an interest in the resolution of disputes relating to the interpretation or the application of its provisions. In addition, the third State must not be a party to the dispute. The objectivity and impartiality of the third party is essential to the effective performance of its role in facilitating the resolution of the dispute between the parties. The recognition of the right of such a State to offer to assist the parties in resolving their dispute is intended to avoid the possibility of such an offer being viewed by the parties as an inappropriate attempt to intervene in their dispute. Second, any party to the dispute may request the good offices or mediation procedure envisaged in article 2. The third party procedure initiated by the request of a party to the dispute may be conducted by any State which meets the two criteria.

(3) The second step in the general dispute settlement system is consensual in nature with respect to both the initiation of the procedure and the settlement of the dispute at the conclusion of the procedure. While either the injured State or the wrongdoing State may request good offices or mediation, this third party dispute settlement procedure can be initiated only with the agreement of the parties to the dispute. In this regard, article 2 is consistent with the freedom of choice principle with respect to dispute settlement procedures. Furthermore, the role of the third party is limited "to facilitating an amicable resolution of the dispute." The resolution of the dispute as a consequence of this procedure will depend upon the agreement

*/ Report ... forty-seventh session, pp. 175-176 (commentary to former article 2).
of the parties to the dispute. The term "amicable" is used to indicate the conditions that should prevail between the parties in seeking to achieve an agreed settlement of their dispute by means of the agreed third party procedure.

(4) It is not necessary for the parties to the dispute to have either initiated or completed the compulsory negotiations envisaged in article 1 before agreeing to good offices or mediation under article 2. The parties may agree to attempt to resolve their dispute with the participation of a third party under either of these procedures without any party to the dispute having initiated the compulsory negotiations provided for in article 1. Even if such negotiations have been initiated, the parties may decide that the dispute is unlikely to be resolved by negotiation and agree to proceed to a third party procedure such as those envisaged in article 2. The good offices or mediation procedure may also be viewed as auxiliary to the negotiations of the parties since the purpose of these third party procedures is to facilitate an agreed settlement of the dispute by the parties.

Article 56 [3]

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Commentary*/

(1) Article 3 provides for conciliation as a possible third step in the general dispute settlement system. This article applies to the same broad category of disputes as the two preceding articles. Similarly, the 1949 General Act for the Pacific Settlement of International Disputes provides in article 1 for conciliation in the event that the parties to a dispute are unable to resolve it by means of diplomacy. 204/

(2) The present provision is intended to address situations in which a dispute has not been resolved within a reasonable period by the compulsory negotiations envisaged in article 1 and no binding third party dispute settlement procedure has been instituted. Any party to the dispute may initiate unilaterally the conciliation procedure provided for in the present

*/ Report ... forty-seventh session, pp. 176-178 (commentary to former article 3).

article if two conditions are met. First, the parties to the dispute have failed to reach an agreed settlement of their dispute by whatever means three months after the request for negotiations under article 1. Second, the parties have failed to actually institute and submit their dispute to a binding third party settlement procedure by the end of the same period.

(3) The first condition is intended to give the parties to the dispute a reasonable opportunity to settle their differences without the intervention of a third party. The conciliation procedure provided for in the present article cannot be activated until the parties have attempted to resolve their dispute by means of negotiation for a reasonable period. The 1949 Revised Geneva Act for the Pacific Settlement of International Disputes provides for a similar approach.

(4) The second condition is intended to give preference to the freedom of choice of the parties with respect to the selection of a more rigorous binding third party procedure to settle their dispute. There are two ways in which the parties may institute such a procedure. The parties may institute a binding third party procedure on the basis of a prior agreement or arrangement, for example, a general dispute settlement agreement, an applicable treaty containing a specific dispute settlement provision, or the prior acceptance by the parties of the optional clause contained in Article 36 of the Statute of the International Court of Justice. The parties may also institute such a procedure pursuant to an agreement adopted subsequent to the dispute for the specific purpose of resolving that dispute. The phrase "has been instituted" is very important. It is intended to ensure that the dispute has actually been submitted to a binding third party procedure in one way or the other.

(5) Article 3 permits a party to unilaterally initiate conciliation to avoid the possibility of lengthy negotiations being used as a pretext by one of the parties to delay the settlement of the dispute. Three months was considered to provide the parties with a sufficient period to determine whether it could be resolved by means of negotiation, and, if not, to institute a binding third party procedure of their choice. Both parties may agree to continue the negotiations if neither party decides to unilaterally institute the conciliation procedure envisaged in the present article.

(6) The injured State or the allegedly wrongdoing State may submit the dispute to conciliation under the present article without the consent of any other party to the dispute if the necessary conditions are met. The
compulsory nature of the conciliation procedure provided for in the present article constitutes a step forward in the area of dispute settlement procedures by providing for the participation of a third party in the settlement of the dispute without the consent of all of the parties to the dispute. However, the results of the conciliation are binding on the parties only to the extent that they reach an agreed settlement.

(7) The constitution and the task of the conciliation commission are determined by the Annex and the succeeding article for the purpose of ensuring that the compulsory conciliation procedure envisaged in the present article is not delayed or precluded by the failure of the parties to agree on such matters.

Article 57 [4]

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its later recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Commentary*/

(1) Article 4 sets forth the task of the Conciliation Commission provided for in the preceding article. Paragraph 1 defines in broad terms the general task

*/ Report ... forty-seventh session, pp. 178-182 (commentary to former article 4).
entrusted to the Conciliation Commission, namely (1) to elucidate the questions of law or fact that are disputed by the parties, (2) to collect the information required to shed light on those questions by means of inquiry or otherwise and (3) to endeavour to bring the parties to an agreed settlement of their dispute. This paragraph is similar to article 15 of the Revised General Act for the Pacific Settlement of International Disputes 205/ and article 15 of the 1957 European Convention for the Peaceful Settlement of Disputes. 206/ The remaining paragraphs address in greater detail the performance of this general task in four possible stages.

(2) Paragraph 2 addresses the information gathering stage of the conciliation procedure. The starting-point for the work of the Conciliation Commission is the ascertainment of the position of the parties to the dispute and the identification of the areas of agreement or disagreement. The parties have an obligation to provide the Conciliation Commission with "a statement of their position regarding the dispute and of the facts upon which that position is based" as the first step in the information gathering stage. The Conciliation Commission may require additional information for a proper determination of the relevant facts that are at issue between the parties. Thus, the parties have an obligation to "provide the Commission with any further information or evidence as the Commission may request". The Conciliation Commission may also use a variety of means such as inquiry to gather any other information that may be required to propose a recommended settlement to the parties.

(3) The Conciliation Commission may consider it necessary to conduct independent fact-finding to gather relevant information concerning the dispute. This may include fact-finding within the territory of one or more parties to the dispute depending on the particular facts that are at issue. The parties have an obligation to "assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical." The Conciliation Commission would need to consult with the party to make the necessary practical arrangements for carrying out this fact-finding. The obligation of a State party to a dispute to permit fact-finding within its territory is a significant advancement over the


206/ European Treaty Series No. 23.
present stage of development of the law relating to the peaceful settlement of disputes which generally requires the consent of the State. The Commission was of the view that the parties should permit fact-finding within their territories where necessary to resolve the dispute. The Commission also recognized that there may be exceptional cases in which it would be impractical for a State to permit such fact-finding. In such a case, the party must provide the Conciliation Commission with an explanation of the exceptional reasons for refusing to permit the fact-finding. This requirement is intended to enable the Conciliation Commission to determine whether the refusal is merely an attempt to obstruct the settlement process. The Conciliation Commission may draw appropriate inferences with respect to the disputed facts from the refusal of a party to the dispute to permit fact-finding within its territory. 207/

(4) Paragraph 3 addresses the second stage in the conciliation procedure. After completing the initial information gathering stage, the Conciliation Commission "may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations." These preliminary proposals may serve to expedite the dispute settlement process if the parties agree to the proposed settlement. This optional stage is also intended to provide the Conciliation Commission with an opportunity to obtain the views of the parties with respect to its proposed solution and, if it is not acceptable, to prepare a revised final recommendation in a further effort to achieve a settlement. The Conciliation Commission is not required to submit, nor are the parties entitled to request, any preliminary proposals.

207/ This is consistent with the decision of the International Court of Justice in the Corfu Channel case in which the Court stated as follows:

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

Corfu Channel (Merits, Judgment), I.C.J. Reports 1949, p. 18.
(5) Paragraph 3 is also intended to allow the Conciliation Commission to make preliminary proposals in the nature of interim measures. These measures may, for example, call upon the parties to the dispute to refrain from any action that might cause irreparable harm or further complicate the task of settling the dispute. The Conciliation Commission may propose, on its own initiative and at its discretion, any appropriate interim measures with a view to facilitating a settlement of the dispute. The parties are not entitled to request such measures. The interim measures would be recommendatory in nature in accordance with the non-binding character of the conciliation procedure. The Vienna Convention on the Law of Treaties also provides that the conciliation commission envisaged in the annex thereto "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement." 208/

(6) Paragraph 4 concerns the third stage in the conciliation procedure. After gathering the necessary information and consulting the parties regarding any preliminary proposals, the Conciliation Commission is required to submit to the parties a report containing its recommendations for settling the dispute not later than three months after it has been constituted. This was considered to provide the Conciliation Commission with a reasonable period for completing its task. Furthermore, this relatively short period would not substantially delay the initiation of other dispute settlement procedures if the dispute could not be resolved by conciliation. The Conciliation Commission may specify in its report a period in which the parties are to respond to its recommendations. The parties may respond favourably to the recommendations resulting in an agreed settlement of the dispute. The parties may also respond by indicating that they have certain difficulties with the recommendation. The Conciliation Commission would have an opportunity in the latter instance to consider the views of the parties in making a further attempt to resolve the dispute, as provided for in paragraph 5 of the present article. The Conciliation Commission may impose time-limits on the parties for the submission of their observations on its recommendations to avoid unreasonable delay in the dispute settlement process. The use of the term "recommendations" is consistent with the non-binding character of the conciliation procedure.

Paragraph 5 provides for a possible fourth stage in the conciliation procedure if the parties' response to the Conciliation Commission's recommendations has not resulted in an agreed settlement of the dispute. This final stage is intended to give the Conciliation Commission one last opportunity to bring the parties to the dispute to an agreed settlement. In view of the response of the parties, the Conciliation Commission may conclude that, with some adjustments, its recommendation may provide a basis for an agreed settlement. Thus, the Conciliation Commission may submit to the parties "a final report containing its own evaluation of the dispute and its recommendations for settlement." This is intended to enable the Conciliation Commission to provide the parties with its own assessment of the situation with a view to facilitating an agreed settlement of the dispute rather than its evaluation of the appropriateness of the parties' responses to its recommendations. However, the Conciliation Commission may conclude that submitting a final report would not serve any useful purpose and therefore decide not to submit such a report. For example, the response of the parties may indicate that the Conciliation Commission's recommendations or any variation thereof do not provide a basis for an agreed settlement or the parties may have agreed to initiate another dispute settlement procedure.

Article 58 [5]

Arbitration

1. Failing a reference of the dispute to the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Commentary*/

Article 5 provides for two types of arbitration, namely, (1) voluntary arbitration by agreement of the parties to the dispute in the context of the general dispute settlement system, and (2) compulsory arbitration at the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures as a special regime for settling disputes involving the use of countermeasures.

* Report ... forty-seventh session, pp. 182-184 (commentary to former article 5).
(2) Paragraph 3 provides for arbitration by agreement of the parties to the dispute as a potential fourth step in the general dispute settlement system. It is intended primarily to address situations in which the dispute has not been resolved within a reasonable period as a result of any of the first three steps in the general dispute settlement system provided for in articles 1, 2 and 3 or by any other means. The present paragraph provides that the parties may agree to submit their dispute to arbitration in two situations: (1) the conciliation procedure envisaged in article 3 has not been instituted or (2) the conciliation procedure has been instituted but the parties have failed to reach an agreed settlement of their dispute six months after the Conciliation Commission's non-binding report. The Revised General Act for the Pacific Settlement of International Disputes also provides in article 21 for the possibility of arbitration in the event that a prior conciliation procedure has failed to result in the parties' agreed settlement of their dispute. 209/

(3) The present paragraph is intended to provide for the possibility of a binding third party dispute settlement procedure as an effective means of settling disputes between States parties to the present draft articles within the framework of the general dispute settlement system. The parties may prefer to first attempt to settle their dispute by means of negotiations without the participation of a third party or by means of a non-binding third party procedure before submitting their dispute to a binding third party procedure. However, the parties may also prefer to expedite the dispute settlement process by agreeing to submit their dispute to arbitration or judicial settlement without first attempting to resolve the dispute by other means. Similarly, the parties to the dispute may by agreement determine the terms of reference and the constitution of the arbitral tribunal. In the absence of such an agreement, the parties may submit their dispute to an arbitral tribunal which is constituted in conformity with the Annex and which has the terms of reference provided for in the succeeding article. These residual provisions are intended to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters and that the agreement of the parties to settle their dispute by means of arbitration can be effectively implemented. Nothing would prevent the

parties to a dispute to have recourse to any other tribunal by mutual agreement including in the case envisaged in paragraph 2 of article 5.

(4) Paragraph 2 establishes a special regime of compulsory arbitration if a dispute arises in which the injured State has taken countermeasures. In such a case, the allegedly wrongdoing State which is the object of the countermeasures has the right to initiate unilaterally compulsory arbitration. The injured State for its part does not have the right to unilaterally institute the arbitral proceedings. Rather it is bound after having taken countermeasures to submit to arbitration. The exceptional nature of the special dispute settlement regime for disputes involving the use of countermeasures is indicated by the phrase "In cases, however". Thus, the allegedly wrongdoing State may institute the arbitral proceedings without attempting to first resolve the dispute by any of the other means envisaged in the general dispute settlement system. The phrase "at any time" is used to avoid any ambiguity in this regard.

(5) The countermeasure is the event that triggers the unilateral right of the allegedly wrongdoing State to institute compulsory arbitration. However, the scope of the arbitral proceedings extends not only to the lawfulness of the countermeasure, but also to the underlying dispute which led the injured State to take the countermeasure. This dispute, in its turn, may include not only issues relating to the secondary rules contained in the draft articles on State responsibility, but also the primary rules that are alleged to have been violated. As a practical matter, it would be difficult for an arbitral tribunal to determine the lawfulness of countermeasures without considering such related questions as whether a primary rule has been violated and whether the violation is attributable to the allegedly wrongdoing State. The broader approach to the scope of the arbitral proceedings would also promote a more complete, efficient and effective settlement of the dispute by resolving all of the related issues. There were different views in the Commission as to whether the draft articles on State responsibility should contain such far-reaching dispute settlement provisions.

(6) The terms of reference and the constitution of the arbitral tribunal for purposes of the compulsory arbitration are determined by the succeeding article and the Annex to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters.
Article 59 [6]

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles, shall operate under the rules laid down or referred to in the Annex to the present draft articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Commentary*/

(1) Article 6 defines the general terms of reference of the Arbitral Tribunal referred to in article 5 and paragraph 2 of article 7.

(2) Paragraph 1 provides that the Arbitral Tribunal shall decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles". The first criterion recognizes that the dispute referred to the Arbitral Tribunal is determined by the issues of fact or law that are identified by the parties to the dispute as the subject of their disagreement. The second criterion is standard language used in the dispute settlement provisions contained in international agreements. The Commission recognized that this criterion required a degree of flexibility in the context of the present draft articles to ensure a resolution of the dispute between the parties. The Arbitral Tribunal may need to consider various factual and legal issues in order to resolve a dispute concerning the interpretation or the application of the provisions of the present draft articles, including those relating to countermeasures. For example, the Arbitral Tribunal may need to consider issues regarding the primary rules of international law relied on by the parties, the alleged violations of these rules, the attribution of any such violation to the allegedly wrongdoing State, the lawfulness of any countermeasures and the consequences of a violation of international law by either party with respect to any initial wrongful act or any unlawful countermeasures. The phrase "any issue" is used to cover all issues of fact or law that may need to be decided by the Arbitral Tribunal to settle the dispute between the parties relating to the present draft articles.

(3) Paragraph 1 also provides that the Arbitral Tribunal shall decide any relevant issues "with binding effect" in conformity with the customary binding

*/ Report ... forty-seventh session, pp. 185-186 (commentary to former article 6).
nature of arbitral awards. The Arbitral Tribunal may also need to issue binding interim or protective measures to facilitate a resolution of the dispute between the parties, including ordering the cessation of the wrongful act and the suspension of countermeasures. These measures would be of an interim nature pending the final resolution of the dispute by means of the arbitral award. The Arbitral Tribunal has the inherent power to issue such binding interim or protective measures as may be necessary to ensure the effective performance of the task with which it has been entrusted, namely the resolution of the dispute between the parties. This is consistent with the binding nature of this third party dispute settlement procedure. The Commission considered that the powers and procedures of an arbitral tribunal, including the power to order interim measures, were generally understood and did not need to be elaborated in the present paragraph.

(4) The present article provides that the Arbitral Tribunal must submit its decision to the parties "within six months from the date of completion of the parties' written and oral pleadings and submissions". The Commission deemed it useful to provide a time-limit for the completion of the work of the Arbitral Tribunal and considers that six months from the date of the final submissions of the parties is a reasonable period for doing so.

(5) Paragraph 2 provides that the Arbitral Tribunal "shall be entitled to resort to any fact-finding it deems necessary for the determination of the case". This paragraph recognizes the importance of an arbitral tribunal being able to resort to fact-finding when it considers this to be necessary to determine the facts at issue between the parties. The Arbitral Tribunal is entitled to engage in "any fact-finding" that it considers to be necessary to resolve the disputed factual issues, including fact-finding within the territory of a party to the dispute. Although the parties are not obligated to permit such fact-finding under this paragraph, the Commission considered that they should be encouraged to do so to facilitate the work of the Arbitral Tribunal and the settlement of their dispute. Furthermore, the Arbitral Tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding, as discussed in relation to article 4.

Article 60 [7]

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.
2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Commentary*

(1) Article 7 addresses the situation that may arise following an arbitration if one of the parties to the dispute should challenge the validity of the resulting arbitral award. This situation may arise with respect to a dispute that is submitted to arbitration by agreement under the general dispute settlement system or by the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures under the special dispute settlement system set forth in the present articles. This article is intended to discourage a party to any dispute from asserting frivolous claims of nullity as a means of avoiding compliance with an unfavourable arbitral award. It is also intended to prevent a party to a dispute involving the use of countermeasures from undermining the special dispute settlement regime with respect to those disputes by ignoring the results of the compulsory arbitration based on spurious assertions of nullity. If the parties fail to institute another procedure for settling the dispute relating to the validity of the award, the present article provides for a mechanism for resolving this dispute by instituting proceedings before the International Court of Justice at the unilateral request of any party. There were different views as to whether these situations should be addressed in Part Three. Some members expressed concern about adding an additional layer to the dispute settlement process by introducing a role for the International Court of Justice in relation to arbitral proceedings. The Commission decided to include the present article - not to provide for an appeal procedure - but to ensure the effectiveness of the arbitration envisaged in article 5 as a means of settling disputes between States parties to the present draft articles. This provision is similar to articles 36 and 37 of the Model Rules on Arbitral Procedure.

(2) Paragraph 1 is intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. This paragraph provides that any party to the dispute may, by making a timely request, unilaterally refer a dispute relating to the validity of an arbitral award to the International Court of Justice if two conditions are

*/ Report ... forty-seventh session, pp. 186-189 (commentary to former article 7).
met. First, any party to the dispute has challenged the validity of the arbitral award. Second, the parties have failed to agree to submit the dispute concerning the validity of the arbitral award to another tribunal within three months of the date of the award. The timeliness of the challenge of the validity of an arbitral award and the corresponding request for a judicial determination of its validity may vary depending on the particular grounds for nullity, as recognized in the Model Rules on Arbitral Procedure. 210/

(3) The competence of the International Court of Justice in the judicial proceedings envisaged in the first paragraph of the present article would be limited to either (1) confirming the validity of the arbitral award in the absence of any grounds for nullity or (2) declaring the total or partial nullity of the award on specified grounds. The Commission noted that the possible grounds for challenging the validity of an arbitral award were set forth in article 35 of the Model Rules on Arbitral Procedure. 211/ The Court would not be competent to review the factual or the legal determinations of the arbitral tribunal as such or the merits of the award. Thus, the present paragraph provides for a limited judicial proceeding concerning the

210/ Article 36 of the Model Rules permits a party to challenge the validity of an arbitral award within six months of the rendering of the award on the following two grounds: (1) the tribunal has exceeded its powers or (2) the tribunal has failed to state the reasons for the award or seriously departed from a fundamental rule of procedure. The same article provides that a party may also challenge the validity of the arbitral award within 6 months of the discovery of relevant information and in any event within 10 years of the rendering of the award on the following 2 grounds: (1) corruption on the part of a member of the tribunal or (2) the nullity of the undertaking to arbitrate or the compromis. Yearbook ... 1958, vol. II, p. 86.

211/ Article 35 of the Model Rules on Arbitration provides as follows:

The validity of an award may be challenged by either party on one or more of the following grounds:

(a) That the tribunal has exceeded its powers;

(b) That there was corruption on the part of a member of the tribunal;

(c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

(d) That the undertaking to arbitrate or the compromis is a nullity.

Yearbook ... 1958, vol. II, p. 86.
validity of an arbitral award and not an appellate or a general review proceeding with respect to the merits of the award. There have been two such proceedings before the International Court of Justice. 212/ The arbitral award would remain final and binding on the parties to the dispute in the absence of a declaration of nullity. A decision of the International Court of Justice confirming the validity of an arbitral award would not provide a basis for recourse to the Security Council in the event of non-compliance with the arbitral award under Article 94 of the United Nations Charter since the obligations with respect to the settlement of the dispute are incumbent upon the parties by virtue of the arbitral award rather than the judicial decision confirming its validity.

(4) Paragraph 2 addresses the situation in which the arbitral proceeding has failed to resolve the dispute between the parties as a consequence of a subsequent judicial proceeding declaring the invalidity of all or part of the arbitral award. The present paragraph provides that any party to the dispute may unilaterally submit the dispute consisting of the unresolved issues to a new arbitration in conformity with article 6. This arbitral proceeding could be viewed as the continuation or the completion of the voluntary arbitration agreed to by the parties or the compulsory arbitration initiated by the allegedly wrongdoing State against which countermeasures were taken under paragraphs 1 and 2, respectively, of article 5. The term "new" is used to indicate that the dispute consisting of the unresolved issues is to be settled by a new arbitral tribunal constituted in conformity with the Annex and with the terms of reference provided for in article 6. This is intended to ensure the availability of an effective procedure for resolving the continuing dispute between the parties without any unnecessary delay.

Annex I
The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

212/ See the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (I.C.J. Reports 1960, p. 192) and Arbitral Award of 31 July 1989, Judgment (I.C.J. Reports 1991, p. 53).
2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:
   (i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
   (ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.
(1) Article 1 of the Annex provides for the constitution and the procedure of the Conciliation Commission envisaged in article 3 of Part Three.

(2) Paragraph 1 provides for a list of conciliators consisting of qualified jurists to be drawn up and maintained by the Secretary-General of the United Nations. Such a list is intended to facilitate the constitution of a conciliation commission without unnecessary delay following the initiation of this procedure under article 3 of Part Three. The present paragraph is similar to paragraph 1 of the Annex to the Vienna Convention on the Law of Treaties.

(3) Paragraph 2 establishes the procedure by which a party to the dispute may unilaterally initiate the compulsory conciliation provided for in article 3 of Part Three, namely by submitting a request to the Secretary-General leading to the constitution of the Conciliation Commission. The present paragraph, which is self-explanatory, sets out the procedure for the constitution of the Conciliation Commission and the selection of its chairman. This provision is similar to paragraph 2 of the Annex to the Vienna Convention on the Law of Treaties.

(4) Paragraph 3 provides for the continuation of the compulsory conciliation envisaged notwithstanding the failure of a party or parties to the dispute to participate in the procedure. The present paragraph is similar to article 12 of Annex V of the United Nations Convention on the Law of the Sea.

(5) Paragraph 4 addresses the situation in which there is a disagreement between the parties as to the competence of the Conciliation Commission. This paragraph provides that the Conciliation Commission shall decide any such question. This is a generally recognized principle with respect to third party dispute settlement procedures. The present paragraph is similar to article 13 of Annex V of the United Nations Convention on the Law of the Sea.

(6) Paragraph 5 provides that the Conciliation Commission shall determine its own procedure. It further provides that the Commission shall take "decisions" by a majority vote of the five members. The term "decisions" must be viewed in the light of the non-binding character of the conciliation procedure under

*/* Report ... forty-seventh session, pp. 189-192 (commentary to former article 1 of Annex).
which the Conciliation Commission’s decisions are recommendatory in nature.
This paragraph is similar to paragraph 3 of the Annex to the Vienna Convention
on the Law of Treaties.

(7) Part Three recognizes that disputes may arise involving more than
two State parties to the draft articles on State responsibility. Paragraph 6
of the present article indicates that the provisions relating to the
constitution of the Conciliation Commission shall apply to multilateral
disputes to the extent possible. This paragraph is similar to article 3 (h)

Annex II

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2,
shall consist of five members. The parties to the dispute shall each
appoint one member, who may be chosen from among their respective
nationals. The three other arbitrators including the Chairman shall be
chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within
a period of three months from the date on which one of the parties
requested the other party to constitute an arbitral tribunal, the necessary
appointments shall be made by the President of the International Court of
Justice. If the President is prevented from acting or is a national of one
of the parties, the appointments shall be made by the Vice-President. If
the Vice-President is prevented from acting or is a national of one of the
parties, the appointments shall be made by the most senior member of the
Court who is not a national of either party. The members so appointed
shall be of different nationalities and, except in the case of appointments
made because of failure by either party to appoint a member, may not be
nationals of, in the service of or ordinarily resident in the territory of
a party.

3. Any vacancy which may occur as a result of death, resignation or any
other cause shall be filled within the shortest possible time in the manner
prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw
up an agreement specifying the subject-matter of the dispute, unless they
have done so before.

5. Failing the conclusion of an agreement within a period of
three months from the date on which the Tribunal was constituted, the
subject-matter of the dispute shall be determined by the Tribunal on the
basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration
procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its
own procedure. Decisions of the Tribunal shall be made by a majority vote
of the five members.
(1) Article 2 of the Annex provides for the constitution and the procedure of the Arbitral Tribunal envisaged in article 5 of Part Three.

(2) Paragraph 1 provides that the Arbitral Tribunal shall consist of five members, including the Chairman, appointed in conformity with the procedure set forth in the present paragraph. This provision, which is self-explanatory, is similar to article 22 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 of Annex VII to the United Nations Convention on the Law of the Sea. The Commission did not consider it necessary to provide for the maintenance of a list of potential arbitrators, as provided for in the latter instrument.

(3) Paragraph 2 addresses the situation in which there is a failure to appoint one or more members of the Arbitral Tribunal by the procedure envisaged in the preceding paragraph within a reasonable period of time. Three months following the request for the constitution of the Arbitral Tribunal was considered to provide a sufficient period for the appointment of its members. In such a case, the President, Vice-President or the senior member of the International Court of Justice would appoint the remaining members of the Arbitral Tribunal, as envisaged in the present paragraph. This paragraph is intended to avoid any unreasonable delay in the constitution of the arbitral tribunal by providing an effective means for the appointment of its members by an objective and impartial third party in the event that the procedure envisaged in paragraph 1 fails to result in the appointment of all five members. The appointments made under the present paragraph may result in one - but not more than one - member of the Arbitral Tribunal being a national of a party to the dispute in accordance with paragraph 1. The additional conditions provided for in paragraph 2 are further attempts to ensure the impartiality of the members appointed by the procedure envisaged in the present paragraph. Paragraph 2 is similar to article 3 of Annex VII to the United Nations Convention on the Law of the Sea and article 3 of the Model Rules on Arbitral Procedure.

(4) Paragraph 3 provides for the appointment of a member of the Arbitral Tribunal in the event of a vacancy by the same procedure provided for the initial appointment. The phrase "within the shortest possible time" is

*/* Report ... forty-seventh session, pp. 192-194 (commentary to former article 2 of Annex).
intended to avoid any unnecessary delay in the arbitral procedure. This paragraph is similar to article 24 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 (f) of Annex VII of the United Nations Convention on the Law of the Sea.

(5) Paragraph 4 recognizes the obligation of the parties to agree on the specific subject-matter of the dispute to be submitted to arbitration, once the Arbitral Tribunal has been established, if they have not already done so. This paragraph is consistent with the customary practice in arbitration. It is similar to article 25 of the 1949 Revised General Act for the Pacific Settlement of Disputes.

(6) Paragraph 5 enables the Tribunal to determine the dispute based on the application for arbitration if the parties have failed to agree as envisaged in the preceding paragraph three months after the constitution of the Arbitral Tribunal. The present paragraph is intended to avoid any unnecessary delay in the commencement of the arbitral procedure once the Tribunal has been constituted. Paragraphs 4 and 5 are similar to article 8 of the Model Rules on Arbitral Procedure.

(7) Paragraph 6 provides for the continuation of the arbitral procedure in the event of the failure of a party to participate in the procedure. This provision is intended to ensure that the dispute is effectively resolved by means of arbitration notwithstanding any attempt by a party to obstruct the dispute settlement process. This paragraph is similar to article 9 of Annex VII to the United Nations Convention on the Law of the Sea. Article 1, paragraph 3 of the present Annex contains a similar provision with respect to conciliation.

(8) Paragraph 7 indicates that the Arbitral Tribunal shall determine its own procedure unless the parties have otherwise agreed with respect to its procedure. Decisions of the Tribunal are to be taken by a majority vote. This paragraph is similar to article 5 of Annex VII to the United Nations Convention on the Law of the Sea and article 12 of the Model Rules on Arbitral Procedure.

(9) It has not been felt necessary to lay down, in relation to the Arbitral Tribunal, all the rules provided for in article 1 of the Annex concerning the Conciliation Commission. In the view of the Commission, those rules are well-established in the case of arbitration and are of a customary character.