A/CN.4/SER.A/1979/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1979

Volume II
Part One

Documents of the thirty-first session
(excluding the report of the Commission
to the General Assembly)

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NOTE

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

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

Part One of volume II contains the reports of the Special Rapporteurs discussed at the session and certain other documents. Part Two of the volume contains the Commission's report to the General Assembly.

All references in the present volume to those reports and documents, as well as quotations from them, are to the edited version of those texts as they appear in volume II of the *Yearbook.*

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CONTENTS

FILLING OF CASUAL VACANCIES IN THE COMMISSION

[Agenda item 1]

DOCUMENT A/CN.4/317

Note by the Secretariat

[*Original: English*]
[*24 February 1979*]

1. Following the election on 31 October 1978 of Mr. Roberto Ago, Mr. Abdullah El-Erian and Mr. José Sette-Câmara as judges of the International Court of Justice, three seats have become vacant on the International Law Commission.

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

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

Article 2 reads:

> 1. The Commission shall consist of twenty-five members who shall be persons of recognized competence in international law.
>
> 2. No two members of the Commission shall be nationals of the same State.
>
> 3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

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

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

STATE RESPONSIBILITY

(Agenda item 2)

DOCUMENT A/CN.4/318 AND ADD.1–4*

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

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

[*Original: French*]
[*24 January, 5 February and 15 June 1979*]

CONTENTS

ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
C.N.R.S.	Centre national de la recherche scientifique (France)
I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
ILO	International Labour Organisation
P.C.I.J.	Permanent Court of International Justice
P.C.I.J., Series A	Collection of Judgments (through 1930)
Series C, —Nos. 1–19	P.C.I.J., *Acts and Documents relating to Judgments and Advisory Opinions given by the Court* (through 1930)
Series C, —Nos. 52–88	P.C.I.J., *Pleadings, Oral Statements and Documents* (beginning in 1931)
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

* See footnote 207 below.

** The present report is a continuation of the seventh report on State responsibility, submitted by the Special Rapporteur to the Commission at its thirtieth session (*Yearbook ... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2).

CHAPTER IV

Implication of a State in the internationally wrongful act of another State (*concluded*)[1]

2. INDIRECT RESPONSIBILITY OF A STATE FOR THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

1. In the introduction to this chapter, we explained that two separate cases would be dealt with successively under the one heading "Implication of a State in the internationally wrongful act of another State". The first case was that of a State which participated in the independent commission by another State of an internationally wrongful act by sending aid or assistance to the latter State. We noted that this case was characterized by the fact that, along with the responsibility of the actual perpetrator of the internationally wrongful act, an ulterior responsibility would be incurred by the State which had contributed, in any of the forms indicated, to the commission of the internationally wrongful act in question. This case was the subject of section 1. The second case (to be considered in this section) is that of a State which, while not necessarily taking part in the commission by another State of an internationally wrongful act and not especially rendering aid or assistance to it, is in a special situation vis-à-vis that other State—a situation such as to justify its being held indirectly responsible, at the international level, for the wrongful act of the other State, in place of the latter State, which committed the act in question.

2. Draft article 1, as adopted by the Commission in first reading,[2] provides that:

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

However, as indicated in the commentary to that article:

... 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.[3]

The purpose of this section is therefore to determine whether there are cases in which the international responsibility arising out of an internationally wrongful act should devolve upon a State other than the one to which the act in question is attributed. In other words, the issue is *indirect responsibility or responsibility for the act of another.*

3. The expression "indirect" or "vicarious responsibility" ("*responsabilité indirecte*" in French, "*mittelbare Haftung*" in German) has sometimes been used, especially in the past, to refer to a great variety of situations,[4] including those involving the responsibility incurred by a State on the occasion of injurious acts by private individuals,[5] or on the occasion of acts

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[1] For the beginning of chapter IV (Introduction and Section 1), see *Yearbook ... 1978*, vol. II (Part One), p. 52, document A/CN.4/307 and Add.1 and 2.

[2] For the text of all the draft articles adopted so far by the Commission: *ibid.*, (Part Two), pp. 78 *et seq.*, document A/33/10, chap. III, sect. B.1.

[3] *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B, article 1.

In order to emphasize the fact that the wording adopted should also cover cases in which responsibility for the internationally wrongful act of a State devolved upon a State other than the one committing it, the Special Rapporteur had proposed in his second report that article 1 should be formulated as follows: "Every internationally wrongful act by a State gives rise to *international responsibility*.*" (*Yearbook ... 1970*, vol. II, p. 187, document A/CN.4/233, para. (30)). Cf. also paragraph (29) of the commentary to that article (*ibid.*, pp. 186–187). However, in view of the abnormality of cases in which a wrongful act might entail the responsibility of a State other than the State to which the act in question would be attributed, the Rapporteur himself proposed in his third report the wording which was subsequently adopted by the Commission (*Yearbook ... 1971*, vol. II (Part One), pp. 213–214, document A/CN.4/246 and Add.1–3, para. (48).

[4] For the various acceptations of the expression "indirect responsibility", see in particular F. Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), pp. 41 *et seq.*

[5] The Commission recorded its opposition to the use of such terminology, which dates back to L. Oppenheim and has in any event been virtually discarded. In its commentary to article 11, it stated:

> "... 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." (*Yearbook ... 1975*, vol. II, p. 73, document A/100/10/Rev.1, chap. II, sect. B.2, para. (11) of the commentary to article 11.

We might add that, in view of the position taken by the Commission in draft article 11, in cases where a State is said to be internationally responsible on the occasion of acts committed by private individuals the State is answerable, not in any way for the acts of the individuals, but for the conduct adopted by its organs in relation to those acts. It would therefore be manifestly incorrect to speak in that connection of responsibility of the State "for the act of another", since in this particular situation the State is in fact answerable only for its own act.

committed by organs which lacked competence or which had contravened their instructions,[6] or with regard to the conduct of territorial governmental entities possessing, under the internal juridical order, a personality separate from that of the State itself.[7] But, in fact, as was mentioned above, the only correct use of the expression "indirect responsibility" of a State under international law, the only one corresponding to the sense in which the terms "indirect responsibility" or "responsibility for the act of another" are used in other systems of law, and the only one to which the Commission has adhered throughout its draft whenever it has encountered this problem is, in our view, the use designed to cover the set of cases in which a State is required to answer for an internationally wrongful act commited by another State or another subject of international law. This is also the sense in which the expression is used by nearly all contemporary writers.[8] In this section, therefore, we use this expression to refer precisely to cases in which international responsibility is attributed to a state for an internationally wrongful act committed by another State. Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered, because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future.

4. Nearly all writers on international law who have dealt with the topic of indirect responsibility of States have for long agreed that there are cases—exceptional ones, it is true—in which the responsibility arising out of an internationally wrongful act should devolve upon a State other than that to which the wrongful act is attributed. However, there have been changes in thinking with regard to the identification of such cases and the justification for dissociating the attribution of the internationally wrongful act and the attribution of the resulting responsibility, and some differences of opinion on the subject remain to this day. One view which predominated for a long time was that a State should be held responsible for the internationally wrongful act of another State—if the latter, having accepted the "supremacy" of the former, conferred on it the right to represent it vis-à-vis third States in international relations. According to this theory, it is precisely the existence of such a relationship of representation between the two States that justifies the attribution of responsibility. A more recent view is that a State is responsible for the internationally wrongful act of another State entity if the latter, while retaining an international personality of its own, places itself in a relationship of dependence or subordination to the State in question, whether this involves a *de jure* relationship or even, in some opinions, a purely *de facto* one. As an example of a *de jure* relationship, reference is sometimes made to the relationship between a federal State and its member States, or more

[6] In draft article 10 [see footnote 2 above], the Commission indicated that a State might be held responsible for such acts. However, it also indicated that the responsibility of the State was manifestly a direct responsibility; since the organ had acted as such, even though in excess of its competence or in contravention of the instructions it had received, it remained a State organ which had acted in that capacity. It was not simply a private individual, much less a subject of international law separate from the State of which it was an organ. The State was therefore answerable for an act which was its own and not someone else's, as would have to be the case if indirect responsibility were involved.

[7] In these cases also, the fact that the State is held responsible at the international level for the conduct of the organs of such entities does not, of course, mean that it is answerable as a matter of indirect responsibility. In order for that to be so, the first prerequisite would be that the entity in question should have a personality separate from that of the State under the international order, and not only under the internal order. Generally speaking, however, as the Commission pointed out in its commentary to article 7 (*Yearbook . . . 1974*, vol. II (Part One), p. 280, document A/9610/Rev.1, chap. III, sect. B.2, para. (9), such entities do not possess an international personality. If the State is answerable for the actions of their organs, its responsibility is nearly always direct because, as specified in draft article 7 [see footnote 2 above], the conduct of such organs will be considered under international law as an act of the State (in this case, the federal State). It is only in the very rare cases where such entities are themselves subjects of international law, having an international legal capacity of their own, although a very limited one, and where they were acting in the framework of that capacity when committing the breach of an international obligation incumbent on them, that one could—provided that the other conditions were fulfilled—speak of an indirect international responsibility of the State of which the entities in question form part.

[8] It is precisely in this sense that D. Anzilotti already uses the term "indirect responsibility" in *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in: S.I.O.I. (Società italiana per l'organizzazione internazionale), *Opere di Dionisio Anzilotti*, vol. II, Scritti di diritto internazionale pubblico (Padua, CEDAM, 1956), vol. II, t. 1, p. 146, and in "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, No. 3 (1906), p. 300 (reprinted in S.I.O.I., *op. cit.*, p. 197). See also P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's), Supplement 2 to vol. X (1917), p. 42; C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 93 and 105; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 63 and pp. 192 *et seq.*; R. Ago, *La responsabilità indiretta nel diritto internazionale* (Padua, CEDAM, 1934), p. 25 (reprinted, with some changes, in *Archivio di diritto pubblico* (Padua, CEDAM), vol. I, No. 1, January–April 1936, pp. 12 *et seq.*); F. Klein, *op. cit.*, pp. 64 *et seq.*; A. Verdross, "Theorie der mittelbaren Staatenhaftung", *Oesterreichische Zeitschrift für öffentliches Recht*, (Vienna), vol. I, No. 4 (new series; May 1948), p. 389; G. Barile, "Note a teorie sulla responsabilità indiretta degli Stati", *Annuario di diritto comparative di studi legislativi* (Rome), 3rd series (special), vol. XXII, No. 3 (1948), p. 434; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III. pp. 1560–1561; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Keppler, 1963), p. 235; J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijtoff, 1973), vol. VI, pp. 705–706; H. J. Schlochauer, "Die Entwicklung des völker rechtlichen Deliktsrechts", *Archiv des Völkerrechts* (Tübingen), vol. 16, No. 3 (1975), p. 262.

frequently to that between a protecting State and the protected State or between a State entrusted with an international mandate or trusteeship and the mandated territory or trust territory. As an example of a *de facto* relationship, reference is made to the relationship between an occupying State and an occupied State or between a "dominant" State and a "puppet" State. However, whereas those who first advanced this view considered that in order for the "dominant" State to be held responsible for the wrongful act committed by the "dependent" State it was sufficient that there should be a relationship of dependence of the type indicated, their successors, realizing the need to circumscribe and make more specific the possible scope of application of indirect responsibility, regard such a relationship as a necessary, but not a sufficient, condition for that purpose. Some of them hold that, in addition, it must be impossible for the injured State to inflict punishment on the dependent State which committed the wrongful act without at the same time affecting the interests of the dominant State, or without reaching into its "juridical sphere". Others, who have gone more thoroughly into the question and whose view is now clearly the predominant one, consider it a further requirement that the dominant State should exercise some control over the actions of the dependent State and that the wrongful act committed by the latter should occur in a sphere of activity which is subject to such control. Lastly, some writers also allow of another, somewhat marginal case of indirect responsibility, namely, the case which would occur where a State coerces another State, even though the latter is not bound to it by a standing relationship of dependence or subordination, to commit an internationally wrongful act. In this case, there would be a situation of what might be termed "occasional" dependence, which materializes only on the occasion of a specific wrongful act. We may now proceed to a more detailed analysis of these different presentations and explanations of the abnormal phenomenon of indirect responsibility as they have succeeded one another in the course of the evolution of legal thinking, and see how the conception which seems to us to be soundest was arrived at.

5. It was Anzilotti who put forward for the first time, in 1902,[9] the argument that a State which was responsible for the international representation—and more specifically the general and obligatory representation—of another State should, as a consequence, by indirectly responsible for internationally wrongful acts committed by that other State. His justification for this argument was that, since the representation of State B had been assumed by State A, it would be impossible for any third State that might be injured by an international wrongful act committed by State B to address itself to the latter in order to assert its international responsibility, because State B no longer maintained direct international relations. And since the international responsibility created by the wrongful act could not be erased, it could only be the representing State that should answer for the wrongful act committed by the represented State.[10] Apart from these cases, Anzilotti did not mention any case in which a State is responsible for acts of another State.

6. The theory advanced by Anzilotti met with considerable success at first; during the first thirty years of this century, most writers who discussed the question[11]

[9] Anzilotti, *Teoria generale ...* (*op. cit.*), pp. 146–147. The same argument was repeated in later works by the same writer: "La responsabilité internationale ..." (*loc. cit.*), pp. 300 *et seq.*, and *Corso di diritto internazionale*, 3rd ed. (Rome, Athenaeum, 1928), p. 473.

[10] Anzilotti expressed himself as follows:

"When a country has accepted the supremacy of another State, but without being completely absorbed into it, it retains its international personality and continues to be a separate subject of international law in its relations with other States; the rules of international law prohibiting any act of injurious to another State then apply to it as to any other person under international law: it is therefore capable of engaging in an activity contrary to the duties imposed on it by international law, but, as it cannot enter into relations with the injured or offended State, the latter must address itself to the State which represents it, and the duty to redress the damage caused rests with that State." (Anzilotti, "La responsabilité internationale ..." (*loc. cit.*), p. 301). Similarly, in *Teoria generale ...* (*op. cit.*), p. 146, and *Corso ...* (op. cit.), p. 473.

It should be noted in this connection that H. Triepel—although not referring to indirect responsibility—had already asserted that the responsibility of a federal State for acts of a member State which had retained an international personality and of a protecting State for acts of the protected State was a responsibility for the act of another; as grounds for the existence of such a responsibility, he mentioned, *inter alia*, the fact that the member State and the protected State had ceased to be "subjects of international 'action law', as either plaintiffs or defendents" (H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), pp. 367–368).

[11] See, for example, although with some differences from author to author: E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915; reprinted: New York, Banks Law Publishing, 1928), pp. 201–202; P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part 1, p. 523; C. de Visscher, *loc cit.*, p. 105; A. Verdross, "Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1929-V* (Paris, Hachette, 1931), vol. 30, p. 465; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 281. This theory was also accepted by most of the members of the Institute of International Law (see the report of L. Strisower and the relevant debate: *Annuaire de l'Institut de droit international, 1927–I* (Paris), vol. 33, pp. 488 *et seq.* and 547 *et seq.*, and *ibid.*, *1927-III*, pp. 147 *et seq.*), and was incorporated in article IX, second paragraph, of the resolution adopted at the Lausanne session (1927) on "International responsibility of States for injuries on their territory to the person or property of foreigners" (see *Yearbook ... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8). It affirms that "a protecting State is responsible for the conduct of a protected State ... so far as the latter (the protecting State) represents the protected State towards third States wronged by it and employing the right to press their claims". The influence of this doctrine is also to be seen in the draft convention prepared by Harvard Law School in 1929, article 3 of which is worded as follows:

"A State is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions ...

subscribed to it, as did State organs[12] and apparently even an international arbitrator.[13]

7. However, this theory came under critical scrutiny in the 1930s, when it was pointed out that simply because, owing to the fact that State A had been authorized by State B to represent it, third States injured by State B could no longer address themselves directly to it in order to claim reparation for its wrongful act, it did not follow that they could no longer demand such reparation from it and could not assert its responsibility. The mere existence of the international representation relationship between A and B has no consequences for third States except that their relations with the represented State are conducted through the representing State; there is nothing to prevent those States from demanding of the represented State, through the representing State, an indemnity by way of reparation. Nor is there anything to prevent the represented State from making such reparation through the representing State. Consequently it cannot be deduced from the mere fact that States which are injured by an internationally wrongful act committed by a State that has authorized another State to be responsible for its international representation address their claims for reparation for the injury suffered to that other State, that in so doing they are asserting the responsibility of the representing rather than the represented State. In other words, if they address themselves to it solely in its capacity as the representative of another State,[14] what they are asserting is the *direct* responsibility of the represented State and not any indirect responsibility of the representing State. Channelling through a second State the demand for the reparation due from the first State, which committed the breach of an international obligation, does not mean holding the second State responsible for that breach. Indirect responsibility on the part of the second State—a responsibility incurred by it for the act of another—could be found to exist only where international law imposed on it the obligation to make reparation, which is obviously not the case when it is approached solely as the "representative" of the State which is, and remains, under an obligation to make reparation.[15]

8. Once these criticisms had been voiced, most writers gradually came to the conclusion that the mere fact that one State was responsible for the international representation of another, even where such representation was general and obligatory, could not constitute a ground for attributing indirect responsibility to it,[16] and they began to seek some other justification for this particular type of responsibility. A few years later, it is true, Verdross "resurrected" the theory of representation as a ground for indirect responsibility, a theory which, in his view, had not been correctly understood by its critics. Verdross agrees with Anzilotti's critics that the fact that injured States must address themselves to the representing State in order to obtain reparation for wrongful acts committed by the represented State does not necessarily imply that, in doing so, they are asserting the indirect responsibility of the representing State. If they are addressing themselves to it purely us a subject acting

For the purpose of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision." (*Ibid.*, p. 229, annex 9.)

[12] See the replies of the Governments of Austria and Japan to the request for information addressed to them by the Preparatory Committee for the Codification Conference (League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), pp. 121 and 123 respectively). The replies of the Governments of Australia, Great Britain and Czechoslovakia, although not very clear, also appear to have been influenced by the representation theory (*ibid.*, pp. 121, 122 and 124 respectively).

[13] See the arbitral decision rendered by M. Huber on 1 May 1925 in the *British claims in the Spanish Zone of Morocco* case between Great Britain and Spain, in which he stated: "If the protectorate puts an end to direct diplomatic relations between the protected State and other States, so that the latter can no longer address themselves directly to the protected State, that limitation imposed on third States must necessarily entail an obligation on the protecting State to be answerable in place of the protected State" (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.I), p. 648). The influence of Anzilotti's theory was also seen in a passage from the judgement rendered on 30 August 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine concession* case, reading as follows:

"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 them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it" (*P.C.I.J., Series A*, No. 2, p. 23).

[14] The situation might be different if they were addressing themselves to it on some other ground. See para. 12 below.

[15] Ago, *op. cit.*, pp. 30 *et seq.* The author stated, as others had done in the past, that cases where a relationship of obligatory representation existed between two subjects of international law could certainly not be considered the only cases in which indirect responsiblity might arise (*ibid.*).

[16] See, in particular, A. P. Sereni, *La rappresentanza nel diritto internazionale* (Padua, CEDAM, 1936), pp. 417 *et seq.*; Klein, *op. cit.*, pp. 71 *et seq.*; Barile, *loc. cit.*, pp. 435 *et seq.*; M. V. Polak, "Die Haftung des Bundesstaates für seine Gliedstaaten", *Oesterreichische Zeitschrift für öffentliches Recht*, Vienna, vol. I, No. 4 (new series; May 1948), p. 384; R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), p. 600; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 262–263.

It is true that to this day there are still some writers who speak of indirect responsibility on the part of the representing State for wrongful acts of the represented State, but it should be noted that these writers do not mention the objections that have been raised to Anzilotti's theory and do not explain how they might be overcome (see, for example, P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 26–27; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 214 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960), vol. I, pp. 334–335; F. Berber, *Lehrbuch* (Munich, Beck's, 1977), vol. III, pp. 17–18; Schlochauer (*loc. cit.*), p. 262).

on behalf the represented State, what they are asserting is the responsibility, and the direct responsibility, of the represented State. However, there is another possibility, namely, that international law imposes 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. If such were the case, says Verdross, the States addressing themselves to the representing State would be asserting the latter's own responsibility, and not that of the represented State. According to Verdross, the practice of States shows that international law has opted for this second possibility. In support of his argument, he refers in particular to the passage in Mr. Huber's decision in the *British claims in the Spanish Zone of Morocco* case, where 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".[17]

9. This revised version of the "representation" theory was, however, no sounder than the original version. Verdross may be right in saying that in theory there is nothing to prevent international law from attributing to the representing State the responsibility for any wrongful act committed by the represented State, but he does not succeed in proving that such an attribution is in fact made by international law, or that it constitutes a rule now in effect, nor does he provide valid arguments in favour of its introduction *de jure condendo*. As for the arbitral decision by Huber to which Verdross refers, a close scrutiny of it shows that the real concern of the learned Swiss jurist 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. The reasons mentioned by Huber for attributing international responsibility to the protecting State do include the fact that the latter represents the protected State in its international relations, but he makes this point in the context of a more extensive set of grounds and in a sense different from that understood by Verdross. What the arbitrator in the *British claims in the Spanish Zone of Morocco* case was seeking was that the protecting State should be confronted with an alternative: either it does not accept the responsibility incurred by the protected State for its acts, in which case it must agree that responsibility remains with the protected State—and this, we repeat, is in no way precluded by the existence of the relationship of representation, since there is nothing to prevent third States from addressing themselves to the represented State through the representing State—or it does not want to run the risk of the injured State's taking action to protect its rights, because such action may also affect the rights of the protecting State itself, in which case it must itself be prepared to assume responsibility in place of the protected State.[18] What the arbitrator is referring to here is the institution of protectorates as such and the almost total constraint on the independence of the protected State which it entails, in most cases. He regards the attribution to the protecting State of responsibility for acts of the protected State as a consequence of that constraint, since at the international level the protecting State is viewed as the "sovereign" of the territory subjected to the protectorate, so that the factor of its international "representation" is not the true reason. It is therefore reading Huber's mind to attribute to him the idea that the existence between two States of a relationship of international representation has as its automatic counterpart the attribution to the representing State of indirect responsibility for internationally wrongful acts of the represented State. Huber could, in our view, be criticized for not making a more searching study of the situation of the protecting State vis-à-vis the protected State and for failing to realize the need to distinguish between different cases in order to determine who is internationally responsible for acts committed in the

[17] A. Verdross, "Theorie ..." (*loc. cit.*), pp. 408 *et seq.* Unlike Anzilotti, however, Verdross does not believe that the case in which a State undertakes the international representation of another State is the only case in which there can be indirect responsibility.

[18] The most striking passages in Huber's decision are the following:

"If the protectorate puts an end to direct diplomatic relations between the protected State and other States, so that the latter can no longer address themselves directly to the protected State, this limitation imposed on third States must necessarily entail a duty on the part of the protecting State to answer in place of the protected State.

"...

"... it would be most extraordinary if, as a result of *the introduction of protectorates, the responsibility incumbent on the territory of Morocco under international law were to be diminished. If responsibility has not been assumed as its own by the protecting State, it remains incumbent on the protected State; in no case can it have been erased. Since the protected State no longer acts without an intermediary in the international field, and since any action taken by a third State to obtain respect of its rights by the Shereefian Government would inevitably affect the interests of the protecting State also, the latter must take upon itself the responsibility of the protected State, at least as a derived responsibility.**

"The responsibilities which exist under international law and the consequent right of third States to provide diplomatic protection for their nationals cannot have undergone any diminution as a result of bilateral agreements concluded between the protected and protecting States." (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 648.)

"... since the situation of the protecting State vis-à-vis other countries is that of a *sovereign** State, its responsibility must be the same." (*Ibid.*, p. 649.)

territory of the protected State, but he cannot be made out to be an adherent of the "representation theory" as the basis for indirect responsibility.

10. Since Verdross believes that the practice of States also provides confirmation of the soundness of his revised theory of representation, it should first of all be pointed out that remarks similar to those made above are also called for as regards the replies by States to point X of the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference. 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 (and in fact only two or three)[19] of the replies expressed themselves as indicated above, to the effect that in the cases mentioned responsibility devolved upon the State representing the offending State, those replies give no reasons for the view advanced, make no distinction between the various cases, and appear to be by no means convincing technically. There are other, much more detailed replies, such as that of Denmark, which expressly rule out the thesis of the indirect responsibility as a counterpart of representation, even though the 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 those in which the represented State must be answerable, even if the claim is addressed to it through the representing State, because the act was committed by its own organs.[20]

11. So far as the point now under discussion is concerned, not very much is known about State practice in the years following the 1930 Conference, but there is no reference in the literature to any case in which the indirect international responsibility of a State was asserted on the basis of its status as the representative of another State. On the contrary, attention may be drawn to the attitude of the Government of Italy in the *Phosphates in Morocco* case. 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.[21]

The Rome Government therefore requested the court to notify its application to the Government of the French Republic, as such, and as protector of Morocco.[22] It made no mention of France's status at that time as the representative of Morocco; the only ground mentioned for the indirect responsibility of France was the fact that it was the State protecting Morocco. Nor did either party make any mention in the subsequent proceedings of the relationship of representation which existed between France and Morocco.

12. Thus it cannot be argued that international legal precedents and practice furnish proof of the soundness of the assertion that a State, having undertaken the general and obligatory representation of another State, is for that reason alone indirectly responsible for internationally wrongful acts committed by that other State. It should be clearly understood that all we are saying here is that it cannot be deduced from international judicial decisions and from statements of position by Governments that the representing State should be held responsible for internationally wrongful acts of the represented State *because of its status as representative*. However, this does not of course mean that such responsibility cannot be attributed to that State on some other ground. In fact, there are many cases in which a State which has undertaken the general and obligatory international representation of another State also has the right to interfere in the internal activities of the represented State. It may be that, in such a case, the State in question will be required to answer for internationally wrongful acts committed by the other State in the exercise of its activities—not, however, because it represents that State but because it controls it, because the other State's freedom of decision and freedom of action are restricted for the benefit of the first State. It is hardly necessary to point out that, when the relationship of representation existing between two States is not accompanied by any situation of subordination of one State to the other—as for example, in the case of the relationship between Liechtenstein and Switzerland—there can be not question of indirect responsibility on the part of the representing State for wrongful acts of the represented State.[23]

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[19] See footnote 12 above.

[20] "When the right of international representation is entrusted exclusively to one of the States, that State is, generally speaking, *responsible for its officials*,* whether these have not acted in the name of the other State. But, if the act involving the State's responsibility has been done by the courts, officials, or private individuals in the other State, *the material responsibility, e.g. the payment of compensation, may devolve on that State, even if the claim under international law to establish such responsibility has to be submitted to the State possessing the right of international representation.*" (League of Nations, *Bases of discussion ... (op. cit.)*, p. 122.)

[21] *P.C.I.J., Series C, No. 84*, p. 13.

[22] *Ibid.*, p. 14.

[23] Barile (*loc. cit.*, pp. 437–438) rightly points out that: "The fact that obligatory and general representation is entrusted by one State to another State is actually an *indicator*, and nothing but an *indicator*, of the existence of a relationship of dependence of the first State on the second State, a relationship of dependence which, when it assumes certain concrete forms, may in and of itself constitute, under international law, the first ground for responsibility for the act of another."

Other writers, while still speaking of responsibility on the part of the representing State for wrongful acts of the represented

(*Continued on next page.*)

13. Thus, contrary to the impression gained by the distinguished leader of the Vienna school, the linking of indirect responsibility to the existence of a relationship of international representation as such is no more grounded in the reality of international legal relations than it is in the respective theoretical bases of the notion of representation and that of responsibility for the act of another. The great majority of contemporary writers who have dealt with the question are so convinced of the truth of this statement that they regard the responsibility of a State for internationally wrongful acts of another State as being linked to the existence, between the two States, not of a relationship of international representation but of a relationship involving, in one form or another, dependence or subordination of one of the two States vis-à-vis the other.[24] However, as was noted above, opinions diverge when it comes to determining whether the special phenomenon of indirect responsibility arises in all or only in some of the cases where one State is subordinate to or dependent on another, and also whether it is incurred on the occasion of all internationally wrongful acts committed by the dependent State or only on the occasion of some of them, namely, those where certain conditions are fulfilled. The differences of opinion are particularly pronounced when it comes to defining the basis or ground of the phenomenon itself.

14. It is hardly necessary for us to linger over the conclusions of those who confined themselves to the question whether or not, in certain specific cases, what is sometimes called the "dominant" State and sometimes the "superior" or "principal" State should be held responsible for an internationally wrongful act committed in each individual case by the "dependent" or "subordinate" State, without seeking to identify the principle underlying their conclusion. The views on which we should focus our attention for the purpose of this study are those which attempted to go from the particular to the general, to formulate criteria, and to draw up a rule establishing in what circumstances and on what bases the act of a "dependent" State could result in the attribution of international responsibility to the "dominant" State. In this context, two main

(*Footnote 23 continued.*)

State, have agreed that the real basis for such responsibility is to be found not in the relationship of representation, but in the relationship of subordination which exists between the two States. The position of L.B. Sohn and R.R. Baxter on this point seems to us particularly revealing. In the draft convention which they prepared for Harvard Law School in 1961, Sohn and Baxter use in article 17 (*c*) a wording similar to that which had appeared in the 1929 Harvard Law School draft. According to that article, a State would be responsible, *inter alia*, for acts committed by "the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible" (*Yearbook ... 1969*, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII). In the commentary to that article, Sohn and Baxter note that a distinction must be drawn between the case referred to in article 17 (*c*) and the case of

> "representation of the foreign interests of one State by another, as Liechtenstein's foreign relations are conducted by Switzerland or as a neutral State protects the interests of a belligerent nation in time of war. In this event, the State conducting foreign relations for another country acts in a representative capacity, rather than as the principal, as in the cases previously considered. The relationship involved in representation of foreign interests also implies no political dependence of the State so represented on the State performing this function. Responsibility accordingly attaches to that international person the organ, agency, official, or employee of which has caused an injury to an alien, even though the claim may have to be presented to that State through the diplomatic representatives of a nation representing the interests of the responsible State." (F.V. García Amador, L.B. Sohn and R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana, 1974), pp. 255–256.)

[24] See, in particular: Schoen, *loc. cit.*, pp. 100 *et seq.*; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, part 3, pp. 109 *et seq.*; Decencière-Ferrandière, *op. cit.*, pp. 188 *et seq.*; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 26 *et seq.*; H. Kelsen, "Unrecht und Unrechtsfolgen im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 517 *et seq.*; Ago, *op. cit.*, pp. 36 *et seq.*; M. Scerni, "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI (1939), pp. 474–475; Klein, *op. cit.*, pp. 129 *et seq.*; Ross, *op. cit.*, pp. 261 *et seq.*; Barile (*loc. cit.*), pp. 439 *et seq.*; Schüle (*loc. cit.*), pp. 334–335; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961) vol. III, pp. 204 *et seq.*; G. Balladore-Pallieri, *Diritto internazionale pubblico*, 8th ed., rev. (Milan, Giuffrè, 1962), p. 350; von Münch, *op. cit.*, pp. 236 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), pp. 364–365; E. Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin), vol. XV (1968), p. 734; G. Ténékidès; "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 788–789; L. Cavaré, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec (Paris, Pedone, 1970), vol. II, pp. 507–508; Verzijl, *op. cit.*, pp. 706 *et seq.*

The view that indirect responsibility is incurred in cases of dependence or subordination, even where those situations are not accompanied by a relationship of international representation, is also shared by some writers, including in particular Verdross (see "Theorie ..." (*loc. cit.*), pp. 412 *et seq.*), who consider representation as such to be independent cause of this form of responsibility. Apart from these writers, it should be noted that those who regard representation as the only ground for indirect responsibility always cite as examples specific cases in which there was in fact a relationship of dependence between the represented and representing States.

There are very few writers who deny the existence of any cases of indirect responsibility under international law. Mention may be made of Quadri, *op. cit.*, pp. 600 *et seq.*, and Sereni, *Diritto internazionale* (*op. cit.*), pp. 1562 *et seq.* They consider that, in cases of dependence, there is either direct responsibility on the part of the superior State or direct responsibility on the part of the dependent State. It should be noted that these writers generally assign responsibility to the "superior" State in the same cases as do writers who speak of indirect responsibility, except that in their view the responsibility is always "direct", either because the "dependent" State has no international personality (so that acts of its organs would be attributed to the "superior" State) or because the "superior" State has failed in its duty to prevent the performance of the injurious act by the organs of the "dependent" State. It may be recalled once again that, in the draft convention prepared in 1961 by Harvard Law School, the conduct of organs of a protected State, a mandated territory or a trust territory is attributed to the protecting State or administering authority (art. 17(*c*)), just as the conduct of organs of the administrative subdivisions of a State is attributed to that State (*Yearbook ... 1969*, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII). Thus, in both cases, the responsibility of the State would be a direct responsibility.

schools of thought can be distinguished. According to one school, which actually consists of writers whose ideas are somewhat outdated and have remained rather isolated, the phenomenon of indirect responsibility should be regarded as a kind of expedient for obviating practical disadvantages. The other school of thought, representing what is now the majority view, consists of those internationalists who, in contrast to the others, have realized the need to consider this phenomenon in greater depth and identify its systematic basis, and have tried to define it.

15. The first school of thought to be considered is therefore the one which holds that the "dominant" State should be internationally responsible for internationally wrongful acts of the "dependent" State because in practice it is impossible for third States injured by those wrongful acts to employ means of "enforcement" against the dependent State, should the latter not spontaneously comply with the obligations arising out of such cases of wrongfulness. If that were not so, they would run the risk of also damaging the interests or rights of the "dominant" States 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.[25] The dominant State will thus serve as a shield against any actualization of the international responsibility of the dependent State, and the third State will accordingly hold the dominant State responsible for all internationally wrongful acts committed by the dependent State. We might add that the "*Schutztheorie*", which was introduced by certain writers towards the end of the last century in order to account for the responsibility of a protecting State for the wrongful acts of the protected State,[26] was later invoked not only to justify the existence of indirect responsibility in international protectorate relationships,[27] but also to provide a basis for the responsibility of a federal State for the wrongful acts of member States which had retained, within narrow limits, a separate international personality,[28] and the responsibility of a "suzerain" State for the wrongful acts of "vassal" States.[29] Later still, this idea, which had until then been entertained only in cases of dependence based on a legal relationship (under international law or internal law), was invoked by one writer in support of the extension of the notion of indirect responsibility to *de facto* relationships. The writer in question was F. Klein, who in 1941 applied the "protection" doctrine to any relationship of subordination—*de jure* or *de facto*—between States subjects of international law, thus asserting the responsibility of the dominant State in all cases of this kind because that State, by its presence, prevented injured third States from taking coercive measures against the dependent State.[30] Lastly, as a kind of

[25] This view has accordingly been termed the "protection doctrine" (*Schutztheorie*).

[26] For example, W. E. Hall argued that the protecting State was responsible for wrongful acts committed by the protected State because injured third States "are barred by the presence of the protecting State from exacting redress by force for any wrongs which their subjects may suffer at the hands of native rulers or people" (*A Treatise on International Law* (1880), 8th ed. (Oxford, Clarendon, 1924), p. 150.

Similarly, according to J. Westlake,

"... the fact that outside States are not free in their choice of methods for seeking redress from the inferior will impose on the superior a responsibility for the wrongs committed by it" (*International Law*, 2nd ed., (Cambridge University Press, 1910), part I, p. 23).

[27] See, for example, Schoen, *loc. cit.*, pp. 106–107; Strupp, *loc. cit.*, p. 114; Decencière-Ferrandière, *op. cit.*, pp. 193–194.

[28] Thus, for example Schoen wrote:

"If in this case the member State is held responsible and the federal State is not, the injured State is unable, in the event of the member State's failing to discharge its responsibility, to take any coercive measures under international law without thereby simultaneously affecting the federal State. However, the taking of such coercive measures would only inflict a new injury on the federal State if it was not responsible for the conduct of its member State, and the injured State, instead of gaining its rights would simply incur the obligation to make reparation to the federal State for the injury it had caused it. If, therefore, the injured State is to be enabled to gain its rights in the manner provided for in international law without at the same time itself committing a new breach of the law, it must be assumed that the conduct of the member State entails the responsibility of the federal State also. The existence of the federal State is what prevents the injured State from acting in self-defence against the member State; the federal State protects the member State against any attack from outside, and therefore it must also answer for the conduct of the member State where the latter has acted as a subject of international law." (*Loc. cit.*, pp. 103–104.)

Strupp (*loc. cit.*, pp. 112–113) and Decencière-Ferrandière (*op. cit.*, pp. 192–193) expressed themselves in similar terms.

[29] See, for example, Schoen, *loc. cit.*, pp. 106–107.

[30] F. Klein writes as follows:

"The international responsibility of subject of international law A, which stands in a one-sided *de jure* (under internal or international law) or *de facto* relationship of dependence to subject of international law C, for its conduct in violation of international law to the detriment of a third subject of international law B is practically meaningless so far as subject B is concerned; for in fact the latter could not normally take any coercive measures under international law against subject A without at the same time provoking the resistance of dependent subject A's protecting Power C—the dominant or superior State—which stands between those two subjects A and B and whose status is recognized by and must be respected under international law, or even encroaching injuriously on its interests or its juridical sphere. It must therefore be assumed and affirmed that protecting Power C—the superior State—is itself responsible for any substantial violations of international law by subject A, a State dependent on it and/or under its protection, in all cases in which the latter—for legal or factual reasons—cannot itself in practice be called to account. This responsibility is simply the expression of the fact that, as a result of a certain relationship between two subjects of international law which is either recognized by international law or at the very least is constitutionally sanctioned, coercive action under international law can in practice be taken only against one of those subjects and not against the other, even if the conduct in violation of international law which occasions the coercive action is attributable to the other subject. In any event, to hold that subject C must be answerable is in no way unreasonable; after all, it normally derives not inconsiderable advantages, especially of an economic nature, from the relationship of dependence, so that it does not seem unjustified to require that it should also bear certain legal disadvantages." (*Op. cit.*, pp. 129–130.)

See also Dahm, *op. cit.*, pp. 208–209.

variant of the idea of holding the dominant State responsible for internationally wrongful acts of the dependent State on the basis of the right-duty of the former to protect the latter, Verdross introduces the idea of "intrusion" (*Eingriff*). He argues that the taking of coercive measures (and in particular of reprisals—unarmed, of course) against a subordinate State would be an inadmissible "intrusion" into the *juridical sphere* of the "superior" State in cases where the "subordinate" State actually forms part of the "superior" State. This applies, in his view, to the relationship between a member State and a federal State and 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). This situation would therefore justify the attribution to the federal State of indirect responsibility for internationally wrongful acts of the member State and to the "suzerain" State of indirect responsibility for acts of the "vassal" State.[31]

16. Despite the scholarly credentials of some of their proponents, the ideas reported above seem no more convincing than the one which seeks to make the existence of a relationship of international representation the basis for attributing to a State the international responsibility for an internationally wrongful act committed by another State. In the first place, the supposed justifications based on a concern to avoid situations in which the "superior" State would be impelled to intervene in order to protect the subordinate State, or to avoid intrusion into the juridical sphere of the "superior" State as a result of coercive measured by a third State against the subordinate State, seem to us to be the product of an ingenious theoretical exercise; the fact remains, however, that scarcely a trace of them is to be found in statements of position by States[32] or in the reasoning of international judges and arbitrators. Secondly, even if one wished to consider the matter from a purely theoretical standpoint (which would be more understandable in this case than in others), the arguments advanced have one common feature: they are 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. Leaving aside the fact that the dreaded disadvantages appear to us to be quite marginal, now that international law has placed very restrictive limits on the forms of coercion that may lawfully be used in such cases, it does not in any event seem clear how those disadvantages would be avoided merely because the responsibility for the internationally wrongful acts in question was attributed to the dominant State. Being itself held responsible, the dominant State would become the direct target of the coercive measures taken against it if it refused to fulfil the obligations arising out of the responsibility it had incurred owing to the act of the subordinate State. This would simply mean a more direct intrusion into its juridical sphere. But there is more to it than this. Although existing international law has allowed and does allow, in some cases, for so serious a derogation from the criteria normally applicable as dissociation between the subject to which an internationally wrongful act is attributed and the subject to which the responsibility arising out of that act is attributed, only a logically and systematically valid ground can justify such a derogation. And if the dissociation in question is to be seen in a whole set of different circumstances, the justification for it must if possible be found in a ground that is common to that set of circumstances. In any event, an anomaly of this magnitude cannot be put forward as a mere practical expedient for avoiding supposed disadvantages which might arise, in a few cases, from the application of the criteria normally governing the attribution of responsibility for internationally wrongful acts.

[31] Verdross did not, however, consider that this situation arose in the case of a protectorate; accordingly, in that case, the attribution to the protecting State of responsibility for acts of the protected State would have to be justified on the ground either of the international representation of the protected State by the protecting State or of the control exercised by the protecting State over the activities of the protected State (Verdross, "Theorie ..." (*loc. cit.*), pp. 415 *et seq.*). For a view similar to that of Verdross, see Ross, *op. cit.*, pp. 261 *et seq.* In the case of a wrongful act committed by a member State of a federal State, or by a vassal State, Verdross explains (*ibid.*, pp. 415–416) that, in his view, the injured third State should address itself in the first instance to the member State or vassal State in order to demand reparation from it for the wrongful act. Only if such reparation were refused could the third State address itself to the federal or suzerain State. However, it seems clear that such a case would not involve indirect responsibility on the part of the federal or suzerain State, since the responsibility as such, i.e. the obligation to make reparation, would rest with the member State or the vassal State. What would be incumbent on the federal or suzerain State would be rather an obligation to ensure the fulfilment by the member State or vassal State of its obligation to answer for its wrongful acts. On this point, see also Barile, *loc. cit.*, p. 439.

[32] At first sight, it would appear that a statement of position in favour of the latter argument is to be found in the letter dated 1 September 1871 from Chancellor Bismarck to the German Chargé d'Affaires in Constantinople concerning the case involving the German national Strousberg, who had suffered injury as a result of breach of contract by the Government of the Principalities of the Danube (later Romania), vassals of the Ottoman Empire. The reason given by the Chancellor for addressing himself to the Ottoman Porte with a view to its securing performance of the contract by the authorities of the Principalities was precisely that any coercive measures taken against the Principalities would constitute an intrusion upon the rights of the Porte ("*Eingriff in ihre Rechte*") and, as such, would provoke protests by the Porte itself. On closer scrutiny, however, it can be seen that the German Chancellor considered the Principalities a kind of province of the Ottoman Empire, possessing purely internal autonomy and lacking, at that time, a separate international personality. Consequently, as far as Bismarck was concerned, this particular case did not fall into the category of those in which the question of the responsibility of one subject of international law for the act of another subject may arise. See Bismarck's letter in J. Wythrlik, "Eine Stellungnahme des Reichskanzlers Bismarck zu dem Problem der mittelbaren Staatenhaftung", *Zeitschrift für öffentliches Recht* (Vienna), vol. XXI, Nos. 3–4 (1941), p. 273.

17. The second, and most important, school of thought to which we must refer for the purpose of this study is composed of those writers who begin by establishing a necessary link between responsibility and freedom. They argue that the international responsibility arising out of an internationally wrongful act can be attributed to a State only if that State, in committing it, was operating in a sphere of action for which it had complete freedom of decision. Contrariwise, in so far as that 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 should be held responsible. This argument, which we shall call the "control theory", and which was already to be found in works of the late nineteenth century,[33] was later taken up and developed with a number of variations. In 1928, the American internationalist C. Eagleton buttressed the argument with a thorough study of international practice, and then stated his conclusion in the following terms:

> ... if one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinated State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left, to the respondent State.[34]

Eagleton thus indicates clearly that in protectorate relationships, as in other comparable relationships, the responsibility for a breach of an international obligation incumbent on the protected State can be attributed to the protecting State only if, and to the extent that, it has control over the other State. This writer thus provided a valid criterion for distinguishing, as would subsequently be done, between cases in which responsibility for the breach of an obligation of the dependent State truly devolves upon the dominant State, because the breach occurred in a field where it had control over the activities of the other State, and cases in which the dependent State itself remains responsible, because it operated in a field of action where its freedom of decision was not restricted.[35] What is still lacking in Eagleton's analysis, however, is a definition of the criteria for distinguishing between cases in which the responsibility attributed to the dominant State is a direct responsibility and those in which it is, in the true sense of the term, indirect, or responsibility for the act of another. Indeed, it may be noted that Eagleton, not having as yet a clear perception of this distinction despite the fact that it is essential, does not use the expression "indirect responsibility" or any similar expression.

18. The present Special Rapporteur went into this question in his study on indirect responsibility under international law published in 1934, where he noted that, in what are usually termed relationships of dependence,[36] the interference of one State in the affairs of the other can take two different forms. Sometimes it involves an actual substitution, in certain fields, of the activity of the former State for that of the latter; in such cases, what we have is an activity exercised by organs of the dominant State in the territory of the dependent State. If a breach of an international obligation of the dependent State is committed in the course of such activity, the dominant State is not only answerable, but directly answerable for it, because the responsibility in question arises out of its own act, the act committed by its own organs, acting in subordination to it.[37] The interference of one of the two States in the activities of the other may, however, take another and less extreme form. In this case, a given activity is left to the dependent State and the organs of that State are responsible for carrying it out; however, in the performance of that activity, the freedom of decision of the dependent State is restricted by either the prior or the subsequent control of the dominant State.[38] It is precisely in connection with this second form of interference that the case of indirect international responsibility arises.[39] Any act committed in the exercise of the activity in question is undeniably an act attributable to the dependent State. If that act constitutes a breach of an international obligation of that State, it is clearly an internationally wrongful act of the dependent State, and if the responsibility for it is attributed to the

[33] In 1883, F. de Martens wrote:

> "Logic and equity would require that States which are in this dependent situation should be responsible for their actions towards foreign Governments only in proportion to their freedom of action. The actions of the Egyptian Khedive or of the Bey of Tunis should entail a measure of responsibility for the European Powers under whose tutelage they stand" (*Traité de droit international*, trans. [into French] A. Leo (Paris, Maresq aine, 1883), vol. I, p. 379).

[34] C. Eagleton, *op. cit.*, p. 43. Elsewhere in his study, he writes: "A State may be held responsible, as a subject of international law, only to the extent that it has rights and duties which it is free to exercise; ..." (*ibid.*, p. 42).

[35] In such cases, as we have several times pointed out, this responsibility does not cease to be a responsibility of the dependent State simply because it will have to be pursued through the dominant State where the latter has undertaken the international representation of the dependent State.

[36] As examples of this kind of relationship at the time when he was writing, the author cited vassalage, protectorates and mandates, a common feature of which is that they are all *de jure* relationships. He was inclined at that time to exclude the possibility of attributing to a State international responsibility for the act of another State in situations of *de facto* dependence (Ago, *op. cit.*, pp. 60–61).

[37] *Ibid.*, pp. 36 *et seq.*

[38] "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." (*Ibid.*, p. 59.)

[39] *Ibid.*, pp. 46 *et seq.*

dominant State, then this is a responsibility for the act of another, a responsibility that can and should be called "indirect". The final conclusion drawn by the author in question from his analysis of the various practical situations studied was that the existence between two States of a situation of dependence is a necessary, but not a sufficient, condition for attributing to the State benefiting from such a situation "indirect" responsibility for any breach of an international obligation of the State which is subjected to that situation. Thus, as was mentioned above, responsibility may in some cases be attributed to the dominant State but be a "direct" responsibility of that State, because the sector of activity within which the breach occurred was reserved for organs of that State. Contrariwise, the responsibility may after all be a "direct" responsibility of the dependent State; that is so in the admittedly rather exceptional cases where the internationally wrongful act is committed by that State in a field of activity in which it enjoys complete freedom of decision without any control.[40] In order for there to be "indirect" responsibility on the part of the dominant State as a result of an internationally wrongful act of the dependent State, a twofold condition must be fulfilled: organs of the dependent State must have committed the act in question, and they must have operated in a field of action in which their freedom of decision was restricted, in one way or another, by the control of the dominant State.

19. In subsequent years, many writers endorsed the basic ideas outlined above. While using various formulae, they agreed in substance that it was the interference or control attributed to one State in or over the external or internal activity of another State that gave rise to indirect responsibility on the part of the former State for internationally wrongful acts committed by the latter. In the view of most of these writers, there are no cases of indirect responsibility provided for in international law except in the above-mentioned circumstances of interference or control. This view is held by Scerni,[41] Barile,[42] Rolin,[43] Morelli[44] and Vitta.[45] There are also those, such as Klein, who profess to be critics of the "control theory" but in fact, while contributing some useful developments to it, remain very close to its approach.[46] Lastly, there are some who fully acknowledge its validity for the purpose of establishing indirect responsibility in what they call "attentuated" cases of protectorate or quasi-protectorate, where the protecting State does not undertake the international representation of the protected State. Examples are Verdross[47] and Ross.[48]

20. The fact that the basic ideas were initially shared by the writers mentioned above does not mean that their views did not subsequently diverge on individual points. For example, they disagree on whether or not the relationship between a federal State and its member States should be regarded, at least in part, as a relationship between subjects of international law, that being a relationship within which the phenomenon of the indirect responsibility of a subject of international law for the act of another subject might arise.[49] They

[40] Thus, even if it will normally be so, it cannot be said that every internationally wrongful act committed by organs of the dependent State automatically gives rise to responsibility on the part of the dominant State (*ibid.*, pp. 62–63).

[41] "Under both international and internal law, the only true cases of indirect responsibility are those in which there is a relationship of interference in and direction of the activity of a subordinated subject by a dominant subject" (Scerni, *loc. cit.*, p. 474).

[42] This writer regards as the basis for indirect responsibility of a State the fact that that State has a "possibility of control" over the activity of the other State, which is linked to it by a relationship of dependence (Barile, *loc. cit.*, pp. 443 *et seq.*).

[43] H. Rolin writes that "it would seem that indirect responsibility should be acknowledged in the case of a State exercising control over the internal affairs of another State" ("Les principes de droit international public", *Recueil des cours ...*, 1950-II, vol. 77 (Paris, Sirey, 1951), p. 446.

[44] "Indirect responsibility presupposes, in the international juridical order, the existence of a certain relationship between the subject responsible for the wrongful act and the subject which committed it, that relationship being characterized by the fact that the former has the possibility of controlling the conduct of the latter or, in other words, of guiding that conduct in a certain direction." (Morelli, *op. cit.*, p. 364.)

[45] Referring to the problem of the responsibility of the protecting State for wrongful acts of the protected State, E. Vitta notes: "It is only in the case of a wrongful act committed by organs of the protected State which are subject to the control of the protecting State that responsibility should be attributed to the latter. We should then have an analogy with indirect responsibility in private law." (*Loc. cit.*, p. 734.)

[46] Klein argues that "the truly existing and legally relevant basis for indirect responsibility under international law is in all cases purely and simply the unique relationship between the two subjects of international law A and C as such, and not the fact that in a particular case this internal relationship assumes the form of '*sottoposizione*' in the sense of not only a purely potential '*ingerenza*' but rather a complete and effective one" (*op. cit.*, p. 126) [translation by the Secretariat]. Thus, for this writer, it is sufficient that there should be potential interference (which in his view occurs in any relationship of dependence), and there need not be any actual interference—something which, in fact, the adherents of the control theory do not claim.

[47] "Only the control theory can account for indirect State responsibility in the case of an attenuated protectorate or a quasi-protectorate" (Verdross, "Theorie ..." (*loc. cit.*), p. 413).

[48] This writer, referring to the responsibility of the protecting State, says that "the responsibility will be restricted to the extent to which the protector State actually has protected or been able to exercise control of the protégé State" (Ross, *op. cit.*, p. 262; cf. also p. 261).

[49] In the view of the Special Rapporteur, the cases in which the member States of a federal State have a separate international personality are so few (and in particular, the international legal capacity which they retain is so limited), that it seems somewhat unrealistic to conceive of any cases in which the indirect international responsibility of the federal State for internationally wrongful acts committed by a member State would actually arise. See Ago, *op. cit.*, pp. 25 *et seq.* Other writers, such as Verdross

also disagree on whether or not the possibility should be recognized of indirect responsibility on the part of an occupying State for an internationally wrongful act committed by the occupied State in a field in which its activity is subject to interference and control by the occupying State. The Special Rapporteur definitely believes that it should, since the situation is similar in a number of respects to that which exists in the case of relationships of dependence, but other writers take a different view.[50] A particular subject of controversy is whether only a "legal" relationship of dependence of one State on another can constitute the framework for the creation of indirect international responsibility on the part of the latter State for an internationally wrongful act committed by the former,[51] or whether such a framework can also be provided by a situation of *de facto* dependence. And it has been argued that, for this purpose, *de facto* situations include both some relatively stable situations, such as that which comes into existence between a "dominant" State and a "puppet" State created on its initiative, and other purely occasional ones, such as that created through coercive action taken by one State against another with the aim of compelling it to adopt a certain line of conduct.[52]

21. Finally, there is one last question on which no consensus exists in the group of authors all of whom endorse the idea that the incurrence, by a subject of international law, of indirect responsibility for the internationally wrongful act of another subject is based on and grounded in the control attributed to the former over the sector of activity within which the latter engaged in its wrongful conduct. The question in dispute is whether, if the conditions for the existence of indirect responsibility on the part of the dominant State are fulfilled, that responsibility should be considered to preclude any responsibility on the part of the dependent State, or whether, on the contrary, it would be conceivable that this other responsibility should subsist alongside that of the dominant State. A further question then is whether, if the two responsibilities do coexist, the injured State should or should not in the first instance pursue the direct responsibility of the dependent State and assert the indirect responsibility of the dominant State only if it meets with a refusal by the dependent State to make due reparation.[53]

22. From the analysis made thus far, we may therefore draw the following conclusion: through the gradual evolution of its ideas, legal thinking—despite what are, after all, marginal differences of opinion within the dominant school of thought—has, in our view, ultimately managed to delineate correctly the juridical configuration of indirect responsibility or responsibility for the act of another under international law. It has also succeeded in defining the basis for such responsibility in terms which, if strictly adhered to, should make it possible to settle the few points which are still in dispute, not always for any good reason. We have now come to the stage where we should, as usual, turn our attention to international practice in order to see whether or not a careful consideration of the positions taken can provide confirmation of the soundness of the conclusions reached on the basis of logical principles. Unfortunately, the known practical cases in which the issue was the international responsibility of a State for inter-

("Theorie ..." (*loc. cit.*), pp. 395 *et seq.*), Ross (*op. cit.*, pp. 259–260) and Morelli (*op. cit.*, pp. 263–264), take a more affirmative attitude on this point, but it seems to us that at times some of them regard as separate subjects of international law entities which in fact are devoid of international personality.

[50] It was in an article published in 1945, in particular, that the Special Rapporteur expounded the idea that military occupation might be one of the situations that could constitute a basis for indirect responsibility under international law. On the question of the control exercised by the occupying State over certain fields of activity of the occupied State, he pointed out that such control was, within certain limits, permitted and sometimes even required by international law, irrespective of the question of the lawfulness of the occupation as such (see R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", Istituto di diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 163 *et seq.*). A comparison between the situation of military occupation and that of relationships of dependence for the purpose of determining the existence of cases of indirect responsibility had already been drawn by Verdross. For the last expression of his thinking on the subject, see *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 390. Ross, on the other hand, maintains that in cases of military occupation the occupying State could incur only direct responsibility.

[51] This view is still held by G. Morelli, *op. cit.*, p. 364.

[52] Among the adherents of the idea that cases of indirect international responsibility can also arise in "any relationship of *de facto* dependence", mention may be made of Barile, *loc. cit.*, p. 446. This writer further states that in his view there is also no need to make a distinction according to whether the creation of the relationship of *de facto* dependence was lawful or unlawful. Actually, it should be noted, those who accept as a basis for indirect responsibility the mere fact of the dependence of one State on another, and not interference or control by the dominant State in or over certain activities of the dependent State, normally make no distinction between "legal" situations of dependence and purely *de facto* situations. See, for example, Strupp, *loc. cit.*, pp. 112–113; Klein, *op. cit.*, p. 111; von Münch, *op. cit.*, p. 236. It may also be pointed out that in the view of some writers the fact that "indirect" responsibility of the dominant State is precluded in cases of *de facto* dependence is no reason for totally precluding the responsibility of that State, which in their opinion should be considered a "direct" responsibility. See, for example, Ross, *op. cit.*, p. 260; Quadri, *op. cit.*, p. 603; Verdross, "Theorie ..." (*loc. cit.*), pp. 413 *et seq.*; Verzijl, *op. cit.*, pp. 712 *et seq.* Eagleton (*op. cit.*, pp. 41 *et seq.*) also acknowledges the existence of the responsibility of the dominant State for actions of the dependent State in situations of *de facto* dependence; however, as has been mentioned, he makes no distinction between direct and indirect responsibility.

[53] Eagleton (*op. cit.*, pp. 26 *et seq.*) and Ross (*op. cit.*, p. 261) take the view that the attribution of responsibility to the dominant State must preclude any responsibility on the part of the dependent State. The idea that the two responsibilities arise and subsist side by side was formerly held by the present Special Rapporteur (*La responsabilità indiretta ...* (*op. cit.*), p. 54), in which respect he was followed by Barile (*loc. cit.*, p. 447), Rolin (*loc. cit.*, p. 446) and Morelli (*op. cit.*, p. 364). It would appear, however, that this idea should be reconsidered in the light of further research into the problem. The idea that the responsibility of the dominant State is only subsidiary to that of the dependent State has been advanced by Verzijl (*op. cit.*, p. 705).

nationally wrongful acts committed by another State linked to it, in one way or another, by a relationship of dependence or submission, are not very numerous. This is hardly surprising, in view of the fact that the practice of States in the matter under discussion has been only very partially recorded, and in view also of the fact that some of these types of relationship are dying out. Nevertheless, as we shall see, there are at least a few cases which can provide useful indications for our purposes.

23. It does not seem necessary to make a detailed analysis of the cases which occurred during the somewhat ephemeral lifetime of the relationship known as "suzerainty" or "vassalage", according as it was viewed from the standpoint of one or the other of the entities involved in such a relationship. In many cases in which States that were formally "vassals" of the Ottoman Empire had caused injury to third States through the conduct of their organs, the third States in question simply invoked the responsibility of the vassal State in the belief that, with few exceptions, those vassal States, with which they were by that time maintaining direct diplomatic relations, were acting free of any interference by the suzerain State. This was the course taken in 1861–1867 by Italy and France on the occasion of internationally wrongful acts committed by Tunisia and by Egypt.[54] On the other hand, the same States regarded Tripolitania not as a vassal State but as a province of the Ottoman Empire, and accordingly attributed directly to the Porte the responsibility for international offences committed in that region. The United States of America, for its part, always regarded the Barbary States, including Tripolitania, as being in fact independent of the Porte and responsible for their violations of international law.[55] Thus, among all these cases, for one reason or another, "indirect" responsibility on the part of the suzerain State for the actions of the vassal State could not be made out in a single one. It may also be recalled that one of them, the *Strousberg* case, has already been discussed above,[56] where we noted the gist of the German Government's position as being that what was then called the Principalities of the Danube (Romania) were, from the international standpoint, simply part of the Ottoman Empire, which "covered it with its sovereignty", and therefore lacked any international personality of its own. Consequently, for Chancellor Bismarck, as we indicated, there could not even have been in that particular case a question of any "indirect" responsibility incurred by Turkey for the internationally wrongful act of another subject of international law. If and end had not been put to the wrongful situation of which the German Government complained, that Government would obviously have considered that Turkey itself had incurred a real and "direct" responsibility of its own. As for the Ottoman Government, its attitude consisted of the assertion that the Principalities was by that time acting in full autonomy and without any control on its part. After stating that it had no basis for interfering in any way, even through its judicial organs, in the "legislative and administrative" affairs of the Principalities,[57] the Porte confined itself to using its influence with the Principalities to induce Bucharest to settle the problem by direct agreement with Strousberg, which was done in 1872. It is not very clear whether, on the question of the international status of the Principalities the views of the Porte were the same as those of the German Government or whether they differed from them, as some of the terminology used would suggest. However, it is apparent that, while the Ottoman Porte had by that time resigned itself to recognizing the Principalities as a separate subject of international law, although linked to it by a relationship of vassalage, it was definitely preparing to deny any responsibility on its part, should Bucharest refuse to settle the case, on the ground that the Principalities enjoyed complete independence in the field in which the breach of Strousberg's contract had occurred. In short, this case is of some relevance to us, although mainly of a negative kind, since neither party invoked the notion of responsibility for the act of another, the reason being that both of them considered the preconditions for it to be lacking in this case—from Germany's standpoint, because in its view only one subject of international law was involved, and from Turkey's standpoint, because, even if in its view there might be two such subjects, another essential condition was not fulfilled, in that the suzerain had no control over the internal activities of the vassal.

24. It does not seem necessary in the present context to consider the no doubt numerous cases in which a federal State has been held internationally responsible for an act of a member State. The cases usually cited in this connection are cases arising out of actions by organs of a member State which has a personality separate from that of the federal State only under

[54] See S.I.O.I.–C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861–1887), vol. I, paras. 230 and 232, and vol. II, paras. 964, 978, 1012 and 1023 (concerning Tunisia), and vol. II, paras. 1013, 1021 and 1031 (concerning Egypt); and A. C. Kiss, *Répertoire de la pratique française de droit international public* (Paris, C.N.R.S., 1966), vol. II, pp. 10 *et seq.* The situation does not seem to have been any different in the *Chadourne* case, involving France and Bulgaria, in which, contrary to the opinion of some writers, no responsibility was laid on Turkey. The French Government simply informed the Porte of the treaty violations committed by Bulgaria, and the responsibility for them was pursued with the Bulgarian authorities. All that the French Government asked of Constantinople was the Porte's backing for the *démarches* to Sofia.

[55] See J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, pp. 391 *et seq.*

[56] See footnote 32 above.

[57] See the letter of 21 December 1870 from the German Ambassador at Constantinople, in Wythrlik, *loc. cit.*, p. 276, and Chancellor Bismarck's letter, already mentioned, of 1 September 1871 (*ibid.*, pp. 279–280).

internal law—hence, actions which international law, as we have twice reaffirmed,[58] simply deems to be acts of the federal State. Consequently, these cases as such have no evidential value for the purpose of confirming the assertion that the federal State would incur indirect responsibility if the member State possessed an international personality of its own and if its organs had acted within the restricted area reserved to the international legal capacity of the member State and in breach of an international obligation of the member State. The assertion of indirect responsibility on the part of the federal State in the latter case therefore appears to be a deduction—and a fully valid one—from the general principles that have been affirmed in the matter, rather than a conclusion which is also grounded in precedents.

25. On the other hand, it is logical to devote more attention to cases which arose in the framework of a relationship of international dependence in the true sense, such as an international protectorate, a mandate or some similar type of relationship. In this connection, the Special Rapporteur ventures to point out that, while relationships of this kind are becoming a thing of the past (although a few do survive), the interest of cases involving such relationships is by no means purely historical or theoretical, since the principles affirmed in those cases may be applicable to other situations which are comparable at least in part and which, regrettable as it may be, still exist.

26. It must be said, however, that international legal precedents in this matter will inevitably prove somewhat disappointing to anyone who expects to find in them a rich harvest of clear decisions and definite positions. As has been mentioned, the main reason is that the cases considered and the decisions on them date back a considerable way. The *Studer* case is an illustration of this. Studer, a United States citizen, claimed to have suffered from acts of invasion and destruction, committed by the Sultan of Johore, of land to which he had been granted a concession by the former ruler of the territory. The United States invoked the responsibility of Great Britain, as the protecting Power of Johore, and the case came before an Arbitral Tribunal, which rendered its decision on 19 March 1925. The Tribunal noted that the United States claim was for the invasion and destruction of Studer's concession through the wrongful acts of the Sultan of Johore, and 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.[59]

The 1885 treaty gave the British Government very extensive control over all international and internal activities of the Sultanate, including in particular matters relating to concessions, in respect of which special restrictions were placed on the Sultan. That being so, and in view of the precise purpose of the claim, it would be natural to interpret the passage from the arbitral decision reproduced above as meaning that the British Government appeared in the proceeding by virtue of its assumption of responsibility internationally for an act committed by the authorities of a protected State in an area in which those authorities were obliged to submit to the directions and control of the protecting State. However, this interpretation is not clearly confirmed by anything else that is said in the decision; it is therefore conceivable that this passage was intended by the arbitrator to have a less specific and broader scope, in view of the fact that the 1885 treaty also required the Sultan to accept "the guidance and control of his foreign relations" and to have no "political correspondence" with foreign States. Since, moreover, the arbitrator did not consider himself equipped to rule on the merits and therefore simply recommended that the case should be taken before the courts of Johore, it would hardly seem that the case could be regarded as a really sure precedent on the point under consideration here.

27. Two other cases, one relating to a protectorate and the other to a League of Nations mandate, are in a way comparable, since at first sight both of them seem to show some influence on the ideas of D. Anzilotti concerning international representation as the basis for indirect international responsibility. They are the *British claims in the Spanish Zone of Morocco* case, arbitrated by M. Huber in 1925, and the *Mavrommatis concessions in Palestine* case, in which the Permanent Court of International Justice gave its judgement on 30 August 1924. It may be noted in passing that Anzilotti was at that time, like Huber, a member of the Court. In both cases, however, his influence was only apparent. Our review of Huber's decision above[60] showed that the deference apparently paid to the "representation theory" was only the starting-point for the development of different ideas. As was noted, the arbitrator actually took the view that, in the protectorate which provided the setting for the case submitted to him for a ruling, the protecting State had ultimately become the true sovereign of the territory of the protected entity. That constituted the ground for his belief that, along with sovereignty over the territory, the protecting State had of necessity also assumed responsibility for internationally wrongful acts committed in that territory.[61] We might add that, while the arbitrator

[58] See footnotes 7 and 49 above. The attribution to the Federal State of acts of organs of its member States lacking international personality is provided for in draft article 7 and is explained in the commentary to that article (see *Yearbook ... 1974*, vol. II (Part One), p. 277 *et seq.* document A/9610/Rev.1, chap. III, sect. B.2).

[59] United Nations, *Reports of International Arbitral Awards*, vol. VI, United Nations publication, Sales No. 1955.V.3), p. 150.

[60] See para. 9 above.

[61] 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 may be noted

(*Continued on next page.*)

speaks of the duty of the protecting State to take upon itself the responsibility of the protégé "*at least*" as a derived responsibility", those words "at least" are rather significant, since it is very probable that, in his view, the responsibility of a protecting State such as Spain for the acts of a protégé such as Morocco is really a direct responsibility. Lastly, Mr. Huber's 1925 decision certainly testifies to his strong belief that the protecting State must assume responsibility for wrongful acts committed by the protected State, but so far as the nature and definition of the responsibility thus assumed and the basis for attributing it are concerned, the decision in question is of little value as a precedent.

As for the judgement of the Permanent Court of International Justice in the *Mavrommatis concessions* case, some influence of the arguments being advanced at that time by Mr. Anzilotti could perhaps be read into the last sentence of the following passage:

> The powers accorded under Article 11 to the Administration of Palestine must, as has been seen, be exercised "subject to any international obligations accepted by the Mandatory". This qualification was a necessary one, for the international obligations of the Mandatory are not, *ipso facto*, international obligations of Palestine. Since Article 11 of the Mandate gives the Palestine Administration a wide measure of autonomy, it was necessary to make absolutely certain that the powers granted could not be exercised in a manner incompatible with certain international engagements of the Mandatory. The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it.[62]

However, even more serious doubts may arise in this case as to whether the authors of the judgement adhered in any way to the "representation theory" and as to the still wider question whether the judgement in this case can be presented as a precedent in regard to the responsibility of a subject of international law for the act of another subject. In the first place, there is nothing to show that the Court regarded what it called "the Administration of Palestine" as an organ of a subject of international law other than the Mandatory itself. Moreover, the British High Commissioner had himself intervened in the approval of the terms on which the contested concessions were granted, and it was shown that the Colonial Office had in turn intervened in the matter. The Court also noted that the operation whereby Mr. Mavrommatis's concessions had been revoked and handed over to Mr. Rutenberg had been the act of the "Palestine and British" authorities.[63] Lastly, as the Court noted, the international obligations violated by that operation were obligations incumbent on Great Britain as signatory to the Mandate, and *not on Palestine*. Thus, the case was far from being one of the indirect responsibility; in order for there to be a responsibility meriting that description, a State must assume responsibility for the breach committed by another State of an international obligation incumbent on that other State. The responsibility incurred by a State for a breach of its own obligations can only be a responsibility resulting from its own act, whether that act was committed by its central organs or by decentralized organs, such as those responsible for administering a mandated territory. Thus this case also is of no value as a precedent for the purpose of determining the grounds of indirect international responsibility.

28. As a positive example of an affirmation of the responsibility which the protecting State must incur indirectly for a breach of an international obligation of the protected State committed by organs of the latter, we cited above [64] the *Phosphates in Morocco* case. In that connection, we stressed the fact that the applicant, the Government of Italy, made no mention of the relationship of international representation which existed at that time between France and Morocco as a ground for its contention of France's indirect international responsibility for the actions of organs of the Makhsen. But that, of course is all that can be noted concerning this precedent.

29. In contrast, the decision in the *Brown* case, rendered on 23 November 1923 by the arbitral tribunal constituted by Great Britain and the United States under the Special Agreement of 18 August 1910,[65] is not only a valid precedent but, in our view, one of great significance in relation to the essential aspects of the question. The United States brought a claim for compensation against Great Britain, as the Power which had had suzerainty over the South African Republic prior to the war and to 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 had 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

(*Footnote 61 continued.*)

that he said "the protected territory" and not "the protégé" or "the protected State"), he went on:

> "The responsibility for events which may affect international law and which occur in a given territory goes hand in hand with the right to exercise, to the exclusion of other States, the prerogatives of sovereignty. Since the situation of the protecting State vis-à-vis other countries is the same as that of a sovereign State, its responsibility must be the same." (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 649.)

[62] *P.C.I.J., Series A, No. 2*, p. 23.

[63] *Ibid.*, p. 19.

[64] See para. 11 above.

[65] United Nations, *Reports of International Arbitral Awards*, vol. VI (*op. cit.*), pp. 120 *et seq.*

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 or control over internal activities, legislative, executive of 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.[66] It is therefore legitimate to deduce from this 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 was 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. The decision in the *Brown* case therefore fully confirms, in our view, the soundness of the conclusions which we reached on the basis of our analysis of the opinions expressed in the literature. Its significance is enhanced by the fact that it considerably antedates the more recent evolution and resulting clarification of the doctrine on the subject.[67]

30. We cannot conclude the first part of our study of international legal precedents and practice—i.e., the part concerned with identifying the State which is answerable for an internationally wrongful act committed in the framework of a legal relationship of international dependence—without recalling once again Denmark's reply to point X of the request for information from the Preparatory Committee for the 1930 Codification Conference. That reply, which in our view is 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.*"[68]

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, we can say that, while the few precedents afforded by arbitral decisions or statements of the views of Governments which relate to classical and largely outdated situations of relationships of dependence and which provide confirmation for the solutions now advocated by most writers, are neither many in number nor, for good reason, recent, they are nevertheless very clear and very definite. And a point which should not be overlooked is that there are no other decisions or statements of views which can be said, after careful study, to provide support for different solutions.

31. We must now proceed to consider how international judicial organs and State practice have reacted to the problem under discussion in the framework of other situations which, unfortunately, unlike those discussed above, are still with us. We are referring in particular to the situation which arises in cases of total, or even partial, military occupation of the territory of one State by another State. It is true that a situation of this kind does not as a rule 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, and leaving aside of course any question of the lawfulness or unlawfulness of the act

[66] "The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (reply, p. 26), survived after the concluding of the London Convention of 1884 (reply, p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no 'treaty or engagement' with any State or nation other than the Orange Free State without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African war, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of." (*Ibid.*, pp. 130–131.)

[67] Klein (*op. cit.*, p. 89 and pp. 246 *et seq.*) is reluctant to concede the broader implications of this decision, which conflicts with his argument that, in protectorate relationships and relationships of dependence in general, international responsibility exists for internationally wrongful acts committed by the dependent State, whether or not the dominant State has power of control over the sector of activity in which the wrongful act was committed. He acknowledges, however, that those writers who have dwelt on this precedent—Verdross and Möller and the present Special Rapporteur—have considered the principles affirmed in the Anglo-American tribunal's award applicable to all protectorate relationships and relationships of dependence.

[68] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 122.

which initiated the relationship between the occupying State and the occupied State or territory, that relationship unquestionably has some features resembling those which mark, for instance, the relationship between a protecting State and the protected State.[69] Military occupation, even if it extends to the entire territory, also brings about no change in sovereignty over the occupied territory and does not affect the international personality of the State subjected to occupation. However, the occupying State, like a protecting State, has to exercise in the occupied territory certain prerogatives of its own governmental authority in order to safeguard the security of its armed forces and provide for its own needs in general, and/or to meet the needs of the population of the occupied territory and maintain law and order, the latter being an area in which the exercise of those prerogatives is in fact required, under certain conditions, by the usages and customs of war and by international conventional law.[70] 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.[71] So too, the conditions of that interference by one State in the international and internal activities of the other,[72] which we found to be a characteristic of the relationships of dependence discussed earlier, are fulfilled. The interference in the international activities of the occupied State has the effect of confining those activities within widely varying limits, going so far in some cases of total and particularly ruthless occupation as to put an end to them altogether. Interference in internal activities is always present, even if it too varies in extent from case to case. Consequently, there will also be some areas of activity which, because they do not affect the interests of the occupying State, will be left to the free decision of the local authorities; it follows that the occupied State will continue to incur international responsibility for any internationally wrongful acts committed in the areas of activity in question.[73] Conversely, the occupying State will sometimes entrust to elements 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 elements of the machinery of the occupied State.[74] 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 there will obviously be a direct responsibility or, in other words, responsibility for its own act.[75] Lastly, 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.[76] It is precisely within those sectors of activity that the phenomenon of indirect international responsibility will again emerge; it is within those sectors, and for the same reasons as we stated when considering relationships of dependence,[77] that the occupying State, as the party in control, must be held indirectly responsible for breaches of the international obligations of the occupied State committed by organs of that State acting under the conditions indicated. As will now be seen, such cases as are revealed by State practice and international judicial decisions—the few cases which are known—provide the expected confirmation of this.

32. Among the oldest cases, mention should first be made of those in which the Italian Government held the French Empire responsible, as the Power then in military occupation of the territory of the Papal State, for acts deemed to be internationally wrongful that

[69] See, in this connection, para. 20 and the references to the literature in footnote 50 above.

[70] On this subject, see Ago, "L'occupazione bellica ..." (*loc. cit.*), pp. 143 *et seq.*, especially p. 148.

[71] *Ibid.*, pp. 149 *et seq.*

[72] *Ibid.*, pp. 157 *et seq.*

[73] See para. 18 above, *in fine*.

[74] For example, article 5 of the Agreement between the Governments of the United Kingdom, the United States of America, the USSR and France on the Machinery of Control in Austria, signed at Vienna on 28 June 1946 (United Nations, *Treaty Series*, vol. 138, p. 93), listed eight separate areas in which the Allied Commission would act directly. Article 2(*c*) provided that the Allied Commission should also act directly to maintain law and order in cases where the Austrian authorities were unable to do so or where they did not carry out directions received from the Allied Commission. (See M.M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1963), vol. I, pp. 990 *et seq.*).

It should be emphasized that, although the organs of the occupying State are required to exercise their functions within the framework of the juridical order of the occupied State and, in so doing, to comply with the international obligations of that State, they still remain under the exclusive authority of the State to which they belong and act in accordance with its directions and instructions. They must not, therefore, be confused with the organs of a State "placed at the disposal" of another State, which are dealt with in draft article 9 (see footnote 2 above).

[75] See para. 18 above, *in initio*.

[76] The instructions of 10 November 1943 to the Allied Control 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. (Whiteman (*op. cit.*), p. 990.)

Article 1 of the Agreement on the Machinery of Control in Austria, which was cited above, provided that:

> "(*a*) The Austrian Government and all subordinate Austrian authorities shall carry out *such directions** as they may receive from the Allied Commission;" (United Nations, *Treaty Series*, vol. 138, p. 86).

[77] See para. 18 above, *in medio*.

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[78] could only rest 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".[79]

33. Another statement of position, more recent but still prior to the Second World War, is to be found in the judgement rendered on 1 March 1927 by the Alexandria Court of Appeal in the *Fink* case. The petitioner, a German national, claimed compensation from the Egyptian Government for damage suffered as a result of the sequestration of his business and its subsequent liquidation by the British military authorities occupying Egypt. The liquidation, which Fink considered catastrophic, occurred after his senior employees had been invited by the Egyptian police to surrender and had been taken in charge by the military authorities. The Court rejected Fink's petition on the following grounds:

> It is clear from this simple account of the facts that the only intervention by the Egyptian Government was the invitation by the local police to the petition's senior employees to surrender to the military authorities;
>
> In the first place, this invitation was more in the nature of a friendly act, designed to prevent the employees from being arrested *manu militari* and taken through the streets of Cairo in that way;
>
> In addition, *the local authorities, in assisting the occupation forces, have always acted on behalf of the latter in accordance with the principles of international law,** which were universally respected even during the last war, *and the local authorities cannot be held responsible for collaboration imposed by circumstances;**
>
> The only acts causing actionable damage, namely, the sequestration and liquidation of the business, were carried out exclusively by the British military authorities.[80]

The Court therefore ruled that, while the conduct of the Egyptian authorities had been wrongful, it 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 that other 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.

34. Coming to more recent times, we may cite two acts which occurred during the German occupation of Rome and which, for all their similarity in execution and in purpose, are particularly relevant to the problem under discussion because of one particular aspect which differentiated them. 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.[81] 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.[82] The responsibility of Germany which the Holy See asserted on that occasion[83] 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 Outside the Walls, where they committed acts of depredation and made arrests.[84] 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, thus asserting the responsibility of the occupying Power in this case also.[85] However, in doing so, it attributed to Germany international responsibility for offences committed by non-German organs in a sector of activity that was subject to the control of the German occupation authorities—a responsibility which must therefore be called indirect.

35. Another statement of position particularly relevant to the question under discussion may be noted in the decision rendered on 15 September 1951 by the Franco-Italian Conciliation Commission established under article 83 of the Treaty of Peace with Italy (1947), in the *Heirs to the Duc de Guise* case. In this case, the French Government called on Italy to return a property owned by French citizens which had been requisitioned under the decrees issued on 21 November 1944 and 4 January 1945 by the (Italian) High Commissioner for Sicily, which at that time was under

[78] Visconti Venosta to Nigra, 13 July 1863, Pasolini to Nigra, 11 March 1863, reproduced in S.I.O.I.–C.N.R., *op. cit.*, vol. II, pp. 875–876. The conduct complained of consisted of unlawful actions with regard to Italian vessels in the ports of Latium and other similar actions.

[79] Nigra to Pasolini, 19 March 1863 (*ibid.* p. 876).

[80] *Journal du droit international* (Paris), 55th year, No. 1 (January–February 1928), p. 196.

[81] See Ago, "L'occupazione bellica . . ." (*loc. cit.*), p. 160.

[82] *Ibid.*, pp. 154–155. See in particular the many references in footnote 28 of that study to writers expressing this view.

[83] This responsibility consisted primarily in the obligation to release the persons wrongfully arrested and in the restoration of the situation existing prior to the offence (*in integrum restitutio*).

[84] *Ibid.*, pp. 167–168.

[85] As a result of the Holy See's remonstrances, there was no repetition of such incidents.

military occupation by the Allied and Associated Powers. The Commission allowed the French claim, observing, *inter alia*, that:

> The fact that on 21 November 1944 administrative *control** in Sicily was being exercised by the Allied and Associated Powers is irrelevant in this case, since no interference either by the commander of the occupation forces or by any allied authority with the aim of causing the requisition decrees of 21 November 1944/4 January 1945 to be issued has been proved.[86]

This decision therefore expressly affirms that the occupied State remains responsible for internationally wrongful acts committed by it without any interference or control by the occupying State. It must obviously be deduced, *a contrario*, that if such interference occurs and such control is established over the activity in the framework of which the international offence takes place, responsibility passes to the occupying State, which is then answerable for the act of the occupied State.

36. A special situation, involving both international dependence and military occupation, is the situation of what are called "puppet States" ("*Etats fantoches*"). This expression is used to describe States or Governments, normally set up in a given territory on the initiative or an occupying State, which, while purporting to be free, are in fact dependent, often to a very high degree, on the State which brought them into existence. The relationship established between the puppet State and the State which created it has already been mentioned, in connection with its impact on questions of international responsibility, in the seventh report of the Special Rapporteur[87] and, subsequently, in the Commission's report on its thirtieth session. The Commission noted that:

> In situations like this, 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" ... State ... it is then the existence of the relationship established between the two States which becomes the decisive factor in this transfer of responsibility from one subject to the other.[88]

The Commission therefore concluded that the problems of international responsibility arising out of the conduct of organs of a puppet State, like those arising out of the conduct of organs of any dependent State, fell within the notion of "indirect responsibility".

37. In order to illustrate its conclusion with a classic example, the Commission first of all referred to the ancient precedent of the situation, between 1806 and 1810, of the "Kingdom of Holland", a pseudo-independent State created by the French Empire and placed under the rule of Louis, the brother of Napoleon I. The Commission cited the conclusion of the Board of Commissioners established by the Convention of 4 July 183 between the United States and France, that the responsibility for the sale and confiscation of goods brought to Holland in American ships must be assumed by France, even though those measures had been taken by organs of the so-called Kingdom of Holland, since the "Kingdom" had had no freedom of decision concerning its actions, being entirely subject to the directions and control of France. Thus, in view of the conditions which were fulfilled in this case, all that the Board did was to apply correctly the notion of international responsibility of a State for the act of another State.

38. The Commission's report on the work of its thirtieth session also mentioned the much more recent outcome of many international disputes which arose from breaches of international obligations committed during the Second World War by organs of a puppet State or Government set up in occupied territory by the occupying State in pursuit of its own policy. The responsibility arising out of such breaches was not usually attributed to the State in whose territory the puppet State or Government had existed and had operated under enemy occupation.[89] It was only when international conventional law provided in that respect for an express derogation from the principles of general international law that such an attribution was made, as, for example, in the cases considered by the Italian/United States and Franco/Italian Conciliation Commissions established under the Treaty of Peace with Italy to rule on internationally wrongful acts committed by the "Italian Social Republic". The Agent of the Italian Government in his pleadings, and the Italian Commissioner in his dissenting opinions, strongly asserted that the Social Republic had been simply the *longa manus* of the German Third Reich, and that Germany, not Italy, should therefore be held responsible for the conduct of organs of that "republic".[90] However, the majority of the Commission held that the "Italian Social Republic" had been a *de facto* Government of a separate State and

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[86] United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 161.

[87] See *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, para. 64, and in particular footnote 105.

[88] *Ibid.*, vol. II (Part Two) pp. 100–101, document A/33/10, chap. III, sect. B.2, para. (7) of the commentary to draft article 27, and in particular footnote 475.

[89] For example, in the *Socony Vacuum Oil Company* case, the United States of America International Claims Commission refused to attribute to Yugoslavia the responsibility for acts committed by organs of the "Kingdom of Croatia", on the ground, among others, that that "kingdom" had been simply a puppet State of Italy and Germany in occupied Yugoslav territory. (See Whiteman, *op. cit.* (1963), vol. 2, pp. 767 *et seq.*)

[90] The Italian argument was expounded in particular in the *Dame Mossé* case. In his dissenting opinion, the Italian member of the Conciliation Commission stated:

> "The self-styled Salò Government was regarded, both by Italy and by the United Nations (i.e., by both parties to the present dispute), as a *longa manus* or, in other words, as an organ of the occupier. The issue was therefore quite different: it was a question not of imputing to a State acts performed by a *Government* which in fact exercised authority over all or part of its territory, but of imputing to it acts performed by another State, the occupying *State*" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (*op. cit.*), p. 495).

not simply an "agency" of Germany. It therefore attributed responsibility for its internationally wrongful acts to the Italian State on the basis of the acceptance by Italy, in article 78 of the 1947 Treaty of Peace, of responsibility for all acts committed by the *de jure* or *de facto* Governments which had exercised authority in Italy during the war. However, the same majority in the Commission acknowledged that:

> ... the Italian Social Republic was established by Germany and ... its Government, when making decisions, *had to reckon with*,* up to a certain point, the intent of its ally....[91]

Had it not been for Article 78 of the Treaty of Peace, such an acknowledgement would, under general international law, have constituted the precondition for attributing to Germany indirect responsibility for internationally wrongful acts committed by organs of the Italian Social Republic within the limits of the field of action in which it was obliged to take account of and comply with Germany's wishes. In other words, it seems logical to assume that, where the creation of the puppet State or Government is brought about by one State in the territory of another State as an entity which possesses a separate international personality, but is subject in essential sectors of its activities to systematic control by the State that contrived its creation, the latter State must assume indirect responsibility for internationally wrongful acts committed by the puppet State or Government within the framework of its controlled activities.

39. Lastly, there is one more situation which is somewhat different from those discussed hitherto but which may also prompt the question whether it might not give rise to the special phenomenon of indirect responsibility. We are referring to the situation of a State which commits a breach of an international obligation towards another State under coercion by a third State. This case, too, was mentioned, although for different purposes, in the seventh report of the Special Rapporteur[92] and in the Commission's report on its thirtieth session,[93] where it was noted that a State which adopts internationally wrongful conduct under the pressure of coercion by another State is obviously not acting "in the free exercise of its sovereignty" or with complete freedom of decision. The State applying the coercion compels the other State to choose the course of perpetrating an international offence which in other circumstances it probably would not commit. Thus, in this case also, the State committing the internationally wrongful act is, at the time of its commission, in a condition of dependence vis-à-vis another State. It is true that, unlike what occurs in the case of a permanent relationship of dependence established by an international instrument, such as a protectorate, or an equally permanent situation of *de facto* dependence, such as military occupation, the condition of dependence under consideration here is of a purely temporary, or even occasional, nature. But the fact remains that, in this particular case, the State engaging in the wrongful behaviour *coactus voluit*, and that, in this case as in those which occur in the situations discussed earlier, the State in question was deprived of its freedom of decision, because it was subject to the control of another State. The conclusion stated then, which we now definitively confirm, was that, in those conditions also, a dissociation must be made between the subject to which the act giving rise to international responsibility would continue to be attributed and the subject upon which that responsibility devolved. Thus, once again, we have a case of indirect responsibility or of responsibility for the act of another.

40. To refer to a few cases which have occurred in practice and have been published and commented on in journals of international law, we may first recall the main facts of the *Shuster* case, which dates back to 1911. At that time, the Persian Government, under coercion as a result of the occupation of part of its territory by Tsarist troops, broke the contract it had concluded with Shuster, an American financier, whom it had engaged as an economic adviser to reorganize the State finances. The Persian Government reluctantly dismissed Mr. Shuster and took it upon itself to compensate the victim of its action, thus avoiding an international dispute. However, as commentators on the incident pointed out at the time, it was only that spontaneous grant of compensation by the Persian Government which prevented the United States Government from invoking the indirect international responsibility of the St. Petersburg Government, since the action of the Persian authorities had been taken under coercion by the latter Government.[94]

41. We may also mention the *Romano-Americana Company* case, concerning a United States company which suffered injury 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 British Government, with a view to obtaining from it compensation for the wrong

[91] Decision of the Italy/United States of America Conciliation Commission in the *Fubini* case (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 429). Similar acknowledgements are to be found in the Commission's decisions in the *Treves*, *Levi*, *Baer* and *Falco* cases (*ibid.*, pp. 265–266, 279, 280, 283, 406, and 417).

[92] *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, paras. 65 to 68.

[93] *Ibid.* (Part Two), pp. 101–102, document A/33/10, chap. III, sect. B.2, paras. (8) to (11) of the commentary to article 27.

[94] 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), p. 389.

suffered by its national.[95] 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.[96] 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 Great Britain. The two Governments seem clearly to have agreed that, if any compulsion or coercion had really 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.

42. Let us note in conclusion that, if such had been the case, the responsibility attributed to the Government exerting coercion would clearly have been an "indirect" responsibility. The terms of the problem should not be misunderstood, as they have been by some writers who claim that, in cases of this kind the responsibility of the State exercising coercion is a "direct" responsibility,[97] or, in other words, responsibility for its own act. It is not the coercion by State A of State B that constitutes the internationally wrongful act[98] for which State C invokes the responsibility of State A and claims compensation from it; rather it is the separate and different act committed by State B, in breach of its obligation towards State C, under the coercion exerted by A. State B alone is the author of that act, irrespective of the conditions in which it acted. And if, by way of exception, its act does give rise to responsibility on the part of State A in lieu of its own responsibility, then that is clearly a responsibility which A must bear for the act of B, hence a responsibility *for the act of another*.[99]

43. We believe that this completes our consideration of the different situations—all different but all, as has been seen, possessing a common feature—in which the phenomenon of indirect international responsibility can be discerned. In our view, there are no other situations in which a State can be required, under general international law, to assume international responsibility for an act committed by another 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 its territory is certainly not an "indirect" responsibility. The Commission has indicated clearly, in draft article 12, 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.[100]

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[95] 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).

[96] See the note from the British Foreign Office dated 5 July 1928:

"In the opinion of His Majesty's Government the facts of the case establish beyond any question that the destruction of the property of the Romano-Americana Company was carried out under the direct orders of the Roumanian Government, and was therefore in law and in fact the act of that Government; . . .

"His Majesty's Government do not deny that, in company with the French and Russian Governments, they urged the Roumanian Government, through their accredited representative in Bucharest, to make the fullest use of the powers assumed by them early in the campaign to prevent the enemy from obtaining the means of prolonging a war disastrous alike to all involved in it at that time, but I must reaffirm that they could not and did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause.

". . .

"His Majesty's Government have every reason for believing that the Roumanian Government would be willing to offer the same terms of settlement to the Romano-Americana Company as have already been accepted by the British, French, Dutch and Belgian companies and by those Roumanian corporations such as the Astra Romana and the Steaua Company, in which the shares are mainly held by non-Roumanian shareholders. His Majesty's Government therefore must decline to accept any responsibility whatever for the compensation which may be due to the Romano-Americana Company arising out of the destruction of their properties in Roumania in 1916." (*Ibid.*, p. 704.)

[97] See the writers referred to in footnote 52 above.

[98] From the aspect which concerns us here, it is irrelevant whether, and in what conditions, such coercion constitutes in itself a wrongful act of the State applying it against the State subjected to it. As noted by the Commission in its report on its thirtieth session:

"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." (*Yearbook ... 1978*, vol. II (Part Two), p. 101, document A/33/10, chap. III, sect. B.2, para. (9) of the commentary to article 27.)

See also the seventh report of the Special Rapporteur (*ibid.* (Part One) document A/CN.4/307 and Add.1 and 2, para. 66, *in fine*).

[99] We should make it clear, in order to avoid any ambiguity, that "coercion" having the effect of producing so serious a consequence as the dissociation of international responsibility from the act which gave rise to that responsibility and the attribution of the responsibility to a subject other than the author of the act must, in our view, be understood to mean not any and every form of pressure, but coercion in the sense in which that term is accepted in the United Nations system.

[100] See *Yearbook ... 1975*, vol. II, pp. 83 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2, art. 12, para. 1 and commentary. See also the fourth report by the Special Rapporteur (*Yearbook ... 1972*, vol. II, pp. 126 *et seq.*, document A/CN.4/264 and Add.1, paras. 147 *et seq.*).

Moreover, if the State to which the organs belong acted, through them, in complete freedom of decision and without being subjected to control or coercion by another party, then obviously it alone bears the responsibility for its act. As for the State in whose territory the act occurred, although it too may incur responsibility, that 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 article 12, paragraph 2. Both responsibilities are therefore direct responsibilities,[101] incurred by the two States each of its own act, and there can be no question in such a case of any indirect responsibility.

44. Provision could, of course, be made under international conventional law for extending to other hypotheses the cases in which a State may incur indirect international responsibility for the act of another State. There is nothing to prevent a State, at least in theory, from assuming by treaty an obligation to answer for certain international offences committed by another State to the detriment of a third State. Some writers have referred to this possibility and have presented it as a case in which the indirect responsibility of the State would be beyond question, and indeed as the surest case in which such responsibility would be apparent.[102] We hesitate to share their enthusiasm. In the first place, it seems to us that it would be more appropriate in this case to speak of one State's giving another a guarantee with respect to the economic consequences of any international responsibility incurred by that other State,[103] rather than of its accepting indirect responsibility for wrongful acts of the other State. Apart from this, we believe that, if one goes deeper into the question, it will be seen 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 a 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 compensation 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 connection.[104] However, there is clearly no need to provide for this case in the context of the article we are about to draw up, since the articles of the draft can always be derogated from by treaty, in so far as 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 dertiment of State C. Obviously, such an agreement—and the resulting extension of cases of indirect responsibility to include cases not provided for under general international law—could operate only with the consent of State C, since the latter is not bound by an agreement which for it is simply a *res inter alios acta*.[105] In any event, here again there is nothing that need be provided for in an article which we are required to formulate solely on the basis of general international law.

45. One last point calls for clarification before we proceed to draft an article on the subject-matter of this section. The question is whether the responsibility which a State must incur indirectly for the internationally wrongful act of another State, in the cases provided for under general international law, precludes responsibility on the part of the State which committed the offence or whether it should be considered to have been incurred in parallel with the responsibility of that other State, which would not be erased as a consequence. It will be recalled that the differences of view which continue to exist on this point were referred to above.[106] Some writers, including the present Special Rapporteur in his first study on the subject, have at times been attracted by the second alternative.[107] After due reflection, however, we are

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[101] All contemporary writers who have dealt with the question agree on this point. See Verdross, "Theorie . . ." (*loc. cit.*), pp. 405 *et seq.* and pp. 421–422; Dahm, *op. cit.*, pp. 203–204; Quadri, *op. cit.*, pp. 602–603; Berber, *op. cit.*, p. 17.

[102] See, for example, Dahm:

> "There are exceptional cases in which a State, irrespective of the participation of its own organs, must also answer for the wrongful acts of others. In such cases, it is legitimate to speak of indirect responsibility in a narrower sense. A responsibility of this kind can be contracted in the first instance by treaty." (*Op. cit.*, p. 204.)

Cavaré:

> ". . . the responsibility for another is an exception . . . Whenever it is accepted, that is because there is a treaty establishing the responsibility of one State for another. Thus, there is one definite case of responsibility for another, namely, responsibilitv under a treaty." (*Op. cit.*, p. 507.)

I. Brownlie:

> ". . . A State may by treaty or otherwise assume international responsibility for another government." (*Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 442.)

[103] See what the present Special Rapporteur said on this subject in *La Responsibilità indiretta . . .* (*op. cit.*), pp. 62–63.

[104] A more doubtful point is whether State B could evade the obligation under general international law to give compensation for the consequences of an internationally wrongful act committed against State C if the latter addressed itself to it for that purpose, in violation of its agreement with State A but without violating any commitment towards B.

[105] 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 seek compensation 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 the compensation paid to State C. The true nature of the agreement between A and B as a "guarantee" agreement would then become apparent.

[106] See para. 21 above.

[107] See references cited in footnote 53 above.

convinced that only the first alternative is in keeping with the nature and raison d'être of the institution of responsibility for the act of another, and that that alternative alone finds support in State practice and in international legal precedents. In none of the cases we discussed in connection with the different situations which we successively considered was there any question of responsibility being attributed, in one and the same case, to both the dominant State and the dominated State, the suzerain State and the vassal State, the occupying State and the occupied State or the State which exerted coercion and the State subjected to coercion.[108] Nor was the "indirect" responsibility of a State presented in any case as being merely "subsidiary" to the "direct" responsibility which an internationally wrongful act will always entail for the State that committed it, irrespective of the conditions in which that act may have been perpetrated. In other words, whenever a State has been held indirectly responsible for the act of another State, the former has always been required to answer *in place* of the second and not *in parallel* with it. Moreover, none of the replies by the Governments to the request for information from the Preparatory Committee for the 1930 Codification Conference mentioned the continued existence of the responsibility of the State committing an internationally wrongful act in cases where the responsibility for that act was considered to be incurred indirectly by another State. The Polish Government, for example, stated in its reply that:

> International responsibility for acts or omissions on the part of a State whose independence is limited should be regarded as devolving *exclusively** on the protecting State . . .[109]

All of this, we repeat, seems to us to be in keeping with the very nature and the raison d'être of an institution such as the responsibility incurred by one subject for a wrongful act committed by another subject—in international law as in any other system of law. The basis of the indirect responsibility of a State for an internationally wrongful act committed to the detriment of a third State by another State is, in all the different cases where we discerned this phenomenon, the existence of a *de jure* or *de facto* situation entailing for the State committing the offence a serious restriction of its freedom of decision in the field in which the wrongful conduct was engaged. Logic and simple justice therefore require that the responsibility of the State whose organs acted in such conditions should be erased, and that the State for whose benefit the restriction in question was imposed should alone be required to answer *in place* of the State which engaged in the wrongful conduct.

46. As a result of the analysis made and the data assembled, we believe that we can now draw up the rule intended to govern the particularly difficult subject-matter of this section. Its formulation should be as simple as possible, but should nevertheless cover all the different *de jure* or *de facto* situations, permanent or occasional, in which "indirect" international responsibility may devolve upon a State. The rule must make clear what conditions must be fulfilled in each of these situations in order for the responsibility for an act of a State to be assumed by another State, and must also show what the situations in question have in common despite their differences. The rule must make it clear that the act constituting a breach of an international obligation of a given State must be an act attributable to that State according to the criteria laid down in draft articles 5 to 15.[110] An act having the same effects but committed by organs of another State (the "dominant" State) acting under the directions and control of the latter—hence, an act attributable, irrespective of the conditions in which it is committed, to that other State—can give rise only to a "direct" responsibility of that other State and not to responsibility *for the act of another*, for which the essential precondition is lacking. The rule must make it clear that where the act consists of conduct on the part of organs of the so called "territorial" State, it must not occur in a field of activity left free from all foreign direction or control; an act committed in those conditions can give rise only to responsibility on the part of the State to which the act in question is attributable. Lastly, it must be made clear that the indirect responsibility assumed by one State for an internationally wrongful act of another State replaces the responsibility of that other State, and is not additional to it.

47. In the light of the foregoing, we believe that we may propose to the Commission the adoption of the following text:

Article 28.[111] *Indirect 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 not in possession of complete freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not entail the international responsibility of the State committing the wrongful act, but entails the indirect international responsibility of

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[108] As we have seen, the publication of the documents relating to the *Strousberg* case (footnote 32 and para. 23 above) has served to dispel some misapprehensions about that case which had previously arisen because of the lack of complete information. The case had been cited as proof—in fact, the only proof—of the "duality" of international responsibilities in cases of dependence or suzerainty. We have also seen that in some cases, such as the *Fink* case (para. 33 above), where the injured State had sought to invoke the responsibility of a dependent State or of a State subjected to military occupation for acts committed by its organs under the directions and control of a dominant or occupying State, that responsibility was firmly denied.

[109] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 123.

[110] See footnote 2 above.

[111] The last article proposed by the Special Rapporteur in his seventh report was numbered 25. As a result of the renumbering carried out by the Commission at its thirtieth session, it became article 27. This article is therefore article 28.

the State which is in a position to give directions or exercise control.

2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not entail the international responsibility of the State which acted under coercion, but entails the indirect international responsibility of the State which exerted it.

CHAPTER V

Circumstances precluding wrongfulness

1. PRELIMINARY CONSIDERATIONS

48. At the outset of the present drafting exercise, it was stated that the subject of part 1 of the draft would be the "*internationally wrongful* act"; in other words, that it would be concerned with defining the rules for establishing, under international law, the existence of an act which was to be characterized as wrongful and which, as such, constituted the source of a State's international responsibility. Accordingly, article 1[112] enuciates 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 in order for there to be an internationally wrongful act of a State; in other words, it establishes what are the constituent elements of an act which warrant its being so characterized. According to that article, there is an internationally wrongful act of a State when conduct is attributable to the State under international law (the subjective element) and when the conduct constitutes a breach of an international obligation of the State (the objective element). Next, the draft articles formulated in chapters II and III respectively analyse and expand on each of the two elements thus described, while those in chapter IV deal with certain special situations where, in one way or another, a State is implicated in an internationally wrongful act committed by another State. Lastly, 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 which it is usually considered may have this effect are consent of the injured State, legitimate application of a sanction, *force majeure* and fortuitous event, self-defence, and state of necessity. Each of these circumstances will be dealt with in turn in the following sections.

49. Some writers, and also some draft codifications, prefer to speak of circumstances precluding *responsibility* rather than of circumstances precluding *wrongfulness*. 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.[113]

We should now like to explain the reasons why we believe that position to be correct.

50. First of all, we are firmly of the view that 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. That is the well-known argument of H. Kelsen.[114] 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. However, matters appear differently to those who regard the notion of the "wrongful act" as a notion which, although linked to that of "responsibility" nevertheless remains distinct from it. Throughout the draft articles, the Commission has made clear its conviction that a distinction must be drawn between the idea of wrongfulness, expressing the fact that certain conduct by a State conflicts with an obligation imposed on that State by a "primary" rule of international law, and the idea of responsibility, indicating the legal consequences which another, "secondary" rule of international law attaches to the act of the State that such conduct consists of. On the

[112] See footnote 2 above.

[113] *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 1.

[114] See in particular "Unrecht ..." (*loc. cit.*), 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 obligation itself as simply a derivative of the concept of responsibility. The inference is that subject X is "obliged" to adopt certain conduct only because the law attaches responsibility to any conduct contrary to the conduct in question.

basis of that conviction, there is no reason, at least in theory, why certain circumstances should not preclude responsibility without at the same time precluding wrongfulness.[115]

51. This, however, brings us to our first comment on the subject. It must be constantly borne in mind that the basic principle of the draft is, as we have 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 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 also precluding responsibility. However, the converse does not apply with the same ineluctable logic. As was noted in the preceding paragraph, there is no reason why, from a purely theoretical standpoint, there should not be some circumstances which, while precluding responsibility, would not at the same time preclude the wrongfulness of the act which, by way of exception, did not give rise to responsibility. However, the problem confronting the Commission is not an abstract problem, but a concrete one: are there or are there not under international law circumstances in which an act of a State remains wrongful but does not give rise to the international responsibility normally linked to such an act?[116] To put it in even more concrete terms, when an act of a State is not in conformity with the terms of an international obligation incumbent on the State in question but is committed, for example, with the consent of the injured State, or in the legitimate application of a sanction, or in circumstances of *force majeure*, or in self-defence, etc., is this an act that, by reason of one of those circumstances, ceases to be an internationally wrongful act, and as a consequence—but solely 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 entails the responsibility of the State that committed it? That is the only pre-judicial question that needs to be answered in the context of these preliminary considerations applicable to the whole series of circumstances which will be dealt with individually in the rest of this chapter.

52. Even in theory, we find it difficult to imagine that international law could adopt so strange an attitude, and one so contrary to its own spirit, as to characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author.[117] It is difficult to see what would be the point of making such

[115] The *abstract* possibility that there are circumstances which would preclude responsibility but would in no way affect wrongfulness has been maintained by a number of writers. See in particular G. Sperduti, "Introduzione allo studio delle funzioni della necessità nel diretto internazionale", *Rivista di diritto internazionale* (Padua), XXVth year, 4th series, vol. XXII, Nos. 1–2 (1943), pp. 19 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 6th ed. (Padua, CEDAM, 1963), p. 351; G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967), pp. 29 *et seq.* In advancing this argument, these writers on international law are, of course, referring only to cases of responsibility for "wrongful" acts, since the issue would be distorted if the argument were extended to cover cases where an "international responsibility" (actually nothing more than an obligation to make reparation for any injury that may result) is attached to activities which are considered "lawful" under international law. In such cases, the existence of circumstances precluding that particular form of responsibility is of course conceivable, whereas there can be no suggestion whatever of circumstances precluding a "wrongfulness" which, by definition, is precluded from the outset. See in this connection Gaja, *op. cit.*, pp. 33 *et seq.*

[116] It is necessary to distinguish clearly between circumstances which would have this effect and the circumstances discussed in chap. IV, sect. 2, where an internationally wrongful act committed by a State entails the responsibility of another State in place of the one which is the author of the act. When this happens, the responsibility resulting from the wrongful act is in no way precluded; it is simply placed on a different subject.

[117] Sperduti observes with good reason:

"The characterization of an act as wrongful results, of course, from the fact that it is contrary to a legal rule; however, an act cannot be considered wrongful if the legal order takes no specific position against it . . ., even if all that the non-existence of such a position does is to reveal, rather than to determine, that the act is not wrongful. In other words, it is inconceivable that a legal order should characterize an act as wrongful without making any provision against it; if the legal order makes no provision against an act, that means that the legal order does not characterize it as wrongful. Logically, it is in the non-existence of such a characterization that the why and wherefore of the non-existence of a position against the act must be seen, despite the fact that the process of interpretation involves starting from the position taken in order to arrive at a finding that the act in question is lawful." (Sperduti, *loc. cit.*, pp. 21–22.)

The same writer (*ibid.*) feels that, among the consequences of a wrongful act provided for by international law, a distinction might be made between those which would constitute responsibility in the strict sense and those which, rather, would allow the taking of measures (not otherwise legitimate) to prevent the occurrence or continuation of the wrongful act. On the basis of that distinction, he refers to the possibility that some special circumstance might have the effect of precluding consequences falling within the former category and not those falling within the latter. He concludes that, in that very special case, the wrongfulness might subsist without there being any responsibility in the strict sense of the term. We cannot, however, subscribe to the formulation of a hypothesis that seems to us far too abstract and, we might add, so improbable, as that of a situation in which, among the consequences of a wrongful act, international law would preclude those allowing the injured State to demand reparation for the injuries suffered or to apply a legitimate sanction against the State committing the act in question, but not those consisting of the taking of coercive measures against that State to prevent it from committing or continuing the wrongful act. In the real world of international affairs there are only two possible situations: either a given act of a State is characterized as wrongful, in which case it logically produces all the consequences provided for by law for an act of that kind—all of which are covered by the current notion of international responsibility—or, by reason of the presence of a certain circumstance, it is characterized as lawful, in which case it does not produce any of those consequences.

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 in question at all.[118] And to conceive of such a situation precisely in relation to a legal order so imbued with effectivity as the international order seems to us to be in glaring contradiction with one of the dominant characteristics of that system of law.

53. To the best of our knowledge, neither international judges and arbitrators nor State organs have expressly considered the question whether such circumstances as the fact that an act was committed with the consent of the injured party, in a case of *force majeure*, in self-defence, and so on, were circumstances which only precluded the responsibility of the State for the act or whether they precluded the wrongfulness of the act itself and hence, indirectly, responsibility for it. However, it is clear from their attitude that they did not by any means regard such circumstances as having only the effect of precluding responsibility for acts which in themselves remained wrongful. Some statements of position evidence that beyond any doubt, as do some of the replies from Governments on point XI of the request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference, concerning "Circumstances in which a State is entitled to disclaim 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.[119]

The reply from the British Government stated that:

> ... self-defence may justify action on the part of a State which would otherwise have been *improper*.*[120]

Even more clearly, the Norwegian Government stated, in connection with self-defence:

> ... only an act, performed in the defence of the rights of a State, that is authorised by international law should involve exemption from responsibility; but then the act would not be an *act contrary to international law*.*[121]

Many additional samples could be given.[122] 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 at all of an intention on the part of these Governments to argue that the circumstances to which they are referring preclude responsibility but do not affect the wrongfulness of the act of the State in question. Since the issue in dispute is whether or not the international responsibility of the State exists in a specific case, 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 solely as a consequence on the existence of responsibility. Accordingly, in simply 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 its private capacity, or because the person who acted 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 quite 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 denied the premise. It is therefore legitimate to conclude that international legal precedents and State practice confirm the validity of the assertion that the circumstances to which we are referring preclude the wrongfulness of the conduct of the State, and only indirectly the international responsibility which would otherwise result from it.[123]

54. As far as the literature is concerned, it is a fact that most writers who deal with the question under discussion use expressions implying that wrongfulness is precluded: "*circonstances excluant l'illicéité*", "*motifs d'exclusion de l'illicéité*", "circumstances which exclude the normal illegitimacy of an act", "*Ausschluss der Rechtswidrigkeit*", "*Gründe, die die Rechtswidrigkeit ausschliessen*", "*Unrechtausschliessungsgründe*", "*circostanze escludenti la illiceità*", and so on. However, it can also be said that writers who use the expression "circumstances precluding responsibility" never do so[124] with the intention of maintaining that those circumstances preclude responsibility but not the wrongfulness of the act which

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[118] Gaja observes: "To state that failure to comply with an obligation produces no consequence is tantamount, in practice, to stating that the party concerned is free to commit breaches of the obligation." (*Op. cit.*, p. 32). It could perhaps be argued that the State injured by an internationally wrongful act which gave rise to no responsibility could still obtain—provided that it and the State committing the act were bound to submit to compulsory jurisdiction—a declaratory judgement of the wrongfulness of the act. But it is difficult to see what value such a judgement would have, since it could not serve as a basis for placing any international responsibility on the State held to be in the wrong.

[119] League of Nations, *Bases of discussion ...* (*op. cit.*), p. 125. It is clear that the reason why the Austrian Government considered that there was no ground for responsibility in the cases referred to was that the international wrongfulness of the act of the State ceased to exist.

[120] *Ibid.*, p. 126.

[121] *Ibid.*, p. 127.

[122] For other examples, see Gaja, *op. cit.*, pp. 31–32.

[123] State practice in this matter was analysed by Gaja (*op. cit.*, pp. 31–32), who arrived at precisely the conclusion set forth here.

[124] Apart from the very special position of Sperduti (to which we referred above, in footnote 117).

exceptionally does not give rise to responsibility. Most of those who use this terminology are in fact writers who always think in terms of responsibility (responsibility for acts of organs lacking competence, of private individuals, etc.), without even 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 international responsibility" but, in the body of their text, speak of "circumstances *nullifying the illegality** of the act" ("*circonstances annihilant l'illégalité de l'acte*"),[125] or of "grounds *precluding** wrongfulness" ("*motifs qui excluent l'illicéité*").[126] This shows that, in their view, the fact that responsibility is precluded is simply a consequence of the elimination of the wrongfulness of an act that, but for the presence of a special circumstance, would have given rise to such responsibility.

55. To wind up this discussion of the question raised above,[127] we should like to add one last consideration which in our view would be decisive, if by now there were any need for that. The circumstances which we have mentioned and which we shall shortly be dealing with one by one have an essential aspect in common; it is that by their presence they impose a limitation on the effect of the international obligation a breach of which is alleged. Thus, they are not circumstances which would preclude the placing of international responsibility on the State whose organs have adopted certain conduct but would leave in existence the wrongfulness of that conduct. The conduct in question cannot be characterized as wrongful for the good reason that, owing to the presence in that particular case of a certain circumstance, the State which committed the act was not under any international obligation to conduct itself otherwise. In other words, there is no wrongfulness when one of the circumstances referred to is present, because as a result 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 which we have called "consent of the injured party", the reason why there is no responsibility on the part of the State, even though it has adopted a line of conduct not in conformity with that normally required under an international obligation towards another State, is that in this particular case the obligation in question is avoided by mutual consent. There cannot have been any breach of that obligation, no wrongful act can have occurred, and there can therefore be no question of international responsibility. The same is true in the case of "legitimate application of a sanction"; the reason why there is no responsibility is that the international obligation to refrain from certain conduct towards another State does not apply when the conduct in question is a legitimate reaction to an internationally wrongful act committed by the State against which it is directed. Here again, the conduct adopted is not a breach of any international obligation incumbent on the State in the specific case concerned and does not therefore constitute, from the objective standpoint, an internationally wrongful act. Similar arguments could be advanced with respect to the other "circumstances" which may be involved.[128] In proceeding now to an individual consideration of the various circumstances mentioned above, we should start from the premise that each of them, by its presence, precludes the international wrongfulness of an act of a State which would otherwise be a breach of an international obligation towards another State. This in fact is how the very great majority of contemporary writers on international law proceed.[129]

2. Consent of the injured State

56. As we begin to consider one by one the various causes which may preclude the wrongfulness of an act of the State, the first question which arises is whether the wrongfulness of conduct of a State not in conformity with what would be required of it under an international obligation is precluded if such conduct is consented to by the State that would have the right to demand compliance with the obligation in question. In other words, does the principle *volenti non fit injuria* apply in international law?

57. It would appear, if only as a matter of simple logic, that—as a general principle, of course—the answer must be in the affirmative. If a State (or, needless to say, any other subject of international law)

[125] Spiropoulos, *op. cit.*, p. 286.

[126] L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 368.

[127] See para. 51 above, *in fine*.

[128] A number of writers have observed that "circumstances precluding wrongfulness" have this effect because, wherever they are present, they preclude the existence of the international obligation. See in particular Strupp, *loc. cit.*, p. 121; Scerni, *loc. cit.*, p. 476; Ross, *op. cit.*, p. 243; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 572–573; Gaja, *op. cit.*, pp. 32–33; B. Graefrath, E. Oeser and P.A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), p. 73. Guggenheim (*op. cit.*, p. 57), argues that in the case of acts committed with the consent of the injured party or as legitimate sanctions it is not even accurate to speak of circumstances precluding wrongfulness, since such acts are entirely legitimate; he considers that it would be more correct to use this expression only in reference to acts committed in self-defence or in state of necessity.

[129] See, in addition to the writers mentioned in footnote 128, Morelli, *op. cit.*, p. 351; Sereni, *op. cit.*, p. 1523; E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), p. 541; Ténékidès, *loc. cit.*, p. 784; M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, p. 599; A. Favre, *Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), p. 643; Schlochauer, *loc. cit.*, pp. 268–269.

consents to conduct by another State which would otherwise constitute a breach of an international obligation towards the first State, the end-result of that consent is clearly the formation of an agreement between the two subjects whereby the international obligation ceases to have effect as between the two subjects, or, at least, is suspended in relation to the particular case involved. Since the obligation is therefore no longer incumbent on the State, its conduct is not contrary to any international obligation, and the wrongfulness of its act is accordingly precluded. This explains, in the first place, why only consent given by a subject of international law (whether or not a State) can have the effect of precluding the international wrongfulness of the conduct adopted in a given case, since the effectiveness of a rule of international law and of the obligations arising from it can be terminated or suspended only by consent articulated at the level of international law. This shows, in the second place, what might be the exception that would perhaps defeat the general principle: where there are rules of international law which allow of no derogation and which, accordingly, cannot be modified by agreement between the parties, the consent of the injured State cannot nullify or suspend the effectiveness of an obligation created by those rules. Having established these premises, let us now proceed to review the practice of States and international judicial precedents in order to ascertain whether or not they confirm these logical deductions.

58. The cases in which consent of the injured State has been invoked as precluding the existence of an internationally wrongful act are many in number; yet, in all the cases we have been able to scrutinize, the parties to the dispute—and any judges or arbitrators to whom it may have been submitted—agreed that the consent of the injured State precluded the possibility of characterizing the conduct to which it had consented as an internationally wrongful act.[130] The only points on which there may have been disagreement were whether consent had in fact been given and whether it had been validly expressed. In order to bring this out more clearly, we shall first consider cases involving a possible breach of a well-known international obligation, namely, the obligation incumbent on a State—except in certain circumstances—not to exercise its functions in the territory of another State, and in particular to refrain from sending its troops into such a territory. It is clear from international practice and the rulings of international judicial bodies that the entry of foreign troops into the territory of a State is considered a serious violation of State sovereignty and often, indeed, an act of aggression, but it is also clear that such action ceases to be so characterized and becomes entirely lawful if it occurred at the request or with the agreement of the State.

59. Let us consider first a typical case of occupation by troops of one State of the territory of another State: *the occupation of Austria by German troops in March 1938*. The question whether that occupation was internationally lawful or was wrongful was discussed by the International Military Tribunal at Nuremberg. To answer that question, the Tribunal found it necessary first of all to establish whether or not Austria had given its consent to the entry of German troops. The fact that Germany had exerted strong pressure on Austria to the end that its authorities should consent to, and indeed request, such action led the Tribunal to the logical conclusion that the consent given in those circumstances was not valid. An interesting point for our purposes, however, is that the Third Reich itself had felt that it needed Austria's consent to legitimize its action, which would otherwise have been flagrantly wrongful. There is also a further point: the Tribunal raised the question whether or not there had been consent by the States parties to the Treaties of Versailles and Saint-Germain-en-Laye, noting that consideration of that additional question was justified because the defendants were claiming that the acquiescence of those Powers had precluded the possibility of speaking of a breach of the international obligations imposed on Germany and Austria by those treaties.[131]

60. The consent—or, better yet, the request made by the Government—of the State whose sovereignty would otherwise have been violated has nearly always been cited as justification for the sending of troops into the territory of another State to help it to suppress internal disturbances, revolt or insurrection. This "justification" was invoked, for example, by the United Kingdom in connection with the dispatch of British troops to *Muscat and Oman in 1957*[132] and to *Jordan in 1958*,[133] by the United States of America with

[130] Provided at least that the conduct in question did not involve a derogation from a peremptory rule of international law. We shall revert to that specific point in paragraphs 75 and 76.

[131] See United Kingdom, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964 (London, H.M. Stationery Office, 1946), pp. 17 *et seq.*

[132] In his statement to the House of Commons on 29 July 1957, the Secretary of State for Foreign Affairs said:

> "The decision of Her Majesty's Government to give help to the Sultan was made for two reasons. First, it was at the request of a friendly ruler who had always relied on us to help him resist aggression or subversion.' (United Kingdom, *Parliamentary Debates (Hansard), House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 574 (29 July 1957), col. 872.)

[133] During the debate in the Security Council on 18 July 1958, the representative of the United Kingdom, after referring to the situation in Jordan, stated:

> "In these circumstances, what could be more natural than the appeal of His Majesty King Hussein and the Government of Jordan for assistance from friendly Governments in maintaining their country's independence? My Government was one of those to whom this appeal was made and we have responded to it" (*Official Records of the Security Council, Thirteenth Year*, 831st meeting, para. 28).

See also the statement by the British Prime Minister to the House of Commons (United Kingdom, *Parliamentary Debates*

(*Continued on next page.*)

regard to the dispatch of its troops to *Lebanon in 1958*,[134] by Belgium at the time of its two interventions in the *Republic of the Congo in 1960*[135] *and in 1964*[136] and by the Soviet Union on the occasion of the sending of troops to *Hungary in 1956*[137] and to *Czechoslovakia in 1968*.[138] During the debates in the Security Council and the General Assembly on these questions, no State contested the validity of the principle that the consent of the territorial State precluded—as a general rule—the wrongfulness of the sending of foreign troops into its territory;[139] the only points on which there were differences of opinion were whether or not there had been consent by the State, whether or not that consent had been validly expressed, and whether or not injury had been done to rights of other States.

61. Similar considerations are evident in the positions taken by States during debates on the continued stationing of troops of a State in foreign territory, where the lawfulness of such stationing was not originally contested. Attention may be drawn to three cases of this kind which occurred shortly after the end of the Second World War. The first concerned the *stationing of British troops in Greece in 1946*. In his statement to the Security Council on 30 January 1946, the representative of the Soviet Union said that the maintenance of British troops in Greece was no longer lawful because, in his view, the original justifications for their presence had ceased to exist.[140] In the ensuing debate, the representative of the United Kingdom rejected the Soviet argument and maintained that the presence of British troops in Greece was lawful, citing as what he considered a decisive argument the fact that it was the Greek Government that had requested his Government to keep its troops in Greece.[141] He added: "Surely an Allied country ... is entitled to have troops in a country if invited by that country's Government."[142] The Soviet representative did not contest the validity of such a principle as a general rule; he merely asserted that in the case in question, in his view, the consent given by the Greek Government was not valid.[143] One month later, *Syria* and *Lebanon* brought before the Security Council *the question of the presence of French and British troops in their*

(*Footnote 133 continued.*)

(*Hansard*), *House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 591, 17 July 1958, cols. 1437–1439 and 1507).

[134] During the debate in the Security Council on this question, the representative of the United States of America said that:

"the President of Lebanon has asked, with the unanimous authorization of the Lebanese Government, for the help of friendly Governments so as to preserve Lebanon's integrity and independence. The United States has responded positively and affirmatively to this request in the light of the need for immediate action." (*Official Records of the Security Council, Thirteenth Year*, 827th meeting, para. 34.)

See also the statement by the President of the United States at the Third Emergency Special Session of the General Assembly on 13 August 1958 (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 733rd meeting, para. 7).

[135] Among the justifications for its intervention advanced by the Belgian Government at that time was the fact that the government of a region of the Congolese State had given its consent. During the debate in the Security Council (held on 13 and 14 July 1960), the representative of Belgium stated that "when we intervened we did so only because we learnt that rioters were advancing on the town in a threatening manner. The Belgian intervention took place with the full agreement of the head of the provincial government." (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting, para. 186.)

[136] During the debate in the Security Council on this question, the representative of Belgium stated that paratroops had been sent to Stanleyville at the request of the central Government of the Congo, and added: "There is no interference in the domestic affairs of a country when the lawful Government of that country is given the assistance for which it asks." (*Ibid., Nineteenth Year*, 1173rd meeting, para. 73.)

[137] The representative of the USSR, speaking in the Security Council on 2 November 1956, read out an official statement by his Government which included the following: "At the request of the Hungarian People's Government, the Soviet Government agreed to move Soviet military units into Budapest with a view to assisting the Hungarian People's Army and the Hungarian authorities to restore order in the city." The statement went on to say that if the Hungarian Government requested it to withdraw those troops the Soviet Government was prepared to negotiate their withdrawal. Lastly, it stated: "In this, the Soviet Government proceeds from the general principle that the troops of any State party to the Warsaw Pact are stationed on the territory of another State Party to the Pact by agreement between all the parties thereto, and only with the consent of the State on whose territory such troops are, or are to be, stationed at its request ...." (*Ibid., Eleventh Year*, 752nd meeting, para. 136). See also the views expressed by the representative of the USSR at the 746th meeting of the Security Council (*ibid.*, 746th meeting, paras. 20 and 156–157).

[138] In a letter dated 21 August 1968 to the President of the Security Council, the representative of the USSR stated: "As you are aware, military units of the socialist countries have entered the territory of the Czechoslovak Socialist Republic pursuant to a request by the Government of that State ..." (*Official Records of the Security Council, Twenty-third Year, Supplement for July, August and September 1968*, document S/8759).

[139] The validity of this principle was reaffirmed, implicitly or explicitly, by several of the States which spoke in the debates. See, for example, with respect to the United States intervention in Lebanon and the British intervention in Jordan, the statements made in the General Assembly by the USSR (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 734th meeting, para. 7), Australia (*ibid.*, 735th meeting, paras. 60–61), Greece (*ibid.*, 738th meeting, paras. 95–96), Pakistan (*ibid.*, 740th meeting, paras. 53–54), Canada (*ibid.*, 741st meeting, para. 42), Ethiopia (*ibid.*, 742nd meeting, paras. 73–76), Cuba (*ibid.*, 744th meeting, paras. 40 *et seq.*), Portugal (*ibid.*, 744th meeting, para. 109), Bulgaria (*ibid.*, 737th meeting, paras. 31–34), Albania (*ibid.*, 739th meeting, para. 75), Poland (*ibid.*, 740th meeting, para. 82), Ghana (*ibid.*, 744th meeting, para. 94) and Nepal (*ibid.*, 745th meeting, para. 71). With respect to Belgium's intervention in the Congo in 1964, see the statements of Bolivia (*Official Records of the Security Council, Nineteenth Year*, 1183rd meeting, para 69), Nigeria (*ibid.*, 1176th meeting, para. 6) and Algeria (*ibid.*, 1172nd meeting, para. 22).

[140] *Official Records of the Security Council, First Year, First Series*, No. 1, 6th meeting.

[141] *Ibid.* The representative of Greece confirmed that point (*ibid.*).

[142] *Ibid.*

[143] *Ibid.*, 6th and 7th meetings.

territories. They claimed that the maintenance of those troops in their territories after the end of the war with Germany and Japan constituted a serious violation of their sovereignty; they further stated that their Governments had repeatedly requested the withdrawal of the troops.[144] What the two Governments were trying to do was to counter the idea that they had given their consent, which they too agreed would have precluded the possibility of speaking of any alleged violation and hence of any wrongfulness in the maintenance of the foreign troops in their territories. Lastly, during the debate in the Security Council on *the stationing of British troops in Egypt*, the representative of Egypt stated that the maintenance of British troops in the territory of his country was continuing without the consent of his Government and had therefore become "contrary to the principle of sovereign equality."[145]

62. Another case which comes to mind in this context is the sending of troops into foreign territory to free hostages taken by terrorists; examples include the actions by Israeli troops at *Entebbe* (Uganda) in 1976, by troops of the Federal Republic of Germany at *Mogadishu* in 1977, and by Egyptian troops at *Larnaca* (Cyprus) in 1978. Various arguments have, of course, been advanced for and against the lawfulness of these "raids", and this is not the place to take a position on that point. What should be noted is that even States which in principle consider such "raids" to be "wrongful" concede their lawfulness if they were consented to by the State whose sovereignty was violated. It is significant 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 Cypus and that the latter, in order to deny the lawfulness of the operation, denied having given such consent.[146]

63. Mention should also be made, again in the context of acts committed by organs of a State in the territory of another State, of cases in which arrests are 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 precedents that these same acts cease to be wrongful if the territorial State consents to them. Attention may be drawn in this connection to the decision of the Permanent Court of Arbitration of 24 February 1911 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 he was immediately stopped by a French gendarme and taken back towards the ship. Three British police officers then went ashore and helped the gendarme to bring Savarkar on board. On 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. An arbitral tribunal, composed of five members of the Permanent Court of Arbitration, ruled that the British authorities were under no obligation to return him. The Tribunal found that the action of the British police had not constituted "a violation of French sovereignty" because France, through the conduct of its gendarme, had consented to it, or at least had allowed the British police to believe that it had so consented.[147]

64. A case similar to but the reverse, so to speak, of the one referred to above occurs when persons on board a foreign ship lying in harbour in a State are arrested. Here again, the question of the effect of the consent of the injured subject arises. One example was the "*Aunis*" case (1863). The Prefect of Genoa, having learnt that five persons wanted by the Italian police were on board the French vessel *Aunis*, which was lying in the harbour of Genoa, asked the French Consul in Genoa for permission to arrest them. The Consul gave permission, whereupon the arrest was made, but on the following day the Consul reversed himself and requested the return of the arrested

[144] During the Security Council debate, the representative of Lebanon stated on 15 February 1946 that it was "well to repeat" that the presence of foreign troops in the territories of Lebanon and Syria was "against the will of the Governments of these States" (*ibid.*, 20th meeting). In a later statement, the representative of Lebanon recalled that, at the time of the debate on the question of the maintenance of British troops in Greece, the representative of the United Kingdom had cited as one of the causes precluding the wrongfulness of the presence of troops of a State in the territory of another State the fact that the latter State had consented to it, and went on to say: "But, you will agree that ... we have not requested such troops to remain on our territory." (*Ibid.*, 21st meeting.) For the similar statement of the representative of Syria: *ibid.*, 20th meeting. On that occasion, the representatives of Australia and Mexico expressed support for the principle that consent of the territorial State precluded the wrongfulness of conduct such as the maintenance of troops in foreign territory (*ibid.*, 21st and 22nd meetings).

[145] *Official Summary Records of the Security Council, Second Year*, 175th meeting.

[146] See *The New York Times* of 20, 21, 22, and 23 February 1978. It is hardly necessary to point out that where an operation of this kind is not justified, from the standpoint of international law, by the fact that the State possessing sovereignty over the territory in which it occurs has given its consent, its wrongfulness may nevertheless be precluded if the case in question should involve any of the other circumstances precluding wrongfulness which will be discussed in the following sections of this chapter.

[147] "... 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), p. 279).

More recently, the District Court in New York was guided by the same principle in the *Sobell* case. 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* (St. Paul, Minn., West, 1956), vol. 142, pp. 515 *et seq.*).

persons. The Italian Government refused to return them, on the ground that the arrest had taken place in circumstances which rendered that act completely lawful. The Italian Minister for Foreign Affairs, Visconti Venosta, observed:

> The Prefect acted on his own initiative, but I believe correctly, having obtained the assent of the French Consul.[148]

And he later stated:

> The fact that the Consul-General of France agreed to the arrest ... should, in our view, have sufficed to obviate any suggestion of a breach of international law ... Whether or not Mr. Huet exceeded his authority, the Prefect of Genoa could in good faith consider himself justified in proceeding with an act which would have become injurious only if performed in the face of a formal protest or objection. The Italian authorities took care to refrain from any action until the consent of the Consul had been given.[149]

65. Again, it has been ruled that wrongfulness of the conduct adopted by a State is precluded where the injured State explicitly or implicitly gave its consent to such a derogation from an international obligation, in cases relating to the payment of moratory interest on a debt imposed by an international instrument. A relevant 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 had made to the Ottoman Government a formal demand for payment of the principal plus interest, but when the subsequent instalments were paid the creditor Government made no reservation as to interest and did not apply any part of the amounts received to interest. It was only in 1902, upon completion of the payments, that Russia demanded the payment of moratory interest, which the Ottoman Government refused to make. The Permanent Court of Arbitration, to which the dispute was submitted, took the view that:

> in principle the Imperial Ottoman Government was liable to moratory indemnities to the Imperial Russian Government from December 31, 1890/January 12, 1891, the date of the receipt of the explicit and regular demand for payment.
>
> But that, in fact, the benefit to the Imperial Russian Government of this legal demand having ceased as a result of the subsequent relinquishment by its Embassy at Constantinople, the Imperial Ottoman Government is not held liable to pay interest-damages by reason of the dates on which the payment of the indemnities was made.[150]

Thus the Court found that Russia's consent had rendered the conduct of Turkey lawful, although it would otherwise have constituted a breach of an international obligation incumbent on Turkey.

66. We may therefore conclude from the above analysis of cases that there is a consensus in international practice and in the decisions of international judicial bodies to the effect that consent of the subject in which is vested the subjective right that suffers injury precludes the wrongfulness of an act of a State which, in the absence of such consent, would constitute a breach of an international obligation.

67. A similar consensus can be seen in the literature; all writers who have dealt with the question agree that where the injured subject consents to the adoption, by the subject committing the act, of conduct not in conformity with what would normally be required of it under an international obligation, that conduct cannot be characterized as an internationally wrongful act.[151] We have already mentioned, under the preliminary considerations in section 1 of this chapter, that some of these writers[152] take the view that "consent of the

[148] Telegram of 11 July 1863 to the Italian Minister in Paris (S.I.O.I.–C.N.R., *op cit.*, vol. II, p. 870.) [Translation by the Secretariat.]

[149] Note dated 19 July 1863 to the Italian Minister in Paris (*ibid.*, pp. 870–871). [Translation by the Secretariat.]

[150] Scott, *op. cit.*, p. 323.

[151] This is especially true of those writers who have dealt with the question of internationally wrongful acts in general. Mention should be made in particular of the following: F. von Liszt, *Le droit international*, translation (into French) of the 9th German ed. (1913) by G. Gidel (Paris, Pedone, 1927), p. 201; Strupp, *loc. cit.*, p. 121; Ago, "Le délit international", *Recueil des cours ... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 533 *et seq.*; Ross, *op. cit.*, pp. 243–244; Guggenheim, *op. cit.*, p. 57; Balladore Pallieri, *op. cit.*, p. 246; Morelli, *op. cit.*, p. 351; A. Schüle, "Ausschluss der Rechtswidrigkeit", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 85; Dahm, *op. cit.*, p. 215; Sereni, *op. cit.*, pp. 1523–1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 785; P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zietschrift der Humboldt-Universität zu Berlin* (Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe), vol. XXII, No. 6 (1973), p. 444; Favre, *op. cit.*, p. 643; Giuliano, *op. cit.*, p. 599.

However, it is also true of writers who have made specific studies of some of the cases referred to in paras. 57–58 above, such as intervention in the internal affairs of another State, abductions within the territory of another State, or non-payment of a debt. For the first of those cases, see, for example, A. Van Wynen Thomas and A.J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas* (Dallas, Texas, Southern Methodist University Press, 1956), pp. 91 *et seq.*; E. Lauterpacht, "The contemporary practice of the United Kingdom in the field of international law: Survey and comment, V", *International and Comparative Law Quarterly* (London), vol. 7, part 1 (January 1958), p. 108; Q. Wright, "Subversive intervention", *American Journal of International Law* (Washington, D.C.), vol. 54, No. 3 (July 1960), p. 529; J.E.S. Fawcett, "Intervention in international law: A study of some recent cases", *Recueil des cours ..., 1961-II* (Leyden, Sijthoff, 1962), vol. 103, pp. 366 *et seq.* With regard to the second case, see, for example, M.H. Cardozo, "When extradition fails, is abduction the solution?", *American Journal of International Law*, vol. 55, No. 1 (January 1961), p. 132; see also V. Coussirat-Coustère and P.M. Eisemann, "L'enlèvement de personnes privées, et le droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XL, No. 2 (April–June 1972), pp. 361 *et seq.*; M.C. Bassiouni, *International Extradition and World Public Order* (Leyden, Sijthoff/Dobbs Ferry, N.Y., Oceana, 1974), pp. 127 *et seq.* With regard to non-payment of a debt, see Fauchille, *op. cit.*, p. 532.

[152] See, among the works mentioned in the preceding footnote, those of Strupp, Guggenheim and Steiniger.

injured State" should not even be presented as a "circumstance precluding wrongfulness", because that would presuppose the existence of a wrongful act which, by way of exception, becomes lawful, whereas if there is consent by the State towards which certain conduct is adopted, then there is no obligation to act otherwise and it follows as a matter of course that there is no breach whatever of any such obligation. The fact that there is no wrongful act, they observe, results from the application of the general rule and is not an exception to it. As we have noted, these writers do not seem quite to grasp the actual working mechanism of what are called "circumstances precluding wrongfulness". When any of those circumstances is present in a given case—and not only when that circumstance is consent of the injured State—wrongfulness of the conduct of the other State is precluded precisely because, in that case, and by reason of the special circumstance which exists, the State committing the act in question *is no longer obliged* to act otherwise. From this standpoint, we repeat, there is no difference between consent of the injured State and the other circumstances to be discussed in this chapter. The *exceptionality* is due precisely to the fact that the circumstance which is found to be present in the particular case renders ineffective in that case an international obligation which, but for that circumstance, would be incumbent on the State and would make any conduct not in conformity with what was required thereunder wrongful. There is an obvious difference between conduct which is generally lawful and conduct which is generally wrongful and would remain wrongful if there were not, in a particular case, a special circumstance that took away its wrongfulness. However, these observations aside, the important point for our purposes is that nowhere in the writings on international law is there any dissent from the view that consent of the injured party precludes characterizing as wrongful the conduct in respect of which such consent was given. The conclusions reached through a study of scholarly works are identical with those to which our analysis of international practice and judicial precedents had already pointed.

68. We may therefore state without fear of contradiction that there exists in international law a firmly established principle whereby consent of the State in which is vested the subjective right that would, in the absence of such consent, be wrongfully injured by the conduct of another State is indeed a circumstance precluding the wrongfulness of the conduct in question. Let us immediately add that this is so as a general rule; we shall see later why provision must be made for a limitation on the scope of the principle, as an integral part of the very enunciation of it. However, before going on to discuss this limitation, we feel that there are a few more points that must be made on the question of determining the *validity* and the actual *existence* of the consent of the "injured" State.

69. In the first place, we should emphasize that the consent in question must have been *validly expressed.* In saying this, we are merely enunciating the application of a general principle. No special condition as to form is required for its expression; like all manifestations of the will of a State, such consent can be *expressed* or *tacit, explicit* or *implicit,* provided, however, that it is *clearly established.*[153] For example, in the *Russian Indemnity* case (1912), as we have seen,[154] the Permanent Court of Arbitration held that Russia had waived payment of the moratory interest due from Turkey and that the latter was therefore under no obligation to pay it. It will be noted that this waiver—this consent to conduct by Turkey which would otherwise have been wrongful—was not made expressly, but that, according to the Court, it was an unquestionable consequence of the fact that the Russian Ambassador in Constantinople had:

> time and again accepted without objection or reservation, and repeatedly reproduced in his own diplomatic correspondence, the outstanding balance of the indemnity as being identical with the outstanding balance of the principal. In other words, the correspondence in later years establishes that the two Parties in fact interpreted the 1879 instruments as implying that payment of the principal amount would constitute payment of the amount to which the recipients of the indemnity were entitled, which in turn implied a waiver of moratory interest.[155]

Similarly, in the cases discussed above involving the arrest by organs of a State of persons who were within the territory of another State, it was held that the action of the local police in co-operating in the arrest constituted a form of consent, tacit but incontestable, by the "territorial State" and that, as a result, there had been no violation of the territorial sovereignty of that State.[156] On the other hand, it does not seem acceptable to us that the consent in question may be merely *presumed.*[157] Presumed consent should not be confused with tacit consent. In the case of "presumed" consent, there is actually no consent by the injured party; it is simply presumed that the State concerned would have consented to the conduct adopted in the

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[153] See in this connection Ago, "Le délit international" (*loc. cit.*), p. 534; Schüle, "Ausschluss . . ." (*loc. cit.*) p. 85; Dahm, *op. cit.*, p. 215.

On the subject of acquiescence in international law, see I. C. MacGibbon, "The scope of acquiescence in international law", *The British Year Book of Law, 1954* (London), vol. 31 (1956), pp. 143 *et seq.*; A. C. Kiss, "Less actes unilatéraux dans la pratique française du droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2 (April–June 1961), pp. 325 *et seq.*; J. Bentz, "Le silence comme manifestation de volonté en droit international public", *ibid.*, vol. XXXIV, No. 1 (January–March 1963), pp. 86 *et seq.*

[154] See para. 65 above.

[155] United Nations, *Reports of International Arbitral Awards*, vol. XI (*op. cit.*), p. 446. [Translation by the Secretariat.]

[156] See the decision of the Permanent Court of Arbitration in the *Savarkar* case (1911), referred to in para. 63 above.

[157] See in this connection Ago, "Le délit international" (*loc. cit.*), pp. 535–536, and Schüle, "Ausschluss . . ." (*loc. cit.*), p. 85; for a contrary view, although in relation to exceptional cases, see Dahm, *op. cit.*, p. 215.

case in question if it had been possible to request its consent. The justification usually advanced for this presumption is that the conduct in question was adopted solely in the pressing interest of the State whose right was formally injured and which, it is said, would certainly have consented if circumstances had not made it impossible to wait until it could signify its consent.[158] However, we find it impossible to accept, even *de lege ferenda*, that such a circumstance could be regarded under international law as precluding the wrongfulness of the conduct; cases of abuse would be too common.

70. Again, it goes without saying that the kind of consent under discussion here must be *internationally attributable to the State*; in other words, it must issue from a person whose will is considered, at the international level, to be the will of the State and, in addition, the person in question must be competent to manifest that will in the particular case involved.[159] In the practice of States, the validity of consent has frequently been questioned from this standpoint. At the time of the *intervention of Belgian troops in the Republic of the Congo in 1960*, for example, there arose the question whether consent expressed by a regional authority could legitimize the intervention of foreign troops or whether such consent could be given only by the central Government.[160] In other cases, the question was raised of the "legitimacy" of the Government which had given consent, either in the light of the constitutional rules in force in the State, or on such grounds as that the Government in question did not have the support of the people, or that it was a puppet Government backed by the State to which consent had been given.[161] Reference may be made, for example, to the statements of some government representatives—although others disagreed—on the occasions of the *intervention of United States troops in Lebanon and of British troops in Jordan* in 1958[162] and of *United States and Belgian troops at Stanleyville* in 1964.[163] Another reason sometimes advanced for considering the consent given to be invalid is that it was expressed in violation of the relevant provisions of domestic law. This was the argument of some speakers in the General Assembly during the debate on the first of the two cases mentioned above.[164] In any event, it seems clear that the question whether the consent expressed by a given person should or should not be considered to constitute consent of the State is not within the scope of any convention on State responsibility; the answer to that question must be found in the existing rules concerning the attribution of declarations of will.

71. As for the substantive conditions which must be fulfilled in order for the consent of the "injured" State to be valid and capable of rendering lawful the conduct not in conformity with what is required under an international obligation adopted towards that State, a further prerequisite is that that consent, like any manifestation of the will of a State, should not be vitiated by "defects" such as error, fraud, corruption or violence. The principles which apply to the determination of the validity of treaties also apply with respect to the validity of consent to an action which would, in the absence of such consent, be internationally wrongful.[165] Cases of consent vitiated by violence

[158] In this case, the circumstance which might, perhaps, preclude wrongfulness would be the fact that the conduct was adopted solely in the pressing interest of the injured State, rather than the "consent" of that State.

[159] See Schüle, "Ausschluss . . ." (*loc. cit.*), p. 85.

[160] See the Security Council debates on this question on 13 and 14 July 1960 (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting), and particularly the statement of the representative of Belgium (paras. 186–188 and 209).

[161] Some writers (Van Wynen Thomas and Thomas, *op. cit.*, pp. 93–94) have even questioned the validity of the consent given by a "legitimate" Government to the entry of foreign troops into the territory of a State during a civil war in that State. In such cases, in the view of these writers, the "legitimate" Government is not necessarily still the "legal representative" of the State.

[162] During the debates at the Third Emergency Special Session of the General Assembly and in the Security Council on the interventions in Lebanon and Jordan, a number of representatives stated that consent to the entry of foreign troops into the territory could validly be given by the "legal" or "lawfully constituted" Government of the State (see *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 741st meeting, para. 42 (Canada); 744th meeting, paras. 40 and 44 (Cuba) and para. 109 (Portugal); and 745th meeting, para. 71 (Nepal)). However, some of them questioned the legitimacy of the Governments of the countries in question, which in their view were simply political puppets of a foreign Government, and maintained that in giving their consent to the entry of foreign troops those Governments had acted against the expressed wishes of their peoples; this was the argument advanced by the USSR (*Official Records of the Security Council, Thirteenth Year*, 827th meeting, para. 114), Bulgaria (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 737th meeting, para. 32), Albania (*ibid.*, 739th meeting, para. 77) and Poland (*ibid.*, 740th meeting, para. 83). Others argued that the Governments of Lebanon and Jordan were entirely legitimate and could therefore express valid consent; see the statements made by the United States of America (*ibid.*, 733rd meeting, para. 7) and Cuba (744th meeting, para. 44).

[163] Belgium and Bolivia (*Official Records of the Security Council, Nineteenth Year*, 1173rd meeting, para. 73, and 1183rd meeting, para. 69) affirmed the validity of consent expressed by a legitimate Government, which they considered the Government of the Congo to be. Ghana argued that the consent expressed by that Government was not valid because it was not a constitutionally lawful Government (*ibid.*, 1170th meeting, para. 118, and 1175th meeting, para. 66) and did not have popular support (*ibid.*). Algeria (*ibid.*, 1183rd meeting, paras. 16–17) also maintained that the consent given by the Congolese Government was not valid, on the ground that that Government had been imposed by foreigners and repudiated by the Congolese people.

[164] See *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, particularly the statements of the representatives of the USSR (733rd meeting, para. 72), Czechoslovakia (735th meeting, para. 112), Bulgaria (737th meeting, para. 32) and Albania (739th meeting, para. 75). For a contrary view, see the statements of the representatives of Jordan (735th meeting, para. 45) and Pakistan (740th meeting, para. 58).

[165] See Ago, "Le délit international" (*loc. cit.*), p. 534; Ross, *op. cit.*, pp. 243–244; E. Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; M. Giuliano, *op. cit.*, p. 599.

occur particularly where the action to which a State is required to consent is the entry of foreign troops into its territory. As has already been mentioned,[166] the Nuremberg Tribunal, for example, considered whether or not there had been explicit or implicit consent to the entry of German troops into Austria. The consent supposedly given was found by the Tribunal to be without effect because it had been expressed under threat of invasion.[167]

72. The second point we must make is that consent of the "injured" State can constitute a circumstance precluding the wrongfulness of the conduct adopted by a State in a particular case, provided that such consent was given *prior to or at the time of the conduct in question*. If it was given only after the act was committed, it will simply amount to having forborne to pursue the consequences arising out of the wrongful act (including a claim to reparation). In this case, however, consent obviously does not efface the international offence which occurred before it was given.[168] For example, when United States marines landed in Cuba in 1912, the Cuban Government's consent to such an action was apparently given after the event.[169] Assuming that such a landing was not in itself an internationally lawful act, the consent given by the Cuban Government to the presence of United States troops in its territory could make that presence lawful only from the time when consent was given. Between the date of the landing and the date on which consent was expressed, the wrongful act subsisted, even if the Cuban State waived its right to assert the responsibility of the United States for the act in question.

73. One last point that must be made is that sometimes the consent which takes away the wrongfulness of the conduct of a State may in itself 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 this. The conduct of B becomes lawful as a result of the consent given by A, but the conduct of A constitutes a wrongful act towards C.[170]

74. It now remains for us to consider whether or not there are any exceptions to the principle that the consent of the "injured" subject precludes the wrongfulness of conduct which, in the absence of such consent, would constitute a breach of an international obligation. The first point to be noted in this connection is that if, in a given situation, there is more than one "injured" subject (or, to express it more accurately, more than one subject towards which the State committing the act should have adopted a different conduct), then the consent of only one of the subjects involved—even if it is the one whose right is most directly affected—cannot take away the wrongfulness of the conduct in question so far as the other subjects are concerned. Such individual consent precludes the existence of an internationally wrongful act only in relation to the subject which gave it. For example, if State A is under an obligation to States B, C and D to respect the neutrality of B, and if B subsequently gives its consent to the entry of A's troops into its territory, A will not have committed any breach of the obligation or any internationally wrongful act so far as B is concerned, but the breach of the obligation to C and D will subsist. Similarly, if a State party to an international labour convention (concerning, for example, the weekly rest period) subjects a national of another State party—with the agreement of the latter State—to treatment not in conformity with the obligations under the convention, that act will not be internationally wrongful so far as the State which gave its consent is concerned, but it will remain internationally wrongful vis-à-vis the other States parties.[171] It must be said, however, that this does not involve any exception to the principle enunciated in the preceding paragraphs. We have indicated[172] that, in our view, the consent of the injured subject is in fact merely part of an agreement between the subject on which the obligation rests and the subject in which the corresponding subjective right is vested, an agreement

[166] See para. 59 above.

[167] United Kingdom, *Judgment of the International Military Tribunal*... (*op. cit.*), pp. 18–19.

[168] See in this connection Ago, "Le délit international" (*loc cit.*), p. 534; Ross, *op. cit.*, p. 243; Morelli, *op. cit.*, p. 351; Schüle, "Ausschluss ..." (*loc. cit.*), p. 85; Sereni, *op. cit.*, p. 1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; Giuliano, *op. cit.*, p. 598. For a contrary view, see Dahm, *op. cit.*, p. 215.

If the wrongful act is a continuing act, it naturally ceases to be wrongful from the time when the consent of the injured subject is obtained.

[169] Hackworth, *op. cit.* (1941), vol. II, pp. 328–329.

[170] See Ago, "Le délit international" (*loc. cit.*), p. 535; Ross, *op. cit.*, p. 244.

[171] In some of the cases referred to above (paras. 59 and 60), the question whether conduct of a State might constitute a breach of that State's obligations to subjects other than the one which had given its consent arose more than once. For instance, in the case of the occupation of Austria by German forces in 1938, Austria's consent to that operation, if it had existed, would have precluded the wrongfulness of the operation in relation to Austria but not in relation to the other States which had had the right, under the Treaty of Versailles, to see the independence of Austria respected. We noted (in para. 59) that the Nuremberg Tribunal itself was in fact concerned about determining whether or not the occupation of Austria had been consented to by the other Powers. Again, in connection with such disputes as those relating to the maintenance of British troops in Greece in 1946, the United States intervention in Lebanon in 1958 and the Belgian intervention in the Congo in 1964, there arose the question whether a possible breach of obligations embodied in the Charter of the United Nations concerning the maintenance of international peace and security was a matter only for the State in whose territory there were foreign troops, or whether that also constituted a breach of obligations to the other States Members of the United Nations. If so, the consent of the State in whose territory there were foreign troops—assuming that it had been valid—could not preclude the wrongfulness of such conduct in relation to the other States Members of the United Nations.

[172] See para. 57 above.

whereby, in the particular case in question, the obligation ceases to have effect or its application is suspended. Obviously, however, such an agreement, like any other, has effect only as between the parties. Consequently, if the obligation subsisted in relation to other subjects it could, as a result of the agreement between two States alone, have ceased to have effect only as between those two States. So far as the other subjects are concerned it continues to exist, and so far as they are concerned the conduct not in conformity with the obligation in question must be characterized as an internationally wrongful act. This, of course, is simply a case in which the principle enunciated in the preceding paragraphs is applied, and not in any way an exception to that principle.

75. The situation is different, however, if the "injured" subject gives its consent to conduct by another subject which is contrary to an obligation imposed by a rule of *jus cogens*. We have already indicated above[173] that this would be the only possible exception which might defeat the general principle. So far as we are aware, writers on international law have not yet considered the question of the effect of the existence of rules of *jus cogens* on the validity of consent of the "injured" State as a circumstance precluding wrongfulness. Yet there is no doubt in our mind that the formation of such rules does have an effect. If one accepts the existence in international law of rules of *jus cogens* (in other words, of peremptory rules from which no derogation is allowed), one must also accept the fact that conduct of a State which is not in conformity with an obligation prescribed by one of those rules must remain an internationally wrongful act even if the injured State has given its consent to the conduct in question. As we pointed out, 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 to replace them by others, even in the relations between two States. Consequently, they can also not be affected by the special type of agreement concluded between the State which adopts conduct not in conformity with an obligation created by a peremptory rule and the State which consents to it. Notwithstanding any such agreement, the obligation remains incumbent on the parties which concluded the agreement, and the conduct not in conformity with what is required under the obligation therefore constitutes a breach of the obligation and produces an internationally wrongful act, the wrongfulness of which subsists even vis-à-vis the State which has consented to it. These logical deductions therefore lead us to the categorical conclusion that there is one exception to the basic principle enunciated in the preceding paragraphs: the consent given by the State in which is vested the subjective right corresponding to an obligation imposed on another State by a peremptory rule of general international law does not have the effect of making lawful an act, not in conformity with that obligation, committed by that other State and of relieving the latter of the resulting responsibility.

76. It would appear, however, that the emergence of a clear and widespread recognition of the existence in international law of rules of *jus cogens* was too recent for us yet to find in State practice or international judicial decisions any support, in terms of specific situations, for the conclusion to which we have been guided by logical principles. For the time being, we do not know of any cases providing a loud and clear affirmation of the fact that the consent of the "injured" State does not preclude the wrongfulness of an act of a State that is not in conformity with what is required of it under an obligation arising out of a rule of *jus cogens*. After all, it is not often that a State will freely consent to conduct by another State which contravenes, in relation to the first State, a rule allowing of no derogation. Consequently, the most one can hope for is to find in certain statements some mere indications of a belief which has not yet had occasion to be openly expressed.[174] But this in no way detracts from the logically incontestable nature of the exception which the existence of *jus cogens* compels us to accept to a principle whose otherwise general validity has been demonstrated in this section of the report.[175]

77. In the light of the considerations expounded in the preceding paragraphs and the conclusions to which they have led us as regards both the basic principle and the sole exception to the principle, we believe that we may propose to the Commission the adoption of the following text for the article defining the rule of international law relating to the subject-matter of this section:

Article 29. Consent of the injured State

The consent given by a State to the commission by another State of an act not in conformity with what the first State would have the right, pursuant to an international obligation, to require of the second State

[173] *Ibid.*

[174] Some Governments have at times expressed doubts as to the exculpatory effect of consent given by a Government to action by a foreign Government which would constitute "interference with the fundamental right of every people to choose the kind of Government under which it wants to live" or 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." (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 745th meeting, para. 72, and 742nd meeting, para. 6.)

[175] 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? In our view, 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.

precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory rule of general international law.

3. Legitimate application of a sanction

78. The next circumstance to be considered among the grounds for precluding the wrongfulness of an act of the State is what is customarily called the "legitimate application of a sanction". In its simplest terms, the idea intended to be conveyed by this expression is the following: 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 admissible in international law as a sanction in response to an international offence committed by the latter.

79. In the title of this section, we use the term "sanction" as synonymous with an action the object of which is to inflict punishment or to secure performance and which takes the form of an infringement of what in other circumstances would be an international subjective right, requiring respect, of the subject against which the action is taken. That is, in our opinion, the proper meaning of "sanction", the meaning most in keeping with international law. It differs both from what we consider to be the excessively narrow meaning attached to the term by those who hold that it comprises only action involving the use of armed force, and from what we consider to be the excessively broad interpretation which goes so far as to include within this single term all the various legal consequences that might flow from internationally wrongful acts. In our view, the authorization of an action such as the application of economic reprisals in no sense involves the use of armed force, but its object is none the less punitive, and this seems to us to be one of the typical attributes of a sanction. Conversely, the sole object of the attribution of the right to obtain reparation for damage suffered is indemnification, which can hardly be described as a sanction. In any event, it is obvious that even for those who would generally prefer to attach a broader meaning to the term "sanction", the only type of sanction that can be considered for the purposes of the question under consideration is the type involving an action which, as has just been stated, would in other circumstances constitute a breach of an international obligation, an infringement of an international subjective right of another. Only where conduct of this nature is a reaction to an international offence by another party can it have the effect of removing its otherwise undeniably wrongful character.

80. The adjective "legitimate" might seem superfluous to those who hold that in international law a non-legitimate reaction to another's internationally wrongful act cannot rightfully be described as a sanction. Nevertheless, in this writer's opinion the adjective seems necessary in order to stress, in the actual description of the situation in question, that certain conditions must be present in order that the situation can in fact be said to have occurred and to produce the effects to be attributed to it. If a State—or another subject of international law—takes action which it claims to justify as a sanction against the State accused of a breach of an international obligation, the wrongfulness of such action cannot be ruled out in cases where the breach, although it has occurred, is not one of those for which international law admits the possibility of reacting by a sanction in the proper sense of the term. 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—and sometimes also to other subjects of international law—injured by an internationally wrongful act the possibility of resorting, against the State guilty of that act, to action which, as stated earlier, is an infringement of an international subjective right of that State. If according to international law the only consequence of an offence is that it gives rise to the right on the part of the injured State to demand reparations, any act consisting of a reaction to the offence in question in a manner that is not in conformity with what is required by an international obligation is clearly an internationally wrongful act, an act not justified by the situation existing in the particular case. The same holds true, of course, in cases where international law, while not in principle ruling out the possibility of applying a sanction against the 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 tried to obtain adequate reparations. In other words, the fact that it has suffered a breach of an international obligation committed by another State by no means invariably or automatically authorizes 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.

81. What is more, we know that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of sanctions (reprisals of an economic nature, for example). However, other forms that were admissible under "classical" international law, such as armed reprisals, are no longer tolerated in peace-time, or at any rate are tolerated only within strict limits. Moreover, in general, as regards forms of sanctions involving recourse to armed force, the tendency is decidedly to restrict their application to the most serious cases and, in any event, to leave the decision as to their use to subjects other than the injured State. In many cases, therefore, recourse to 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 a

"legitimate" application of a sanction. Again, even where the internationally wrongful act calling for a reaction would justify a sanction involving the use of force, whatever the subject responsible for applying it, the action taken in the guise of a sanction certainly could not include, for instance, a breach of obligations of international humanitarian law. Such a step could never be legitimate, and such conduct would remain wrongful.

82. An additional point is that even conduct—reprisals or other measures— which in certain circumstances would be admissible as a reaction to an international offence committed by another party would cease to be a legitimate form of sanction if it should cease to be commensurate with the injury suffered as a result of the offence in question. Here likewise, the justification pleaded by the State under the pretext of applying a sanction would cease to be a justification. A sanction which in its application goes beyond the limits prescribed by international law is no longer legitimate, and the conduct adopted by the State that is not in conformity with an international obligation in that case does not cease to be wrongful.

83. We have considered it useful to enter into some detail simply to provide a better explanation for the use, in this context, of the expression "legitimate application of a sanction". The point we wish to stress is that only an application that can be characterized as legitimate (because occurring in certain circumstances) can validly be held to be a circumstance precluding the wrongfulness of State conduct not in conformity with what in other circumstances would be required by an international obligation. Nevertheless, we have no intention of anticipating at this stage the tasks that clearly come within the purview of part 2 of the draft articles on State responsibility. It is not the task of the Commission at the present time to determine at what point the consequences envisaged in international law for an internationally wrongful act include the possibility for the injured State or other subjects to apply a sanction against the guilty State, or to identify definitively the distinctive features of a sanction within the general context of the legal consequences of internationally wrongful acts, or to define the instances in which the one or the other of these forms is applicable. The Commission will deal with these matters when it begins the actual consideration of the content, forms and degrees of international responsibility, for it is then that it will have to determine the various new legal situations brought about by the commission of these internationally wrongful acts, which will have been defined in part 1 of the draft. For the purposes of the particular object of this section, our concern is to indicate that the "circumstance precluding wrongfulness" we are dealing with here is represented by what international law considers admissible as a legitimate application of a sanction in response to an internationally wrongful act—by what the Commission itself will in fact have defined as constituting such "legitimate application".

84. In connection with the "legitimate application of a sanction", we can only reiterate the remark we made in the preceding section in dealing with the topic of the "consent of the injured State". On grounds of logic alone, a positive answer must also be given here, and with all the more reason, to the question whether or not the circumstance that the action of a State constitutes legitimate application of a sanction in response to the internationally wrongful act of another party removes any trace of wrongfulness from that action, even where the action consists of conduct that is not in conformity with what in other circumstances would be required of the State by an international obligation. It can hardly be otherwise, for in the circumstances in which it is carried out the action in question is admissible in international law, and may at times even be required by international law, for example, when the decision to apply a sanction is taken by an international organization. Once again, the mechanism that leads to the result in question is the same. The lawfulness of the act of the State, although conflicting with the terms of an international obligation, lies in the fact that the circumstance found to exist in the particular situation as an exception cancels out that obligation. There is no wrongfulness because in the case in point the obligation is not operative, and consequently there is no breach of the obligation.

85. In international practice and international legal precedents, we can hardly expect to find pronouncements by statesmen or conclusions by judges which explicitly and specifically affirm the principle that an act by a State towards another State that is not in conformity with an international obligation ceases to be internationally wrongful if the State taking the action, because it is the victim of an infringement of its rights, is simply reacting to the offence by applying a legitimate sanction against the perpetrator of the offence. This is not the principle on which the differing views of parties to inter-State disputes clash. Generally, the issues that are the subject of discussion or of rulings are of another kind, namely, whether or not in particular cases recourse to sanctions—notably, reprisals—was a measure admissible 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 reparations; whether or not, in taking reprisals, even legitimately, it was admissible to disregard obligations relating to a particular field; whether or not proportionality between the injury suffered and the particular reaction should be or had in fact been respected, etc. But this does not mean that, behind the positions adopted on these different issues, cannot be seen the implicit conviction of diplomats or arbitrators that in principle wrongfulness is precluded when an act, although not in conformity with the terms of an international obligation, constitutes the "legitimate" application of a sanction in response to an offence committed by another.

86. So far as international legal precedents are concerned, reference should be made here 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.[176] In the first award, relating to *Responsibility of Germany for damage caused in the Portuguese colonies in the South of Africa* (*Naulilaa incident*), handed down on 31 July 1928, the Tribunal, before deciding *in concreto* on the international lawfulness or wrongfulness of certain acts by the German authorities—and 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. The award contains the following passage, which is particularly interesting in that it ascribes specifically to the temporary suspension of the force of the rule between the parties the reason why an action which is not in conformity with the rule, and which is a reaction against another's wrongful act, is not itself wrongful:

> The latest doctrine, and more particularly German doctrine, defines reprisals in these terms:
>
> "*Reprisals* are an act of taking the law into its own hands (*Selbsthilfehandlung*) by the injured State, an act carried out—*after an unfulfilled demand*—in response to an act contrary to the law of nations by the offending State. *Their effect is to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations.** They are *limited* by the experiences of mankind and the rules of good faith, applicable in the relations between States. *They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.*"[177]

The award then goes on to note that the opinions of learned writers are divided on the issue whether or not the reprisals must be proportionate to the wrong. Having made these remarks, the Tribunal proceeds to deal with the specific case and says:

> The first requirement—the *sine qua non*—of the right to take reprisals is a *motive* furnished by an earlier act contrary to the law of nations. This requirement—which the German side concedes must be satisfied—is missing, and that fact would be sufficient grounds for dismissing the claim of the German Government.[178]

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 sanction had been satisfied it would have regarded the German "sanction" against Portugal's possible international offence as not being wrongful.

87. In the second award, handed down on 30 June 1930 and relating to the *Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war* (*"Cysne" case*), the Tribunal states the following:

> With regard to the theory of reprisals, the arbitrators refer to the award of 31 July 1928, in which the matter is discussed in detail. As the respondent maintains, *an act contrary to international law may be justified, by way of reprisals, if motivated by a like act.** The German Government was able, therefore, without breaching the rules of the law of nations, to respond to the Allied additions which were contrary to article 28 D.L. [article 28 of the London Declaration (see paragraph 96 below)] by an addition contrary to article 23.[179]

The Tribunal thus clearly shows—and here almost spells it out—that in its opinion, an act performed by a government as a sanction in response to an international offence against it is on that account to be considered lawful, even though intrinsically "contrary to the law of nations".

88. So far as State practice is concerned, the positions adopted by official bodies reveal, explicitly or implicitly, a firm belief in the international lawfulness of a course of conduct which is not in conformity with the terms 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 the request for information addressed to them by the Preparatory Committee for the Codification Conference of 1930. Point XI of the request bore the heading: "Circumstances in which a State is entitled to disclaim Responsibility"; its paragraph (*b*) envisaged the following cases:

> What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?[180]

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 the point. In their replies, the Governments merely indicated in what cases and under what conditions they would regard reprisals as internationally lawful.[181] In doing so, they implicitly acknowledged the principle that in a number of cases the State was free to react, in the form of sanctions, to an internationally wrongful act committed by another State, by means of conduct which would otherwise be

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[176] *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), p. 7.

[177] United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1025–1026. [Translation by the Secretariat.]

[178] *Ibid.*, p. 1027. [Translation by the Secretariat.]

[179] *Ibid.*, p. 1056. [Translation by the Secretariat.]

[180] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 128.

[181] *Ibid.*, pp. 128 *et seq.*, and League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to Vol. III* (C.75(*a*).M.69(*a*).1929.V), pp. 4 and 22.

characterized as wrongful and would entail its international responsibility. On the basis of the replies received, 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.[182] (Basis of discussion No. 25.)

89. After the Second World War and in consequence of the definitive affirmation, as a fundamental principle of modern international law, of the ban on recourse to force, the *opinio juris* of States on the legitimacy of reprisals marked the culmination of an evolution that had been discernible more and more in the successive stages of the acceptance of this fundamental principle[183] and that had long been advocated by certain scholars.[184] Unquestionably, this *opinio* has thus become much more restrictive.[185] 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.[186] The opportunity for giving tangible expression to this conviction of the members of the international community regarding the question of principle of the lawfulness or wrongfulness of armed reprisals arose between the late 1960s and the early 1970s in connection with the elaboration of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*[187] The Declaration, adopted on 24 October 1970 proclaims (Principle I) that:

States have a duty to refrain from acts of reprisal involving the use of force.

Without wishing to discuss here the general question of the mandatory or non-mandatory force of the principles embodied in the Declaration, we may take it for granted that the ban on the use of armed reprisals[188] found a place in the Declaration simply as a reflection of the principle which had previously become part of international custom. As stated above,[189] we are inclined to think, therefore, that action taken as a "sanction" against an internationally wrongful act but involving the use of armed force cannot in most cases be considered even under general international law, as a "legitimate" sanction; the wrongfulness of such an action cannot therefore be ruled out.

[182] League of Nations, *Bases of Discussion* ... (*op. cit.*), p. 130. For reasons mentioned several times, the Conference ended before it had the opportunity to discuss a number of the Bases of discussion, including Basis No. 25.

[183] An early restriction of the legitimacy of recourse to armed reprisals was introduced by article 1 of the Hague Convention (II) of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. Subsequently, recourse to armed reprisals became implicitly conditional on the prior exhaustion of the procedures for peaceful settlement provided for in many bilateral treaties (Bryan Treaties between the United States of America and various Latin American countries, other treaties of the same kind) and multilateral treaties (Locarno Pact of 1925, etc.). The question of the legitimacy of armed reprisals was raised in connection with the partial ban on war laid down in the Covenant of the League of Nations, more particularly on the occasion of the bombardment and occupation of Corfu by Italy in 1923, after the massacre of the Tellini mission at Jamina, but in practice the question remained open, despite certain statements in support of a ban on recourse to this form of reprisal. The discussion was resumed in 1928 in connection with the Kellogg–Briand Pact and the outlawing of wars of aggression. We may prudently infer from these discussions, as does I. Brownlie (*International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 222) that "the controversy as to whether the Covenant and the Pact prohibited reprisals indicated that their status as measures of self-help was far from secure."

[184] Article 4 of the resolution concerning the "Regime of reprisals in peace-time" adopted by the Institute of International Law at its thirty-fourth session (*Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, part 2, p. 709) stated:

"Armed reprisals are prohibited in the same way as recourse to war."

[185] In international legal precedents, one of the first manifestations of this new attitude can be found in the judgment of the International Court of Justice of 9 April 1949 in the *Corfu Channel* case (Merits). The Court denied the lawfulness of the minesweeping operation—called "Operation Retail"—carried out on 12 and 13 November 1946 by the British Navy in Albanian territorial waters. The Court considered the operation as the "manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law", even though the Court recognized that Albania had completely failed to carry out its duty of carrying out the minesweeping itself after the explosions on 22 October 1946, which had caused serious damage and loss of human life to two British warships (*I.C.J. Reports 1949*, p. 35.)

[186] See the list of cases considered and decisions taken by the Security Council drawn up by D. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), pp. 33 *et seq.* For example, in its resolution 188 (1964) of 9 April 1964, the Council indicates in general terms that it:

"*Condemns* reprisals as incompatible with the purposes and the principles of the United Nations."

The term "reprisals" in that text refers exclusively to armed reprisals.

The incompatibility of reprisals involving the use of armed force has been maintained by virtually all writers on this question. See Brownlie, *International Law* ... (*op. cit.*), p. 281, and the references given by him. Only recently has there been renewed discussion of this principle, in consequence of the difficulties encountered by the Security Council in performing the function assigned to it by the Charter. See in this connection the debate which took place in 1969–1972 in the *American Journal of International Law*, and particularly the articles therein by: R. A. Falk, "The Beirut raid and international law of retaliation" (vol. 63, No. 3 (July 1969), pp. 415 *et seq.*); Y. Blum, "The Beirut raid and the international double standard. A reply to Professor Richard A. Falk" (vol. 64, No. 1 (January 1970), pp. 73 *et seq.*); Bowett (*loc. cit.*, pp. 1 *et seq.*); R. W. Tucker, "Reprisals and self-defence: the customary law" (vol. 66, No. 3 (July 1972), p. 587). 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 concepts other than that of reprisals.

[187] General Assembly resolution 2625 (XXV), annex.

[188] It has been argued that in such cases the explanation for legitimacy of recourse to armed reprisals lies in the notion of self-defence.

[189] See para. 81 above.

90. However, this is not the point of prime concern here. What we mean to stress is that, during the drafting of the 1970 Declaration, the legitimacy of other forms of reprisals in the form of sanctions applied against States that had committed international offences was by no means denied by the representatives of Governments participating in that drafting exercise. On the contrary, it was explicitly recognized. The conviction generally shared by Governments on this point seems to be aptly expressed in the statement made by the representative of the Netherlands in the Sixth Committee of the General Assembly on 13 December 1968:

> I would like to stress that any State, no matter to what region of the world [it] belongs, may find itself in the position of suffering damage from illegal acts on the part of another State and that such a State, for that reason, would be justified in taking measures of non-violent reprisal.[190]

The most recent statements by Governments confirm, therefore, that if the necessary conditions are fulfilled,[191] there is nothing to prevent the State which has suffered an international wrong from reacting against the State which committed the wrong by action consisting of unarmed reprisals. Even though not involving the use of armed force, however, such action nevertheless constitutes conduct not in conformity with what would be required under an international obligation towards the State against which it is directed.[192] The fact that the conduct adopted in this case constitutes the legitimate application of a sanction on the part of the State injured by an international offence committed by another State is therefore considered, even now, by the spokesmen of the members of the international community as cause for precluding the wrongfulness of such conduct.

91. Reference is made above to an instrument adopted within the framework of the United Nations and to views expressed in the course of the debates taking place at that time within the Organization. That provides us with an opportunity to consider for a moment an aspect already touched upon in earlier paragraphs. We noted in passing that the former monopoly of the State directly injured by the internationally wrongful act of another State, as regards the possibility of resorting against that other State to sanctions which would otherwise be unlawful, is no longer absolute in modern international law. It probably still subsists in general international law, even if, *in abstracto*, some might find it logical to draw certain inferences from the progressive affirmation of the principle that some obligations—defined in this sense as obligations *erga omnes*—are of such broad sweep that the violation of one of them is to be deemed an offence committed against all members of the international community, and not simply against the State or States directly affected by the breach. In reality, one cannot underestimate the risks that would be involved in pressing recognition of this principle—the chief merit of which, in our view, is that it affirms the need for universal solidarity in dealing with the most serious assaults on international order—to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach. It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient "institutionalization", should have turned in another direction, namely towards a system vesting in international institutions other than States the 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 should be taken in response and how they should be implemented.

92. Under the United Nations Charter, those responsibilities are vested in the competent organs of the Organization. These organs—and this is the point which interests us in the context of the subject matter of this section—are empowered not only 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,[193] or at times, all Member States, to apply certain sanctions not involving the use of 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 "sanction" is less strict: it does not mean exclusively comportment injurious to what, in other circumstances, would constitute a genuine right—and therefore a right which must be respected—of the State

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[190] K. Swan Sik, "Netherlands State practice for the parliamentary year 1968–1969", *Netherlands Yearbook of International Law, 1970* (Leyden), vol. I, p. 171.

The same representative added that, in the view of his delegation: "the respectable and laudable object of preventing the abuse of reprisals would be served, better than by their abolition, by underscoring the conditions to which their exercise [is] subject". (*Ibid.*)

For the summary record of the statement of the representative of the Netherlands, see *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1095th meeting, paras. 9–10.

[191] Namely, as mentioned earlier, that the offence to which the reprisals are intended to be a response must not be such as to entail any consequence other than to give rise to the right of the injured party to obtain reparation; that, if such is the case, a prior attempt to obtain reparation must have been made; and that, in any event, the reaction must not have been disproportionate to the offence. An additional condition, referred to in article 5 of the Resolution of 1934 of the Institute of International Law, would be that there must not be any provision previously agreed between the parties for peaceful settlement (see footnote 184 above).

[192] If it were otherwise, the action would amount to mere retorsion, and would not constitute reprisals in the strict sense.

[193] Either directly, or through the regional agencies referred to in Article 53 of the Charter.

suffering the sanctions in question. The sanctions (as, for example, some of those enumerated in Article 41 of the United Nations Charter and some of those provided for earlier in Article 16, paragraph 1, of the Covenant of the League of Nations) may constitute measures no doubt harmful to the interests of the State against which they are directed, but not necessarily and in all situations involving a breach of the provisions of international obligations towards that State. Nevertheless, the situation can often be otherwise. For example, the severance of economic relations with a State to which the State applying the measure is bound by an economic or trade co-operation treaty 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 with a State with which there exists one of the many agreements for co-operation in those fields, or—and the case is by no means purely theoretical—of such measures as the embargo on the supply of arms or other material to a State when there is a treaty obligation to provide such material.[194]

93. In these and other conceivable cases, it is beyond doubt that sanctions applied in conformity with the provisions of the Organization's constituent instrument would not, in the legal system of the United Nations, be wrongful, even though possibly conflicting with other treaty obligations owed by the State applying them. Indeed, this conclusion has never been contested. It is justified precisely because, under the rules laid down in the treaty containing the Charter and subscribed to by both the subject which may apply and the subject which may suffer the measures in question,[195] the applicability of such measures is provided for in the form of the "legitimate" or even "mandatory" enforcement of sanctions against a State recognized, within the same system, as guilty of certain specific unlawful acts.

94. Thus far, we have considered sanctions not involving the use of force, the application of which would be entrusted to Member States by the competent organs of the United Nations. The measures would therefore be legitimate, even though their implementation should take the form of conduct not in conformity with the terms of an international obligation owed by the implementing State towards the State suffering them. 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 a sanction involving—in this case legitimately—the use of armed contingents under the direct authority of the United Nations, we might hypothesize the simpler case where the Organization, or the International Labour Organisation, or some other organization, denies to a State which has seriously and persistently violated 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. Nevertheless, we do not believe that we should pursue the consideration of a question which involves discussion of the wrongfulness or preclusion of the wrongfulness of the action of an international organization: such problems are beyond the scope of this draft, which is devoted exclusively to internationally wrongful acts committed by States and the responsibility deriving from such acts.

95. Learned authors are practically unanimous in recognizing that the conduct of a State should not be considered as wrongful if adopted in the legitimate application of a sanction 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 terms of an international obligation in effect between the two States, and hence as wrongful. A number of writers on international law, in considering the circumstances excluding wrongfulness, refer specifically to the application of a sanction,[196] others to the sanction or the

[194] The examples of the sanctions ordered in 1935 by the League of Nations against Italy at the time of its action against Ethiopia and in 1977 by the United Nations against South Africa for its policy of *apartheid* are only too well known.

[195] This clarification seems necessary, as the situation might be different in the—admittedly exceptional—event that the passive subject of the sanctions which a State Member of the United Nations is called upon to apply was not also a Member State. In such a case, it would still seem indisputable that the Member State could not claim to be debarred from action by a treaty binding it to the non-member State, for every Member State has a duty to give precedence to the obligations provided for in the Charter over those that it has accepted in other conventions. In fact, as early as the League of Nations period, the Legal Sub-Committee of the Council, in determining the sanctions to be applied against Italy for the action taken against Ethiopia, pointed out that friendship and non-aggression treaties existing between Italy and other Member States, as well as most-favoured-nation clauses, must be interpreted as subordinate to Articles 16 and 20 of the Covenant. However, it could be validly argued that with respect to the State not a Member of the United Nations—and earlier of the League of Nations—against which the sanctions are to be applied, the treaty in effect with that State could not be considered as either voided or suspended by decisions or measures adopted within a system set up by a convention to which that State is not a party. Action taken against that State in contravention of the treaty in question would not necessarily cease to be wrongful by virtue of the fact that within the said system the action is treated as a "sanction".

[196] See for example, H. Kelsen, *loc. cit.*, p. 561, and *Principles of International Law* (New York, Rinehart, 1952), p. 23; Ago, "Le délit international" (*loc. cit.*), p. 536 *et seq.*; E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (Zurich, Polygraphischer Verlag, 1949), pp. 37–38; Morelli, *op. cit.*, p. 352; R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed. (Turin, Unione tipografico-editrice torinese, 1971), p. 574.

reaction to a prior internationally wrongful act,[197] and still others—more numerous—to the legitimate recourse to reprisals,[198] or, more generally, to measures of self-protection.[199] The lawfulness of conduct adopted by way of sanction is, *a fortiori*, supported by writers who maintain that, in the case of the application of known sanction with the "consent of the injured State",[200] it would even be misplaced to speak of a circumstance precluding, *by way of exception*, the wrongfulness of the act of the State.[201] Lastly, the conduct considered in this section is implicitly acknowledged as lawful by those writers who, without dealing expressly with this particular issue, recognize, in respect of the consequences of the internationally wrongful act, the right, or even in some cases the duty, to adopt a conduct other than that which would be required under an international obligation, either by referring explicitly to sanctions,[202] or by referring to reactions to an internationally wrongful act that take the form of reprisals and other coercive or non-coercive measures.[203]

96. There is one final question to be dealt with before concluding consideration of this topic. International legal precedent, the practice of States and juridical literature confirm incontestably the proposition that a State's conduct is not internationally wrongful if that conduct, while not in conformity with the requirements of an obligation binding that State to another State, is justified as the legitimate application of a sanction in response to an internationally wrongful act previously committed by that other State. But what happens if, in the legitimate application by State A of a sanction against State B, the action of A has the effect of infringing the rights of State C, towards which no application of sanctions is justified? Once again, it is logic itself which, in our view, provides the answer to this question. There is no doubt that while the existence of the earlier internationally wrongful act by State B may preclude the wrongfulness of A's reaction towards B, it cannot, however, in any way preclude the wrongfulness of the injury caused to C in connection with this reaction. This answer is corroborated by the award, referred to earlier, of the Portugal/Germany Arbitral Tribunal in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and prior to Portugal's entry into the war ("Cysne" case)*. Claiming that Great Britain had violated international obligations laid down in the Declaration concerning the Laws of Naval War,

[197] See, for example, Scerni, *loc. cit.*, p. 476 and Sereni, *Diritto internazionale* (*op. cit.*), pp. 1524, 1554.

[198] See, among others, de Visscher, *loc. cit.*, pp. 107, 109 *et seq.*; W. van Hille, "Etude sur la responsabilité internationale de l'Etat", *Revue de droit internationale et de législation comparée* (Brussels), 3rd series, vol. X, No. 3 (1929), p. 566; Spiropoulos, *op. cit.*, p. 286; J. Basdevant, Règles générales du droit de la paix", *Recueil des cours . . ., 1936-IV* (Paris, Sirey, 1937), vol. 58, p. 550; A. Sánchez de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, p. 526; Verdross, *Völkerrecht* (*op. cit.*), p. 411; Ross, *op. cit.*, pp. 243, 245 *et seq.*; R. Redslob, *Traité de droit des gens* (Paris, Sirey, 1950), pp. 242, 252; M. Sørensen, "Principes de droit international public", *Recueil des cours . . ., 1960-III* (Leyden, Sijthoff, 1961), vol. 101, p. 218; Schüle, *loc. cit.*, *Wörterbuch . . .*, vol. III, pp. 84–85; Dahm, *op. cit.*, p. 213; von Münch, *op. cit.*, pp. 142 *et seq.*; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 404; Ténékidès, *loc. cit.*, pp. 785–786; N.A. Maryan Green, *International Law, Law of Peace* (London, MacDonald and Evans, 1973), p. 259; Favre, *op. cit.*, p. 643; Schlochauer, *loc. cit.*, pp. 273 *et seq.*; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), p. 658.

[199] See for example, D. Anzilotti, *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. 1, (Padua, CEDAM, 1955), pp. 419 *et seq.*, and Quadri, *op cit.*, pp. 264 *et seq.*, p. 584. Naturally, self-protection as a circumstance precluding wrongfulness is relevant in this context only in so far as it represents the reaction to an internationally wrongful act.

[200] See para. 67 above.

[201] See Strupp, *loc. cit.*, p. 121; Guggenheim, *op. cit.*, p. 57; Steiniger, *loc. cit.*, pp. 444–445; Graefrath, Oeser and Steiniger, *op. cit.*, pp. 72, *et seq.* As mentioned earlier, these writers take the view that in such cases the wrongfulness of the conduct adopted by the State would in any case be precluded by virtue of the same rule which provides for the obligation in question. In their view, it is axiomatic that the obligation to refrain from a given conduct would not cover a situation in which the conduct in question represented the legitimate application of a sanction. In this particular case, the presence of a circumstance exceptionally precluding wrongfulness would not be necessary in order to support the conclusion that the conduct in question does not violate any obligation and consequently cannot constitute an internationally wrongful act.

[202] For example, State and Law Institute of the Academy of Sciences of the Soviet Union, *Kurs Mezhdunarodnogo Prava* (International Law Course), gen. ed. F.I. Kozhevnikov *et al.* (Moscow, Nauka, 1969), vol. V. pp. 434 *et seq.*; L.A. Modzhorian, "Otvetstvennost v sovremennom mezhdunarodnom prave" (Responsibility in modern international law), *Soviet Yearbook of International Law, 1970* (Moscow, Nauka, 1972), pp. 143 *et seq.*

[203] For example, L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. II, pp. 135 *et seq.*; Y. de la Brière, "Evolution de la théorie et de la pratique en matière de représailles", *Recueil des cours . . ., 1928-II* (Paris, Hachette, 1929), vol. 22, pp. 241 *et seq.*; E. [Speyer] Colbert, *Retaliation in International Law* (New York, King's Crown Press, 1948), pp. 60 *et seq.*; C.G. Fenwick, *International Law*, 4th ed. (New York, Appleton–Century–Crofts, 1965), pp. 636–637; Balladore Pallieri, *op. cit.*, pp. 249–250; Cheng, *op. cit.*, pp. 97–98; J.C. Venezia, "La notion de représailles en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXI, No. 1 (January–March 1960), pp. 471 *et seq.*; K.J. Partsch, "Repressalie", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 103; C. Cepelka, *Les conséquences juridiques de délit en droit international contemporain* (Prague, Charles University, 1965), pp. 42 *et seq.*, 61 and 62; M.B. Akehurst, *A Modern Introduction to International Law* (London, Allen and Unwin, 1970), pp. 14–15; F. Kalshoven, *Belligerent Reprisals* (Leyden, Sijthoff, 1971), pp. 20 *et seq.*, 22 *et seq.* The writers referred to in footnote 186 above express the same views; even those among them who rule out entirely the legitimacy of the use of armed reprisals recognize the legitimacy of reprisals not involving the use of force.

As regards draft codifications prepared by learned writers, see articles 7 to 10 of the draft agreement on international responsibility drafted by B. Graefrath and P.A. Steiniger: "Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), No. 8 (1973), pp. 227–228.

signed in London on 26 February 1909 [called the "London Declaration" ("D.L.")], Germany had 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, could not be added to that list, since they were not "*exclusively** used for war". Germany thereupon destroyed the Portuguese vessel *Cysne*, which was carrying such items. The Portugal/Germany Arbitral Tribunal's award, after agreeing with Germany that "an act contrary to international law can be justified, by way of reprisals, if motivated by a similar act",[204] proceeded to add:

> However, the German argument, which is sound up to this point, overlooks an essential question which can be put in the following terms: *Could the measure which the German Government was entitled to take, by way of reprisals, against Great Britain and its allies, be applied to neutral vessels and, specifically, to Portuguese vessels*?
>
> The answer must be in the negative, even according to the opinion of German scholars. This answer is the logical consequence of the rule that reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible. By contrast, the measures taken by the German State in 1915 against neutral merchant vessels were aimed directly and deliberately against the nationals of States innocent of the violations of the London Declaration attributed to Great Britain and its allies. Consequently, not being in conformity with the Declaration, they constituted acts contrary to the law of nations, unless one of the neutral States had committed, against Germany, an act contrary to the law of nations that could make it liable to reprisals. There is no evidence of any such act having been committed by Portugal, and the German claim relies exclusively on the acts committed by Great Britain and its allies. Hence, in the absence of any Portuguese provocation warranting reprisals, the German State must be held not to have been entitled to violate article 23 of the Declaration in respect of Portuguese nationals. Accordingly, it was contrary to the law of nations to treat the cargo of the *Cysne* as absolute contraband.[205]

97. The correctness of the principle affirmed by the Tribunal and the soundness of its application in the particular case seem to us so obvious as not to need any further supporting evidence.[206] It would be worthwhile to comment on the distinction which, at first sight, the Tribunal apparently wished to draw between two hypotheses. In its reasoning, it places on one side the "macroscopic" cases in which the action implementing the reprisals against the State guilty of prior breaches is an action immediately and deliberately directed against the innocent third State, precisely as in the case where goods were prevented from reaching enemy territory by the destruction of the neutral vessel carrying them. On the other side, it places cases in which, conversely, the action is aimed directly only at the State against which the reprisals are being taken and it is only in the context of this action that the rights of a third State are also infringed. In actions of the second type, it happens frequently that State A, having applied sanctions against State B, claims to be acting justifiably vis-à-vis State C—whose rights are unduly infringed by the measures in question—on the grounds that it would have been very difficult, if not physically impossible, in the specific case, to inflict the sanction which it was necessary to inflict on the guilty State without at the same time causing regrettable injury to a third State. History has shown this to be so in cases where the sanction applied involved the use of force. It has been argued, for example, that in the course of the bombardment of a town or port of an aggressor State by way of reprisal, it was not always possible to avoid personal or material injury to aliens. It has also been argued that the aircraft of the State called on to implement the sanction might, in the circumstances, find themselves practically forced to cross the air space of State C, in violation of its sovereignty, in order to reach the targets designated for the enforcement of the punitive action in the territory of B. However, it is hardly necessary to add that an infringement of the rights of a third State may just as easily occur in cases of the application of sanctions in no way involving the use of armed force.

98. It is surely beyond doubt, however, that the principle to be followed in respect of all such situations remains that applied by the Portugal/Germany Arbitral Tribunal in the "*Cysne*" case. It should again be noted that the fact that the right of the third State was infringed in connection with the application of a legitimate sanction directed against a State guilty of a prior international offence can by no means be considered as a circumstance precluding the wrongfulness of the injury caused unlawfully to the right of a State which had done nothing to justify the application of sanctions against it. This does not mean, of course, that even so, in some circumstances, the wrongfulness may not be precluded—but that would be because of other factors for the preclusion of wrongfulness which had a bearing on the particular case, and not of a cause which can render blameless only the action taken against the State which is the object of the sanctions. For example, the consent of the injured State can be pleaded as a justifying circumstance in cases of the overflight of the territory of a State to which the sanction is to be applied. In some—admittedly rare—cases, necessity can be

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[204] See para. 87 above.

[205] United Nations, *Reports of International Arbitral Awards*, vol. II, *op. cit.*, pp. 1056–1057.

[206] For the legal literature, see, among others, Strupp, *loc. cit.*, pp. 188–189 and the authors cited by him; J. Hatschek, *Völkerrecht* (Leipzig, Scholl, 1923), pp. 405 *et seq.*; Cheng, *op. cit.*, p. 98; J. Stone, *Legal Controls of International Conflict* (London, Stevens, 1959), p. 290; Venezia, *loc. cit.*, pp. 495 *et seq.*; Partsch, *loc. cit.*, p. 104; Schlochauer, *loc. cit.*, pp. 273–274. See also art. 6, para. 3, of the 1934 Resolution of the Institute of International Law (*Annuaire de l'Institut de droit international, 1934* (*op. cit.*), p. 710).

pleaded to the same effect. In cases of injury caused to third parties by action carried out in the territory of the State against which the sanction is directed, fortuitous event or *force majeure* may sometimes be taken into account. This is probably what the Portugal/Germany Arbitral Tribunal had in mind in speaking of cases of injury to the nationals of an innocent State as constituting "an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible". But these various contingencies have no bearing on the question which concerns us here. What matters, in the present context, is the fact that the legitimate application of a sanction against a particular State can in no case constitute, as such, a circumstance precluding the wrongfulness of an injury caused to the subjective international right of a third State against which the application of sanctions is in no way justified. Only the wrongfulness of the conduct adopted towards the State whose action warrants the sanction can be eliminated.

99. We believe that this completes the consideration of the various aspects of the problem of the legitimate application of a sanction as a circumstance precluding the wrongfulness of an act by a State which would otherwise not be in conformity with the requirements of an international obligation owed by that State. Consequently, our conclusions must now be embodied in an article establishing the rule on the subject dealt with in this section. As to actual wording, we propose to the Commission the following text:

Article 30. Legitimate application of a sanction

The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.

4. *Force majeure* and fortuitous event[207]

100. *Force majeure* and fortuitous event are circumstances frequently invoked in international life as precluding the wrongfulness of an act of a 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 various authors, international arbitrators and judges, and government pleaders.[208] The different meanings given them are a source of confusion, which is accentuated on some occasions by the use of the expression "*force majeure*" as a synonym of "state of necessity". Before raising the question of the validity of the circumstances envisaged as precluding the wrongfulness of an act of State, we should say what we understand by the terms which form the title of this section. It is important to establish the distinction to be drawn between the circumstances taken up for study in this section and those that were considered in previous sections of this chapter. It is then important clearly to specify the scope of the two notions we intend to use here, since "*force majeure*" and "fortuitous event" are two expressions each of which, despite the links between them, describes separate categories of situations.

101. The distinction to be drawn between *force majeure* and fortuitous event, on the one hand, and the circumstances dealt with in the preceding sections (Consent of the injured State, Legitimate application of a sanction), on the other, is easy and poses no real problem. The circumstance which precludes the wrongfulness of an act committed by the State in those situations is the existence, in the particular case, of conduct by the State suffering the act in question. That conduct consists either in the expression of consent to the commission by another State of an act otherwise contrary to an international obligation of that State, or in the prior perpetration of an international offence rendering legitimate the use of a measure of reaction or sanction against the perpetrator. A situation similar to the latter occurs, again, when the circumstance invoked is the one to be dealt with in another section of this chapter, namely self-defence. But this is not so in the case of *force majeure* or fortuitous event. The State suffering an act committed in such conditions is not then 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, whatever its conduct, it is irrelevant in determining the existence of the circumstance in question. It is arguable however that the notions of *force majeure* and fortuitous event are similar in certain aspects to another notion, namely "state of necessity". In the next section we shall examine whether this other notion may or may not be invoked, at least in certain cases, as a circumstance precluding the wrongfulness of an act of a State. But it cannot be denied that at first sight the notions of *force majeure* and fortuitous event—particularly the first—and the notion of state of necessity may appear to have points in common, starting, in particular, with that of the irrelevance of the prior conduct of the State against which the act to be justified has been committed. It is

[207] Section 4 of this report, which was circulated in mimeographed form as document A/CN.4/318/Add.4 of 15 June 1979, was presented by Mr. Ago when he was no longer a member of the International Law Commission.

[208] See in this connection the information furnished in the study prepared by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine" (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315). This document, hereinafter called "Secretariat Survey", was circulated in 1977 in a provisional mimeographed version under the symbol ST/LEG/13.

therefore necessary to devote a few lines at this point to delimiting the scope of these various notions.

102. In language which, it must be admitted, often lacks conceptual rigour, the terms "*force majeure*" and "fortuitous event" on the one hand and "state of necessity", on the other, are all three used to indicate a situation facing the subject taking the action, as a result of an additional and unforeseen factor which leads it, as it were *despite itself*, to act in a manner not in conformity with what is required of it by an international obligation incumbent on it. This basic analogy is of course the root of the uncertainty observed with regard to the delimitation of these different notions.[209] The criteria proposed in this connection vary considerably. It may be noted, however, that the tendency is to refer to a "state of necessity" ("*necessité*", "*Notstand*", "*stato di necessità*", etc.) where there is an attempt to justify conduct which conflicts with an international obligation and is engaged in with the alleged intention of saving the very existence of the State from grave and imminent danger in no way attributable to that State and not preventable by any other means. The notion of state of necessity is also often invoked—despite the existence of divergent opinions, and the fact that some prefer to apply the notion of *force majeure* to such cases—to justify conduct engaged in to safeguard, if not the State itself, at least some of its vital interests: ensuring the survival of part of its population afflicted by a natural disaster by requisitioning foreign means of transport or supply; preventing the State's bankruptcy by deferring payment of its debt; preventing the outbreak of a civil war by seizing, on foreign territory, those preparing to provoke it; preventing massive pollution of its coasts by sinking on the high seas a foreign vessel leaking oil, etc. Let it be clear, in order to avoid any misunderstanding, that our purpose in drawing attention to these attempted justifications is not to subscribe unquestioningly to the ideas advocated by their authors; when the time comes, that question will be examined with considerable prudence and critical judgement, for under cover of "necessity", attempts have often been made to hide the gravest abuses. For the time being, our only purpose is to clarify as far as possible those situations which most frequently come to mind when one talks of a state of necessity, so that we can, by contrast, define more satisfactorily the notions with which we are concerned in the present context, namely *force majeure* and fortuitous event. We therefore merely wish to emphasize that in the minds of most of those who see it as a circumstance precluding wrongfulness, a state of necessity comprises two elements: first, the impossibility of otherwise preserving the State or its vital interests from a grave and imminent danger; and, secondly, the undeniably intentional nature of the conduct engaged in to this end. In other words, and this is the commonest opinion, anyone invoking a state of necessity is perfectly aware of having deliberately chosen to act in a manner not in conformity with an international obligation.

103. In contrast, *force majeure*—and *a fortiori*, fortuitous event—are generally invoked to justify conduct for the most part *unintentional*. If the organs of a State which are responsible for the observance of an international obligation are led not to observe it, this is said to be due to an external and often totally unforeseen circumstance, to the occurrence of which those organs have in no way contributed and which they are incapable of resisting, with the result that it is materially impossible for them to act in conformity with the obligation, be it an obligation to do or not to do. We speak, for example, of "*force majeure*" ("*fuerza mayor*", "*forza maggiore*", "*nepreodolimaya sila*", "*höhere Gewalt*", etc.) if a pilot loses control of his aircraft as a result of damage or atmospheric disturbance and is obliged to violate the airspace of another State knowingly but involuntarily. The same is true of the destruction through uncontrollable natural causes of property which a State was required to hand over to another State, etc. Obviously, alongside these so to speak unquestionable cases, there are others which are more arguable, whose attribution to the notion of "*force majeure*" rather than to that of "necessity" is not so easy—and in this connection, practice and doctrine hesitate more noticeably.[210] Let us take, for example, situations in which, under the impetus of unforeseen events, an organ of the State engages in conduct not in conformity with an international obligation without being ineluctably led to do so by forces beyond its will. It may, for example, be driven to it by the perception of grave risks, which it would otherwise run, of its life or of that of persons placed in its charge. We do not believe, however, that such cases can be advanced as cases of "state of necessity" in the accepted sense of the term.[211] In the

[209] There are other reasons for this confusion. As the Secretariat points out in the study mentioned in footnote 208 above, the choice of one expression rather than another to characterize a given case is influenced by the nationality of the author, and hence by the meaning attributed to these expressions in the legal language of his country. The choice is also influenced by whether or not, depending on the author, the absence of "fault" or "negligence" is presented as a separate circumstance precluding the wrongfulness of an act of the State. Moreover, some authors betray a prejudice in favour of the existence of a single circumstance, either *force majeure* or "state of necessity", etc. For further details, see Secretariat Survey (see footnote 208 above), paras. 20–24.

[210] Government practice is generally broader than the doctrine in characterizing certain cases as cases of *force majeure*. We do not of course feel it necessary to take into consideration the opinion of those few authors who make no distinction between the two notions involved here: that of Sereni, for example, who in dealing with state of necessity places the term "*force majeure*" in parenthesis (*op. cit.*, p. 1528). Other writers sometimes speak of *force majeure* in connection with situations which seem to us to come clearly within the framework of a state of necessity.

[211] Some authors—they too are quite few—are of another opinion: see Quadri, *op. cit.*, p. 226; P. Lamberti Zanardi, "Necessità (Diritto internazionale)", *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, p. 905.

first place, it does not seem correct to speak of a real "choice", or "free choice", in respect of the decision to be taken by State organs which know that they and those who share their fate would perish unless they acted in a given manner, such as the captain of a warship in distress seeking refuge in a foreign port without authorization or the pilot of a State aircraft landing without authorization on foreign soil to avoid an otherwise inevitable disaster. But what is important is that, in the cases envisaged, the choice that theoretically arises is not between honouring the international commitments of the State and safeguarding a superior interest of the State in question. The grave and imminent danger which determines the action committed is a personal danger to the State organs carrying out the action, and not a danger to the life of the State itself or to one of its vital interests. In our opinion, these cases should therefore be classified under the heading of situations of *force majeure*, and it is under the present section that they will be dealt with.

104. It should be added, to complete the preliminary task of defining these terms, that the expression "fortuitous event" ("*cas fortuit*", "*sluchay*", "*Zufall*", "*caso fortuito*", etc.), when not wrongly used as a mere synonym of "*force majeure*", is normally used to describe an unforeseen situation which makes it impossible for the State organ taking the action to act otherwise than contrary to an international obligation of the State, but at the same time, impossible for it to realize that it is engaging in conduct different from that required by an international obligation of the State. This is the case, for example, when because of fog a frontier guard, despite precautions which have been taken, finds himself on foreign territory without realizing it. It is also the case, for instance, when a storm and its effects on an aircraft's equipment cause the pilot to enter the airspace of another State without realizing the fact.[212]

105. One final point must be made: the fact that we have so far mentioned various situations advanced as possible cases of *force majeure* does not mean that in our opinion each of them is definitely to be regarded as a circumstance precluding the wrongfulness of the State act in question. Only a critical analysis of situations actually revealed by State practice will enable us to establish when and in what conditions the wrongfulness of an act of a State is precluded with real justification.

106. Having said that, we shall now embark on a thorough investigation of our subject, beginning with the most important hypothesis, that of *force majeure*. In the light of the above considerations, we shall reserve this term for cases in which the State organ (or, obviously, any other person whose conduct is attributable to the State under articles 5 to 9 of the draft articles on State responsibility)[213] is placed by an external circumstance in a situation which makes it *impossible* for it to act otherwise than it does, although it realizes that it is engaging in conduct not in conformity with what is required by an international obligation incumbent on its State. In this connection, we have also shown that this hypothesis could arise in two separate forms: that of a real *absolute* impossibility of acting otherwise, and that of a *relative* impossibility, i.e., a situation in which the State organ could theoretically comply with the obligation but at the cost of a sacrifice that could not reasonably be required of it (for example, by jeopardizing its life or that of the persons entrusted to it). In the first case, the conduct in question is entirely *involuntary*; in the second, the will of the organ exists *in theory* but in practice is nullified by a perilous situation. We shall deal first with the former case, that of *the absolute impossibility of fulfilling the international obligation.*

107. The external factor that makes it impossible for the State to act in conformity with its obligation may be a *natural* event, such as a catastrophe or natural disaster of any kind.[214] But this external factor may also be attributable to human action, loss of sovereignty, or quite simply loss of control over a portion of State territory, for example.[215] This same factor may have the effect of rendering the performance of the international obligation *definitively* impossible,[216] but it may also have the effect of rendering it only *temporarily* impossible;[217] it may prevent the State from honouring an obligation "*to do*"[218] or an obligation "*not to do*".[219] In short, all kinds of

[212] Unlike what happens in cases of *force majeure*, where the State organ taking the action is aware of breaching an international obligation but does so against its will, in a case of "fortuitous event" the organ in question acts of its own free will but is not aware of doing so in breach of an international obligation.

[213] See footnote 2 above.

[214] We have already cited examples (in para. 103 above): atmospheric disturbance resulting in a State aircraft being diverted from its normal course, against the will of the pilot, into the airspace of another State; an earthquake destroying property (a work of art, for example) which a State is required to have over or restore to another State. There are also cases such as a flood or drought destroying products to be delivered to a foreign State under a trade agreement.

[215] For instance, where a State has undertaken to hand over to another State products to come from the soil or subsoil of a specific region and this region has subsequently passed into the sovereignty of a third State, or been devastated by military operations carried out by a third State, or been removed from the control of the State by an insurrectionary movement, etc.

[216] This would be the case, for example, in the event of the total destruction of property to be handed over to a given State, or the perpetration of a frontier violation.

[217] This would be the case if the unforeseen destruction of the means of transport to be used made it temporarily impossible to transfer particular foodstuffs to another State.

[218] This would be so if an earthquake destroyed property to be handed over to another State, or if an insurrection removed part of a State's territory from the control of that State and thus prevented it, in that part of its territory, from adopting the necessary measures to protect foreign agents or other aliens.

[219] A sufficient example is that already given of damage or a storm driving a State aircraft into foreign airspace.

circumstances may operate, but they all have one aspect in common: the State organs are involuntarily placed in a situation which makes it *materially impossible* for them to engage in conduct in conformity with the requirements of an international obligation of their State. The question therefore arises 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. We propose to seek the answers given to this specific question in State practice, international jurisprudence and the scholarly works of publicists.[220] Needless to say, our analysis will take into consideration those cases, and only those cases, which, in the light of the observations made so far, we feel can be characterized as cases of *force majeure*; we shall not allow ourselves to be influenced by the differing terminology which may have been used in connection with them.

108. Let us first consider the positions taken by States at international codification conferences and, in the first instance, in the preparatory work of the Conference for Codification of International Law (The Hague, 1930). This does not give us as much help on the present point as we have found it to do on other matters. 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* was a circumstance precluding the wrongfulness of an act of the State or entailing responsibility engendered by such an act in some other way. It is interesting to note, however, that the Swiss Government, in its particularly detailed reply on Point V of the request for information, concerning State responsibility for acts of the executive organ, was careful to specify that the two reservations should be made regarding that responsibility. In the first place, it said that an exception should be made where the act of the State was committed in exercise of the right of "lawful defence" against unjust aggression; and in the second place:

> 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.[221]

A similar view emerged, either explicitly or implicitly, from the positions taken by other Governments in connection with cases in which the State might incur international responsibility through having failed to forestall acts of private individuals which caused damage to foreign States or to the person or property of their nationals. A study of Governments' replies to the request for information and of representatives' statements in the Third Committee of the Conference reveals that the disagreement which subsisted as to whether, with regard to aliens, the State ought to adopt preventive measures equal to or in some cases much stronger than those it had adopted for the protection of its own nationals, or "normal" preventive measures, etc., did not prevent the advocates of the two opposed views from agreeing that the State should not bear any responsibility where reasons of *force majeure* had rendered it absolutely impossible for the State to take the requisite preventive measures.[222]

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[220] The situations describable as cases of *force majeure* may be relevant 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 do" to the existence of a situation of *force majeure*. For example, the Agreement on Co-operation with regard to Maritime Merchant Shipping, done at Budapest on 3 December 1971, requires the State to assist foreign vessels driven towards its ports by bad weather. Similarly, the Agreement on the Rescue of Astronauts, of 22 April 1968, imposes on the State on whose territory the astronauts land unintentionally an obligation to assist them and return them promptly to the representatives of the launching State. Art. 40 of the 1961 Vienna Convention on Diplomatic Relations requires the State on whose territory a foreign diplomatic agent proceeding to a third State finds 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 do"—for instance, an obligation not to confiscate enemy vessels remaining in its ports for reasons of *force majeure* after hostilities have broken out: art. 2 of the Convention (VI) Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, done at The Hague on 18 October 1907. (See Secretariat Survey, paras. 5 *et seq.*, 81, 99 and 100.) Clearly, however, these provisions must not be taken as evidence that *force majeure* is to be regarded as a circumstance precluding the wrongfulness of an act of the State. As we shall see, they can do no more than provide indirect confirmation that such is the case.

[221] League of Nations, *Bases of Discussion* ... (*op. cit.*), p. 241. Reproduced in Secretariat Survey, para. 61.

[222] 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.*), pp. 62 *et seq.* and pp. 93 *et seq.*, and *Supplement to vol. III* (*op. cit.*), pp. 13, 14, 18 and 19. For representatives' statements in the Third Committee of the Conference on Bases of Discussion Nos. 10, 17 and 18, see: League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March–12 April, 1930), *vol. IV. Summary Records of the Third Committee* (C.351(*c*).M.145(*c*).1930.V), pp. 143 *et seq.* and pp. 185 *et seq.* For a detailed analysis of these replies and statements, see Secretariat Survey, paras. 69 and 70.

It should be noted in particular that the representative of China, in criticizing the view that a State should be held responsible where it had omitted to take "the measures which should normally have been taken", remarked:

> "... this is a test to which no country could subject itself. Take even the most highly organized countries in point of peace and order; even in those countries there must be times of stress—whether human, whether of *force majeure**—there must be abnormal times in which it cannot be expected to take measures such as would be taken normally." (League of Nations, *Acts of the Conference* ... (*op. cit.*), p. 186.)

The representative of Finland, who spoke on behalf of Latvia and Estonia as well, criticized for different reasons the proposal by a sub-committee of the Conference that the State should be held responsible "if it has manifestly failed to take such preventive or

109. The positions taken by States in the preparatory work of the 1969 Vienna Convention on the Law of Treaties[223] are even more enlightening for our present purposes. Article 58 of the draft articles adopted in 1966 by the Commission stipulated 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 it rendered that execution permanently or temporarily impossible. The Commission specified in the commentary to that article:

> The Commission appreciated that such cases might be regarded simply as cases where *force majeure could be pleaded as a defence exonerating a party from liability** for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, *as part of the law of treaties*, that the operation of a treaty may be suspended temporarily.[224]

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 the object indispensable for the fulfilment of the obligation, it imputed this preclusion of responsibility to the termination or the suspension of the obligation. It is therefore clear that in the opinion of the Commission, since the international obligation in question had ceased to operate in that particular case, there was no responsibility because there was no internationally wrongful act.

110. At the United Nations Conference on the Law of Treaties, Mexico submitted a proposal to extend the scope of article 58 to all situations in which the result of the *force majeure* would be to render impossible the fulfilment of the obligation.[225] In support of this proposal, the representative of Mexico asserted 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 other more frequent cases, such as the impossibility of delivering a particular article owing to a strike, the closing of a port, or a war, or the impossibility of making certain payments because of serious financial difficulties, etc.[226] Some of these examples, particularly the last, were such as to give rise to doubts. Many representatives were not prepared to regard them in all circumstances as cases of *absolute impossibility* of fulfilling the obligation laid down by the treaty, cases which would justify not only preclusion of the wrongfulness of conduct by a State not in conformity with the requirements of the treaty, but also the right of invoking them as grounds for terminating or suspending the treaty. In their view, that would seriously have endangered the security of treaty relations among States.[227] As a result, the Mexican proposal was eventually withdrawn and the Conference, in article 61, paragraph 1 of the text it adopted, stipulated as the sole ground for terminating or suspending a treaty the case of the "permanent disappearance or destruction of an object indispensable for the execution of the treaty". It seems none the less certain, however, that the discussions which took place on this point revealed a general belief that the impossibility—at the very least, the *material and absolute impossibility*—of complying with a treaty obligation constituted a condition of *force majeure* precluding the wrongfulness of the conduct adopted in the case in question by the State having the obligation.

111. There are innumerable practical cases in which States have invoked *force majeure* as a circumstance which they consider justifies their engaging in conduct not in conformity with that required of them by an

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punitive measures as in view of the circumstances might properly be expected of it". Such a solution, he said, ignored:

> "... one special case—namely that of a State which is not by accident placed in an irregular position, but which intentionally applies at home a general régime incompatible with the proper application of preventive or punitive measures.
>
> "In such a case, there would be no question of *force majeure*,* nor would the circumstances be abnormal; the whole structure of the State would be such that foreigners might not be able to claim proper measures of protection." (*Ibid.*, p. 185.)

The supporters of the two divergent views therefore agreed that in cases of *force majeure*, and particularly when this expression denotes situations in which it is absolutely impossible to engage in a specific conduct, the State does not incur responsibility.

[223] For an analysis of this preparatory work, see Secretariat Survey, paras. 77–80.

[224] *Yearbook ... 1966*, vol. II, p. 256, document A/6309/Rev.1, part 2, chap. II, para. (3) of the commentary to article 58.

[225] 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 permanently impossible the fulfilment of its obligations under the treaty. It then provided that *force majeure* might be invoked only as ground for suspending the operation of the treaty when impossibility of fulfilment was purely 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. 182–183, document A/CONF.39/14, para. 531 (*a*).)

[226] 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 that rule.
>
> "According to paragraph (3) of the International Law Commission's 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, 62nd meeting of the Committee of the Whole, paras. 3–4.)

[227] See Secretariat Survey, para. 79.

international obligation incumbent on them. But in few of these cases have they pleaded a circumstance of *force majeure* consisting unquestionably of an *absolute impossibility* of engaging in different conduct. This is easy to understand: while a State frequently finds itself in a situation in which it has even great difficulty in engaging in conduct in conformity with an international obligation in force for it, it is uncommon for it to be in a real and *insurmountable situation of being materially unable* to act in conformity with the obligation. Further, if such a case occurred and if the impossibility were obvious, it is unlikely that the State towards which the obligation existed would persist in arguing that the obligation had been breached and in invoking the consequences. What is beyond any doubt, however, is that when a party was able to prove the existence of a situation of "absolute" *force majeure*, the legal effects of that situation were not contested by the other party to the dispute. If there was contention, it generally centred on the factual existence of the situation invoked, and not on its validity as a circumstance precluding the wrongfulness of an act of the State in the event that its existence was established.

112. "Absolute" impossibility of fulfilling an international obligation sometimes occurs in relation to an *obligation "not to do"*, in other words, to refrain from committing a certain act. Among examples of a situation of this kind, we mentioned above[228] the one which springs most readily to mind, that of a State aircraft which, because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the authorization of the latter and despite the pilot's efforts to prevent it. The recognition in such a case of a circumstance precluding the wrongfulness of the act is clearly apparent from an exchange of notes between the Yugoslav Government and that of the United States of America which took place in 1946 following certain cases of United States aircraft entering the airspace of Yugoslavia. 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 America and Yugoslav authorities".[229] In his reply of 3 September 1946, the Acting Secretary of State of the United States stated:

> The Yugoslav Government has already received assurances from the United States Government that the 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 not control, such as bad weather, loss of direction, and mechanical trouble.**[230]

113. The principle relating to a maritime situation corresponding to the aerial situation envisaged in the preceding paragraph has even been the subject of international codification. After affirming 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 in paragraph 3 that:

> Passage 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 by distress.[231]

Moreover, article 18, paragraph 2 of the "Informal Composite Negotiating Text/Revision 1" drawn up in April 1979 by the President of the Third United Nations Conference on the Law of the Sea and by the chairmen of the main committees of the Conference provides that:

> ... [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.[232]

There are also other conventions in which *force majeure* is treated as a circumstance capable of precluding the application of an obligation "not to do" and, consequently, the wrongfulness of an act of the State not in conformity with such an obligation. Article

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[228] See para. 103.

[229] United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502. Reproduced in Secretariat Survey, para. 144.

[230] *Ibid.*, p. 504; Secretariat Survey, para. 145.

We have already mentioned (see footnote 220 above) that situations describable as cases of *force majeure* might be relevant for reasons other than the possibility that they preclude the wrongfulness of an act of the State. We pointed out that in situations of *force majeure* a State may be regarded as having an obligation in respect of the treatment of aliens, or particularly foreign aircraft or vessels, such as an obligation not to punish the pilot of an aircraft which for reasons of *force majeure* has entered the airspace of the State, not to destroy such an aircraft in flight, to assist it, etc. As we said, the positions taken by Governments in such circumstances can provide only indirect confirmation, on occasions, of the validity of *force majeure* as a circumstance precluding the wrongfulness of an act of the State. In our view, an example of such a position is to be found in the Memorial submitted to the International Court of Justice by the United States of America on 2 December 1958 in the case of the Aerial Incident of 27 July 1955. The Memorial contains the following passage:

> "The case of an aircraft off its proper course in the air is similar to a ship off its course on the sea. It is, therefore, assimilated to the cases at sea. *Particularly relevant are cases of an act of God or force majeure driving a ship off its proper course.** The law and practice have long been established at sea that a ship in such a plight should be aided, not ensnared or held for piratical aims of salvage, ransom, or enslavement of the crew. The ancient laws of the sea are pertinent." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 217.)

As a logical consequence of this reasoning we are led inevitably to conclude that, in the opinion of the complainant Governments, if the aircraft that had entered foreign airspace for reasons of *force majeure* had been a State aircraft, its involuntary intrusion could not have been regarded as an internationally wrongful act.

[231] United Nations, *Treaty Series*, vol. 516, p. 213. It is interesting to note that in the English text the term "*relache forcée*" has been rendered by "*force majeure*". This term was clearly intended to describe a situation in which it was absolutely impossible to avoid stopping or anchoring, whereas the term "distress" referred instead to one of those situations of *relative* impossibility which we shall deal with later.

[232] A/CONF.62/WP.10/Rev.1, p. 27.

7, paragraph 1 of the Convention of Transit Trade of Land-Locked States, done at New York on 8 July 1965, provides that:

> Except in *cases of force majeure* all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.[233]

It is hardly necessary to point out that such provisions of treaty law in no way constitute an exception to some other principle of general international law; they are evidently none other than express confirmation, in relation to a particular case, of a general principle of customary international law.

114. The "absolute" impossibility of fulfilling an international obligation may also occur in connection with an *obligation "to do"*, to engage in conduct of commission. We gave an example above:[234] the case of the destruction of goods or property which the State was required to deliver or restore to a foreign State. International practice provides a typical example of an international dispute concerning the existence or the non-existence of a situation in which it was materially impossible to fulfill an obligation under the Treaty of Versailles in respect of delivery of goods. The treaty, amended on this specific point by a subsequent agreement, required Germany to deliver a certain quantity of coal annually to France. In 1920, however, the amount of coal supplied by Germany was considerably less than that provided for in the instruments in force. Reporting the situation to the French Parliament and announcing his intention of taking appropriate measures, the President of the Council and Minister for Foreign Affairs, Mr. A. Millerand, stated on 6 February 1920:

> Moreover, it is impossible for Germany to claim that, if it had not fulfilled its commitment, it is because *it would have been materially impossible for it to do so.** Precise information made available to us shows that, during this month of January, Germany consumed over eight million tons of coal for a population of 60 million, whereas during the same month, for a population of 40 million, France did not have even half that amount: it had only 3,250,000 tons. In other words, every German had more coal for heating than every Frenchman. We cannot accept such a situation.[235]

In emphasizing later that Germany could not, in that particular case, "shelter behind a *de facto* impossibility", Mr. Millerand was implicitly recognizing, *a contrario*, that if it really had been "materially impossible" for Germany to fulfil its commitment, there would have been no breach of the obligation.[236]

115. As a concrete example of the impossibility of fulfilling an obligation to restore property for reasons of *force majeure*, we might refer to what happened in connection with the application of articles 3 and 4 of the Treaty of Sèvres. These provisions gave the Bulgarian minorities residing in the territories of the Ottoman Empire ceded to Greece the right to choose Bulgarian nationality. In that event 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 in those circumstances 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 in the area previously inhabited by the Bulgarians and 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.[237]

The commission therefore proposed that the Greek Government should compensate the Bulgarian nationals who had been deprived of their property;[238] 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.[239]

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[233] United Nations, *Treaty Series*, vol. 597, p. 52.

[234] See para. 103 above.

[235] See A.C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1962), vol. I, p. 128.

[236] In connection with the effects of *force majeure* on obligations to deliver certain products, it may be recalled that a number of commodity agreements give the States parties to these agreements the possibility of withdrawing from the agreement or suspending its operation in respect of themselves if circumstances beyond their control prevent them from fulfilling the obligations of the agreement. See, for instance, the 1956 (modified in 1958) and 1963 International Olive Oil Agreements (art. 39, para. 2(*a*)) and the other agreements cited in Secretariat Survey, paras. 54–56.

[237] Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece (League of Nations, *Official Journal*, 7th year, No. 2 (February 1926), annex 815, pp. 208–209); Secretariat Survey, paras. 124–125.

[238] *Ibid.*

[239] *Ibid.*, p. 111. This case appears to us to be a good example of the application of the principle with which we are concerned, although we consider that to regard it as a genuine case of the "material impossibility" of fulfilling an obligation might exaggerate its significance somewhat. We may add that the State having the obligation had unquestionably contributed by its action to creating the situation of impossibility of fulfilment, and this obviously led the Commission of Enquiry to propose that the dispute be settled by compensating the injured persons.

The problem of the repercussions of *force majeure* on an obligation to restore property was also discussed by the Permanent Court of Arbitration in its award on 24/27 July 1956 in the Ottoman Empire Lighthouse Concession case. The Court rejected Claim No. 15, by France, for compensation for the 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. Secretariat Survey, para. 484.

116. The role of *force majeure* as a circumstance precluding the wrongfulness of conduct not in conformity with the requirements of an international obligation has received special consideration in connection with failure to *pay a State debt*, both at conferences for the conclusion of major multilateral conventions and in connection with individual disputes. In the work of the 1907 Conference for the revision of the system of arbitration established by the 1899 Hague Convention for the Pacific Settlement of International Disputes, the representative of Haiti stated that disputes concerning the appreciation of circumstances of *force majeure* putting a State into a condition momentarily of being unable to pay a debt should come within the jurisdiction of the arbitration court. He gave the following reason for this:

> For the circumstances of *force majeure, that is to say, of the facts independent of the will of man, may, in paralysing the will to do, frequently prevent the execution of obligations.**
>
> ... I cannot imagine a great creditor nation which, in virtue of the arbitral decision, would forget to consider as "of bad faith" the debtor State unable to meet its obligations as the result, say, of an inundation, of a volcanic eruption, of failure of crops, etc. The testimony of contemporaneous history is against any such admission....[240]

The representative of Romania challenged his Haitian colleague's assertion that these situations of *force majeure* were frequent and therefore needed to be mentioned specifically in the revised Convention.[241] Apart from that, however, no one disputed the principle that when a genuine situation of *force majeure* occurred, i.e. a situation in which it was *absolutely impossible* to fulfil the obligation, the State rendered materially insolvent should not be considered "in breach" of its obligation.

117. Failure to pay a public debt of the State has led to many international disputes in which *force majeure* has been invoked by the debtor State as a circumstance justifying its conduct. It might of course be pointed out that the obligation involved in that conduct was actually an obligation of internal public law rather than an international obligation proper. There was a case, however, in which failure to make due payment gave rise to an international dispute; the State of which the creditors were nationals took steps for their diplomatic protection and, with the agreement of the debtor country, the dispute was brought before the Permanent Court of International Justice. In its Judgement, the Court treated *force majeure* as a general principle which was valid in relation to any system of law, and not as a principle defined by a specific internal legal order. Accordingly, its Judgment on the question of *force majeure* constitutes a precedent which certainly applies in determining the validity of *force majeure* as a circumstance precluding the wrongfulness of a State's conduct which is not in conformity with an international obligation.

118. 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 the basis of the gold franc, whereas the Kingdom maintained that it could pay those sums on the basis of the paper franc. To support its argument, the Serb–Croat–Slovene State first invoked the argument 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 an argument of law, that of the existence of a circumstance of *force majeure* consisting in the "material impossibility" of making a payment in gold francs. In his statement to the Court on 22 May 1929, Mr. Devèze, counsel for the Serb–Croat–Slovene State, asserted that:

> ... *force majeure* ... frees the debtor of his obligation by reason of the impossibility of his performing it, when this impossibility results from an *unforeseen circumstance for which he is not responsible; the typical situation of* force majeure *being what the English call an act of God.**[242]

As to the specific case referred to the Court for judgement, the situation of *force majeure*, according to Mr. Devèze, had been caused by the war. He therefore invited the Court to consider whether:

> ... the circumstances show that Serbia is seeking to obtain an unlawful gain or whether on the contrary it is governed by a force beyond its control, the *force majeure* of a war, in resisting a claim that the French Government itself would be unable to accept if an attempt were made to impose a similar burden on it ...[243]

In its Judgment handed down on 12 July 1929, the Court ruled as follows:

> *Force majeure*—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which article II of the Special Agreement provides.
>
> It is contended that under the operation of the forced currency régime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became *impossible.** But if the loan contracts be deemed to refer to the gold franc as a standard of value, *payments of the equivalent amount of francs, calculated on that basis, could still be made.** Thus, when the Treaty of Versailles became effective, it might be said that "gold francs", as stipulated in article 262, of the weight and fineness as

[240] See J.B. Scott, *The Proceedings of The Hague Peace Conference, The Conference of 1907*, vol. II (New York, Oxford University Press, 1921), pp. 296; Secretariat Survey, para. 105.

[241] "It has been said that there are cases of *force majeure*, of great economic crisis that might, at a given moment, shake the solvency of the State.... such eventualities are too rare to make it necessary to foresee their consequences in international stipulations." (*Ibid.*, p. 299 and p. 76 respectively; Secretariat Survey, para. 105.)

[242] Serbian Loans, *P.C.I.J., Series C, No. 16*(III), p. 211 [translation by the Secretariat]; Secretariat Survey, para. 266.

[243] *Ibid.*, pp. 211–212 [translation by the Secretariat]; Secretariat Survey, para. 266.

defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie. But it could hardly be said that for this reason the obligation** of the Treaty was discharged in this respect on the ground of *impossibility of performance.** That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source of basis of the original obligation, but as one of impossibility of performance, it appears to be quite as impossible to obtain "gold francs" of the sort stipulated in article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts.[244]

In short, the Court took the view that the war had undoubtedly made it difficult for Serbia to perform its obligation, but had not placed it in a situation of "absolute impossibility" with regard to so doing. 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 the sum as calculated in gold francs. There was accordingly no material impossibility of performing the obligation in question. But the Court implicitly acknowledged—and this is what is relevant for our purposes—that if the obligation to pay *in specie* had been explicitly provided for, 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 that obligation.

119. The Permanent Court of International Justice took the same attitude in the case concerning the payment in gold of the *Brazilian loans* issued in France. Entering the lists once again in support of its nationals, the French Government maintained that the loans contracted by the Brazilian State should be paid on the basis of their gold franc amount, whereas the Brazilian Government maintained that they should be paid on the basis of their paper franc amount. In that connection, the Government of Brazil too referred to the "*force majeure*" and "impossibility" which it considered prevented it from paying the sum due as calculated in gold francs. In its case dated 2 July 1928, it stated:

When Brazil contracted these loans in 1909, 1910 and 1911, the régime applicable was that of the simple *legal currency*, the debtor being in a position to obtain from the Bank of France the *gold francs* he need to settle his obligations.

As a result of the subsequent institution of the *forced currency régime*, under which the *paper franc* continues to have the same status as legal tender for the payment of debts in currency, the debtor found himself unable to obtain the gold francs needed for the service of the contracts from the issuing bank.

This change in the legal regulations governing French currency constitutes a case of *force majeure*, of the kind called in doctrine a *sovereign act* (*fait de prince*); hence the impossibility for the debtor of satisfying the obligation entered into under the strict terms of the contract.

...

The foregoing considerations lead to the following conclusions:

...

4) The inconvertibility of the paper franc into gold francs, under the law of 1914, must be considered a case of *force majeure* (*fait de prince*), which has made payment in the agreed specie impossible.

5) Given the impossibility of obtaining gold francs, for reasons beyond its control, the debtor may settle the debt by paying, in paper francs at the legal currency rate, as many units as he owed in gold francs, the creditor not having the right to demand a greater number of francs than that shown in the certificates of indebtedness (Civil Code, article 1895).[245]

The French Government's reply to this in its counter-case of 1 October 1928 was as follows;

A. *The law on the mandatory exchange of Bank of France notes does not constitute a case of* force majeure.

It should be noted, first, that a circumstance that does not prevent the performance of an obligation but merely renders its performance more difficult or more burdensome does not constitute a case of *force majeure*. This is true of the law providing for the forced currency of banknotes of the Bank of France. The Brazilian Government can of course no longer obtain from the Bank of France the old French gold coins which were in circulation before 1914 and were abolished by the law of 25 June 1928. But that does not prevent it from obtaining anywhere in the world the amount of gold that it needs to service its loans. Still less does this prevent it, in the absence of gold, from paying its creditors the equivalent value of this gold, on the date of payment, in the currency of the place where the payment is effected. The gold payment clause in fact generally results in payment in the currency of the place of payment but calculated in terms of gold.[246]

In its Judgment of 12 July 1929, the Permanent Court of International Justice endorsed the French Government's argument on that point, stating:

"*Force majeure*".—The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, *there is no impossibility because of inability to obtain gold coins*,* if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.[247]

This means that the French Government and the Court did not deny the soundness of the argument that the existence of a circumstance making the performance of the obligation "absolutely impossible" precluded the wrongfulness of conduct not in conformity with the requirements of the obligation; on the contrary, by implication but beyond any doubt, they recognized it. All they failed to recognize was that such an absolute impossibility had existed in the case in question.

120. The effect to be attributed to circumstances making it "impossible" for a State to fulfil its obligation to repay a debt to aliens was again the subject of a

[244] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, Nos. 20/21, Case No. 41*, pp. 39–40; Secretariat Survey, para. 268.

[245] *Brazilian Loans, P.C.I.J., Series C, No. 16* (IV), pp. 153 and 158. See also the Brazilian counter-case of 30 September 1928 (*ibid.*, p. 240) [translation by the Secretariat]; Secretariat Survey, para. 271.

[246] *Ibid.*, p. 255 [translation by the Secretariat]. See also the case of the French Government dated 29 June 1928 (*ibid.*, p. 186) and the oral statement by the counsel, Mr. Montel (*ibid.*, p. 109) [translation by the Secretariat]; Secretariat Survey, para. 272.

[247] *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, Nos. 20/21*, p. 120 [translation by the Secretariat]; Secretariat Survey, para. 273.

dispute before the Permanent Court of International Justice, between the Greek Government and the Belgian Government in the case of the *Société Commerciale de Belgique*. The Greek Government argued that the reason why it had not yet complied with an arbitral award of internal law requiring it to pay a sum of money to the Belgian company was not its unwillingness to do so but solely impossibility arising out of the country's budgetary and monetary situation. In its rejoinder of 15 December 1938, the Greek 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 . . .[248]

Also, in his oral statement of 16 May 1939, counsel for the Greek Government, Mr. Youpis, confirmed the Government's intention of complying with the arbitral award and the fact that, if it had not complied with it in full and immediately, it was because of its budgetary situation and its lack of foreign currency. Mr. Youpis then said:

> For these reasons, it is *impossible** for the Hellenic Government to *execute the award without delay and in full;** they constitute a case of *force majeure* which exonerates the Government from all responsibility.[249]

In speaking of "*force majeure*" and the "impossibility" of engaging in the conduct required by the obligation, the pleader for the Greek Government probably did not have in mind an actual *absolute impossibility*, but rather an impossibility of engaging in such conduct without thereby injuring a fundamental interest of the State, i.e. a situation which, in our opinion, might be subsumed under the hypothesis of a state of necessity rather than under that of *force majeure*.[250] That having been said, the statement in defence of the Greek argument might suggest that in his opinion an "absolute impossibility" of paying, if established, would in itself relieve the debtor State of its obligation. It was primarily on that point that the counsel for the Belgian Government, Mr. Sand, considered it necessary to oppose the view which he thought he detected in his adversary's statements. Replying to a question from Judge Anzilotti, Mr. Sand acknowledged that "if the resources needed to pay are lacking, there is no fault calling for international sanction".[251] He pointed out, however, that "incapacity to pay can entail only a full or partial suspension of payment, which may moreover be modified and terminated, but it will not entail release from the debt, even in part".[252] As to the concrete situation constituting the subject of the dispute, he concluded as follows in his statement of 19 May 1939:

> . . . *the factual impediment resulting from the financial situation of a State does not, in the present case, constitute a situation of "force majeure".**
>
> In fact, *in the case of obligations relating to fungible things,** such as a sum of money, *there is never "force majeure",** there can only be a more of less prolonged state of insolvency which does not affect the legal obligation to pay *by which the debtor State continues to be bound, for the obstacle is not insurmountable.**
>
> The debt subsists in its entirety, pending the return of more prosperous times.[253]

It can therefore be concluded from this case that, despite their opposition, there was a point of agreement between the two Governments. Both admitted in principle that a genuine situation of *force majeure*—or at least a situation of "absolute impossibility" of performing an obligation—constituted a circumstance precluding the wrongfulness of the non-performance. For one of them, however, a mere temporary—and in its opinion necessarily temporary—impossibility of performing an obligation to pay a sum of money could not constitute a case of *force majeure*. That impossibility could justify non-payment only as long as it subsisted, the obligation then being only suspended.[254]

121. In concluding our consideration of jurisprudence and State practice concerning the question before us, we may observe that *force majeure* has also been invoked as a circumstance precluding the wrongfulness of the conduct of the State in connection with the special category of international obligations to do known as obligations "of prevention": the obligation, for example, to prevent the occurrence in the State's territory of events injurious to foreign States or aliens. Reference may be had on this point to the *Corfu Channel* case and the conflicting views expressed by the majority of the Court 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, the fact was nonetheless certain that it 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 a short time before the disaster which they caused the British warships. That grave omission therefore involved Albania's international responsibility.[255] Judge Krylov, on the other hand, in

[248] *P.C.I.J., Series C, No. 87*, p. 141 [translation by the Secretariat]; Secretariat Survey, para. 278.

[249] *Ibid.*, p. 190 [translation by the Secretariat]; Secretariat Survey, para. 281. Mr. Youpis cited numerous precedents in support of his argument.

[250] It should be observed that the counsel for the Belgian Government, referring to Mr. Youpis' contention 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 admitted that "so far as that principle is concerned, the Belgian Government would no doubt be in agreement". (*Ibid.*, p. 236 [translation by the Secretariat]; Secretariat Survey, para. 284.)

[251] *Ibid.*, p. 260 [translation by the Secretariat]; Secretariat Survey, para. 285.

[252] *Ibid.*, p. 239; Secretariat Survey, para. 284.

[253] *Ibid.*, p. 270 [translation by the Secretariat] (Secretariat Survey, para. 287).

[254] The Court did not see fit to rule on this point in its Judgment of 15 June 1939.

[255] See *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23 (Secretariat Survey, para. 303).

his dissenting opinion, denied that Albania had breached the obligation to warn the British ships of the danger they ran. 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.[256] The opinion of the majority of the Court and the dissenting opinion therefore differed only on the point of fact of 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 really been "materially" and therefore "absolutely impossible" for Albania to warn the British vessels, that country could not have been charged with any breach of the obligation and, consequently, with any internationally wrongful act.

122. In connection once more with international obligations of prevention, *force majeure* in the sense of "material" and "absolute impossibility" has also been invoked as a justification for non-performance of the obligation to prevent acts injurious to foreign States or aliens by private individuals. One instance of this was the existence of situations in which the State having the obligation had lost control—as a result of an insurrection or for other reasons—over the territory in which the acts in question occurred. Among many examples we might mention the *Prats* case. In 1862, during the American Civil War, an English 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; this was referred to the Mexico/United States Mixed Commission created under the Convention of 4 July 1868. The American and Mexican Commissioners concurred in dismissing the claim. The United States Commissioner, Mr. 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.[257] The Mexican Commissioner, Mr. Palacio, particularly stressed "possibility" as limiting the obligation of protection and, in that connection, commented as follows:

> ...
>
> Possibility is, indeed, the 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 [attempting] an impossibility, and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense.
>
> ...
>
> Under such a state of things [state of war] it is not in the power of the nation to prevent or to avoid the injuries cause or intended to be caused by the rebels ... and as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no 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 can not 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.
>
> It must not appear strange to speak of violence (*vis major*) when the question is of nations, and even of very powerful ones.[258]

123. Having considered State practice and international jurisprudence, we can now turn to the opinions expressed by the authors of scholarly works and codification drafts on this subject. In the opening paragraphs of the present section we drew attention to the divergencies existing among the various authors as to use of terms and definition of notions. However, despite these points of disagreement, or more often of misunderstanding and confusion, a careful analysis[259] reveals that the authors concerned are practically unanimous that the wrongfulness[260] of the State's conduct is precluded if the State finds it *absolutely impossible* to adopt conduct different from that which it did adopt in a given concrete case and which was not in conformity with its international obligation. Some writers expressly state that an actual impossibility of fulfilling the obligation precludes the wrongfulness of conduct which is not in conformity with the obligation;[261] others—and this virtually amounts to the same thing—stress the need for the conduct to have been "voluntary", "freely adopted", etc., for there to be wrongfulness and, consequently, responsibility.[262]

[256] *Ibid.*, p. 72 (Secretariat Survey, para. 306).

[257] J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. III, p. 2889; Secretariat Survey, para. 341.

[258] *Ibid.*, pp. 2893 *et seq.*; and *ibid.*

Among the many cases in which similar views are expressed, we shall limit ourselves to mentioning the Egerton and Barnett case, the British Claims in the Spanish Zone of Morocco case and the Home Insurance Co. case; Secretariat Study, paras. 354, 412–420, and 426–429 respectively.

Statements of position which are of interest for our present purposes 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.

[259] See in particular the treatment of the subject in the Secretariat Survey, paras. 487–560.

[260] Some speak of "responsibility" being "precluded"; on this point we shall simply refer the reader to the comments in the "Preliminary considerations" forming section 1 of the present chapter.

[261] To cite a significant 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 *vis major; for the obligation, the violation of which constitutes an unlawful act, ceases when its observance becomes impossible.**"

See also Ténékidès, *loc. cit.*, p. 785.

[262] For instance, G. Sperduti ("Sulla colpa in diritto internazionale", Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e studi* (Milan, Giuffrè, 1950), vol. III, p. 103) states that *force majeure* precludes wrongfulness. He adds the following comment:

> "*Force majeure* exerts, with respect to an abstract entity's responsibility ... an influence analogous to violence against the

(Continued on next page.)

Many authors mention *force majeure* as a circumstance precluding wrongfulness and, whatever meaning and scope they may give to that expression, they undoubtedly introduce into *force majeure* the hypothesis of a situation making it absolutely impossible for the State to comply with the obligation.[263] In conclusion, we may note that 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 accepted by those writers who, while not expressly invoking the notions of "*force majeure*" and "impossibility of performance", exclude the possibility of the State being held responsible in cases in which it cannot be charged not only with any malice but also with any negligence. For negligence can scarcely be attributed to a State whose conduct is adopted in circumstances of absolute impossibility, and independently of its willingness, to act otherwise.[264]

124. If we take a look at *codification drafts*, we shall see that two of them 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 deriving from that act,[265] namely the drafts prepared by García Amador, for the Commission, and by Graefrath and Steiniger. Article 17, paragraph 1 of the revised preliminary draft submitted to the Commission in 1961 by García Amador reads:

> An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.[266]

Article 10, paragraph 6 of Graefrath's and Steiniger's draft reads:

> Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes. (The obligation to indemnify does not apply in cases of *force majeure* or of a state of emergency.)[267]

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 the obligation materially and *absolutely* impossible,[268] it necessarily includes the situation of absolute impossibility which concerns us at present.

125. We can conclude from the body of considerations set out in the preceding paragraphs that in international law it is a well-established and unanimously recognized principle that conduct not in conformity with what is required by an obligation does not constitute a wrongful act if it was *absolutely impossible* for the subject to act otherwise. One or two further remarks may be useful, however, to clarify the conditions in which this conclusion is justified. First, as long as the situation is of the kind we have dealt with so far, the *force majeure* or *vis major* must, as the English-language writers say, be "irresistible" or "inescapable"; in other words, the State must have no real possibility of avoiding it.

(*Footnote 262 continued.*)

person of organs with regard to the validity of legal instruments; in both cases, in view of the psychological impossibility of determining (*vis absoluta*) or freely determining (*vis compulsiva*) to act as one should, the activity originated by the individual organ either may not be regarded as an activity of the entity or, in any event, because of the unusual circumstances, does not give rise to the consequences ensuing from the activities of the entity" [translation by the Secretariat].

Similarly, Jiménez de Aréchaga (*loc. cit.*, p. 544) writes that "there is no responsibility if a damage ensues independently of the will of the State agent and as a result of *force majeure*". In the opinion of M. Sibert (*Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 311), if the injurious act is to be imputed to its author "it must result from his free determination". Similarly, in the view of G. Schwarzenberger ("The fundamental principles of international law", *Recueil des cours ..., 1955-I* (Leyden, Sijthoff, 1956), vol. 87, p. 351 if there is to be responsibility "the illegal act" must be "voluntary". See also Quadri, *op. cit.*, p. 589, and Brownlie, *Principles ...* (*op. cit.*), p. 423.

[263] See, for example, Basdevant, *loc. cit.*, p. 555; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), pp. 62–63; Delbez, *op. cit.*, p. 368; R. Luzzatto, "Responsibilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. 51, No. 1 (1968), p. 93; D. Ruzié, *Droit international public*, 3rd ed. (Paris, Dalloz, 1978), p. 56; Giuliano, *op. cit.*, p. 601.

Very many authors have referred to "*force majeure*" as a circumstance justifying conduct not in conformity with the State's obligations concerning the treatment of aliens; see Secretariat Survey, paras. 538 *et seq.* The position taken by J. Goebel deserves attention for the following statement: "The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a State to escape liability where it otherwise would be responsible." ("The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil war", *American Journal of International Law* (New York), vol. 8, No. 4 (October 1914), p. 813.)

[264] On the other hand, some authors (Quadri and Sperduti, for example) see no justification for the converse proposition, namely that the requirement that the State's act be committed voluntarily necessarily implies that the State has not been negligent. Some supporters of the argument that *force majeure* is a circumstance precluding wrongfulness are at the same time, like Personnaz, Delbez and Ruzié, supporters of the argument that the absence of "fault" or "negligence" is not sufficient to preclude wrongfulness.

[265] It may be noted that the fact that the other codification drafts do not mention this as a circumstance precluding international wrongfulness should by no means be interpreted as an argument against the validity of "*force majeure*" as a circumstance precluding the wrongfulness of an act of the State. Concerning this, see the analysis in Secretariat Survey, paras. 561 *et seq.*

[266] *Yearbook ... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum. Although the wording of this text is open to misunderstanding, it seems clear to us that the concluding part of the sentence can only refer to the occurrence of the circumstance of *force majeure* and not to the commission of the act imputable to the State.

[267] *Loc. cit.*, p. 228.

[268] In the commentary to article 13 of his 1958 preliminary draft (which became article 17 of the revised draft of 1961), García Amador cites examples which show that in his view the concept of *force majeure* includes cases in which there was no real absolute impossibility of the State performing its obligation (*Yearbook ... 1958*, vol. II, pp. 51 *et seq.*, document A/CN.4/111). We have no means of knowing the exact meaning which Graefrath and Steiniger give to the term "*höherer Gewalt*".

126. Secondly, it seems obvious to us that the *force majeure* (by which we continue to mean a situation of "absolute impossibility of performing a given international obligation") must exist at the very moment when the State engages in the conduct which is not in conformity with the obligation. One consequence of this, in cases in which the act of the State extends in time—in which, for example, it has a continuing character—is to raise the question as to what the effect will be if the situation of *force majeure* which existed at the commencement of the act ceases during its continuance. In our view, whether the State's conduct consists of an action or an omission, it will undoubtedly, if it remains unchanged, become an internationally wrongful act as soon as the situation of *force majeure* ceases to exist.[269]

127. The two conditions we have just mentioned are in a sense implicit in the very notion of "*force majeure*". But a third condition must also be considered: the situation which prevents the obligation from being performed must not have been caused by the State that has the obligation, whether through an intentional act or through negligence. For example, a State may not invoke the destruction of the property 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 concurred in its destruction, or has negligently failed to prevent it from being destroyed. Likewise, it may not use engine damage as a justification for its aircraft having entered the airspace of another State if the damage is attributable to its own action or its negligence. Admittedly, in a case of that kind, no other course is open to it at the moment when it engages in the conduct which is not in conformity with its international obligation, but its being in that situation is its own doing, and it cannot use the situation to justify or excuse the conduct.[270] It is sometimes maintained in connection with the situation of *force majeure* that if it is to be valid as a circumstance precluding the wrongfulness of an act of the State it must have been "unforeseeable" to the State committing the act in question. This obviously cannot mean that if the State had been able to foresee the occurrence of a situation which in itself was absolutely unavoidable, that situation could not be considered as a circumstance of *force majeure*. What is true, though, is that if the State had been able to foresee the situation and take steps to prevent it, or its consequences, the situation could not be considered as a case of *force majeure* because it would then have originated in the State's negligence.

128. If, therefore, the conditions specified in the preceding paragraphs are met, the undoubted effect of the situation of *force majeure* consisting in the "absolute impossibility" of the State performing its obligation is to preclude the wrongfulness of the conduct adopted by the State in those conditions, even though that conduct is not in conformity with what is otherwise required of the State by the obligation. The obligation rendered unperformable at a given moment for reasons of *force majeure* is an obligation which—as we have already indicated[271]—is made inoperative, definitively or temporarily, in the case in point. No breach of that obligation can occur in such circumstances. The objective element of a wrongful act is therefore non-existent, and there is no internationally wrongful act.

129. As we stated above,[272] we have so far dealt exclusively with the kind of situation in which *force majeure* consists in an *absolute material impossibility*, for the State having the obligation, to conduct itself in the manner thereby required. We shall now take up the other kind of situation, the one in regard to which we used the expression "*relative impossibility*".[273] There we described the circumstances in which it can occur and defined in principle the characteristics by which it can be recognized. Let us now see how it is treated in turn in practice, jurisprudence and doctrine. It should be noted at the outset that although this situation too, more often than not, is defined as one of *force majeure*, in some instances it is called "emergency", or, in French, "*détresse*".

130. The circumstance of serious peril to the very life of the organ which is required to observe an international obligation of its State has been invoked mainly

[269] In the case of an obligation "not to do"—to refrain from discharging oil at sea, for example—any such discharge which is due to *force majeure* and is therefore not wrongful will become wrongful if it continues once the situation of *force majeure* has ceased. In the case of an obligation "to do"—to supply coal or some other product of the subsoil, for instance—a failure to supply which is excusable if 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. This is clearly the principle which the Belgian Government had in mind in the case of the *Société commerciale de Belgique*, cited in paragraph 120 above. Counsel for the Belgian Government incorrectly 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". On the contrary: there very well may 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 revives, and if the State having the obligation then continues in breach of its obligation it is acting wrongfully.

[270] This is the condition to which the Swiss Government was referring (see para. 108 above) when, in its reply to Point V of the request for information submitted to States by the Preparatory Committee of the 1930 Codification Conference, it expressly mentioned "fortuitous occurrences" and "*vis major*" as circumstances precluding international responsibility, but with the proviso "*that the State might nevertheless be held responsible if the fortuitous occurrence or vis major were preceded by a fault, in the absence of which no damage would have been caused to the third State in the person or property of its nationals**". A similar position was taken in a note from the Netherlands Government to the German Government following the destruction in 1916 of a German zeppelin airship. See Hackworth, *Digest* ... (*op. cit.*), vol. VII (1943), p. 552, and Secretariat Survey, para. 252.

[271] See para. 55 above.

[272] See para. 107 above.

[273] Paras. 103 and 106.

in connection with violations of the frontier of another State, as justification for particular conduct not in conformity with the obligation but adopted by the organ in question. Cases of violations of airspace are especially numerous.[274] At this point we shall confine ourselves to the particularly significant case of the *incidents which took place in 1946 between the United States of America and Yugoslavia*, a case we have already had occasion to cite above.[275] We mentioned it there in order to draw attention to certain assertions in which the two parties concerned expressed general agreement that an act committed in circumstances of *force majeure* precluded wrongfulness; obviously, this held true primarily in cases of genuine "absolute impossibility" of performance of the obligation in question. For our present purposes the case deserves further consideration. On 9 and 19 August 1946 respectively, two United States military aircraft penetrated 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 penetrated Yugoslav airspace solely in order to escape serious danger, and it lodged a protest with the Yugoslav Government against the attack on the aircraft. The response of the Yugoslav Government was to denounce the systematic violation of Yugoslav airspace, which it claimed could only be intentional in view of the frequency with which it happened. In a note dated 30 August 1946, however, the Yugoslav Chargé d'Affaires informed the United States Department of State that Marshal Tito had forbidden any firing on aircraft flying over Yugoslav territory without authorization, and 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.[276]

In his reply dated 3 September 1946, from which we have already quoted, the Acting Secretary of State of the United States reiterated the assertion that:

> No American planes have flown over Yugoslavia intentionally without advance approval of Yugoslav authorities *unless forced to do so in an emergency.** I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course *so as to seek safety** even though such action may result in flying over Yugoslav territory without prior clearance.[277]

Hence the two Governments did in fact agree that crossing of air boundaries was justified when such conduct was necessary in order to save the aircraft and its occupants.[278]

131. These principles are confirmed by cases of violation of a sea boundary. Let us take a recent example. On the night of 10–11 December 1975, 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.**"[279] Iceland, on the other hand, maintained that British 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.

132. The conventions codifying the law of the sea also provide for "distress" as a circumstance justifying conduct which would otherwise be wrongful. We have already cited article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[280] which, as a consequence of the right of innocent passage through foreign territorial seas, permits "stopping and anchoring" in so far as they are rendered 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 or anchoring in order to save persons, ships or aircraft

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[274] In addition to the cases mentioned in paras. 141, 142 and 252 of Secretariat Survey, see those cited by O.J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", *American Journal of International Law*, vol. 47 (October 1953), pp. 559 *et seq.*; and *Revue générale de droit international public* (Paris), 3rd series, vol. 32, No. 1 (January–March 1961), pp. 97 *et seq.* Lissitzyn (*loc. cit.*, p. 588) rightly observes that in certain cases:

> "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 and its occupants to such unreasonably great risk that the entry must be regarded as forced by circumstances beyond the pilot's control (*force majeure*)."

See also the case cited by Hackworth, *Digest* ... (*op. cit.*), vol. II (1941), p. 305.

[275] See para. 112 above.

[276] See footnote 229 above.

[277] See footnote 230. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in connection with the aerial incident of 27 July 1955 (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 225 *et seq.*

[278] This principle has also been recognized in the other cases (which we do not consider it necessary to reproduce here) mentioned in footnote 274 above.

[279] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting. See Secretariat Survey, para. 136. So far as private vessels are concerned, the principle has been recognized in a number of cases, more particularly in the famous case of the *Enterprise* (see Secretariat Survey, paras. 328–331). Again with regard to private vessels, see the position adopted by the United Kingdom Government in its Memorial of 28 August 1958 to the International Court of Justice in connection with the Aerial Incident of 27 July 1955 (*I.C.J. Pleadings* (*op. cit.*), pp. 358–359).

[280] See para. 113 above.

in distress.[281] Other conventions or draft conventions also provide for distress as a circumstance that may justify conduct different from what would be required normally. Similar provisions appear, for example, in the international conventions on the prevention of pollution of the sea.[282]

133. The conclusion to be drawn on the point under discussion is therefore that a body of State practice exists on the matter, as revealed by the positions adopted by States in particular disputes and when concluding international agreements. In accordance with this practice, if a State organ adopts conduct that is not in conformity with an obligation not to violate the land, sea or air frontier of another State without the latter's authorization, or 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 has been compelled to adopt it in order to save its own life or that of other persons, in particular persons for which it is responsible. Accordingly, three questions may be asked: (1) Is there a rule of general application, valid for conduct not in conformity with an international obligation regardless of the content of the obligation, or is there a rule whose application must be regarded as limited to the context in which it has been expressly accepted in practice? (2) Is it only danger to the life of the organ and of the other persons mentioned that can preclude the wrongfulness of conduct not in conformity with a particular obligation, or does that possibility exist, as well, in cases of danger to another paramount interest of those persons? (3) Should the interest safeguarded by adopting conduct not in conformity with an international obligation be proportionate to the interest protected by the obligation—an interest which is then sacrificed?

134. Doctrine is divided on the answer to the first of these questions.[283] 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 fields, and the *ratio* of the principle itself 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? Further cases could be envisaged, but the area within which they would fall is of course inevitably limited by the very nature of our hypothesis, which is, to refresh our memories, that a State organ commits an act that is not in conformity with an international obligation so as to save its life in a situation of serious danger to it. In any case, a person–organ would have little material opportunity of breaching many international obligations of its State, and particularly the more important of them, simply in order to save its life in a situation of distress.

135. As to the second question, we have seen that the practice usually speaks of a situation of distress, which may at most include a situation of serious danger but not one that jeopardizes life itself. The protection of something other than life, particularly where the physical integrity of a person is still involved, may also represent an interest that is capable of severely restricting an individual's freedom of decision and compel him to act in a manner which is justifiable but not in conformity with an international obligation of the State of which he is an organ.

138. With regard to the third question, it seems to us beyond doubt that the wrongfulness of an act or omission not in conformity with an international obligation cannot be precluded unless the interest protected by that act or omission is to some extent proportionate to the interest ostensibly protected by the obligation. What is more, the latter interest must be markedly less important than that of protecting the life of the organ or organs in distress. An attempt to justify conduct which, although designed to save the life of a person or of a small group of persons, endangered the life of a greater number of human beings, would be unacceptable. One has but to imagine cases such as a military aircraft carrying explosives and liable to cause a disaster by making an emergency landing, or a nuclear submarine suffering a serious breakdown which might cause a nuclear explosion at a port in

[281] *Ibid.*

An old case involving the crossing of a border—in this case a land border—in order to save human life is that of the *Crossing of the Austrian border by Italian officials in 1862* case: S.I.O.I.–C.N.R., *op. cit.*, vol. II, p. 869; Secretariat Survey, para. 121.

[282] The International Convention for the Prevention of Pollution of the Sea by Oil, done at London on 12 May 1954, stipulates in art. IV, para. 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" (United Nations, *Treaty Series*, vol. 327, p. 8; see also Secretariat Survey, para. 91), and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London, Mexico City, Moscow and Washington on 29 December 1972, provides in article V that the prohibition on the dumping of wastes into the sea 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 of a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat ..." (United Nations, *Legislative Series, National Legislation and Treaties relating to the Law of the Sea* (United Nations publication, Sales No. E/F.76.V.2), p. 466; Secretariat Survey, para. 92).

See also the other conventions cited in this connection in Secretariat Survey, footnotes 212 and 213.

[283] For example, Quadri (*op. cit.*, p. 226) formulates the rule in general terms, whereas Lamberti Zanardi (*loc. cit.*, pp. 905–906) envisages its application in regard to specific obligations only.

which it sought refuge. The influence of this factor on the applicability of the principle cannot be ignored.

139. It now remains to consider the case envisaged above known as "fortuitous event".[284] This term, as we pointed out, is intended to denote a situation in which, as a result of external factors it is impossible for the State organ to realize that its conduct is not in conformity with what is required of it by an international obligation incumbent upon the State. Such external factors may be either natural events or acts of man, but in both cases they must be factors which, for no fault of the organ concerned and of the State to whose apparatus it belongs, are beyond the control of both. The difference, also mentioned above, between *force majeure* and *fortuitous event* lies essentially in the fact that in the first case the State organ in question is aware that it is breaching an international obligation but does so against its will because it has no opportunity of acting otherwise, while in the second case, the organ could have adopted different conduct, for it normally acts of its own accord, but *it is not aware that it has breached an international obligation.*

138. In international relations, the probability of specific situations occurring which can be classed as fortuitous events seems far less than in the case of relations between individuals. Nevertheless they are possible, and we have already looked at some examples. We mentioned the case in which, because of sudden thick fog, a frontier guard may unwittingly be on foreign territory, and that of an aircraft which enters the airspace of another State, unbeknown to the pilot, because weather or other difficulties have prevented him from fixing his position visually and have put the aircraft's instruments out of action. A similar situation may affect a ship which, again because of poor weather conditions, unknowingly enters foreign territorial waters closed to navigation. A conceivable case is that of a house recently purchased by a foreign diplomatic or consular agent and then requisitioned by military authorities, where it has been impossible to acquaint them with the new ownership. A diplomat's baggage may be searched because it bears no indication of the name and status of the owner and happens to have ended up with other luggage. A foreigner who has not paid attention to certain notices may enter a firing area and be killed as he is passing behind the targets by a shot fired by a trainee soldier. An isolated mountain artillery battery will conceivably continue firing after a truce or an armistice because its radio equipment is not working and an avalanche prevents the high command from contacting it in any other way, etc. If cases of this kind occur, the very logic of the principles on which we have seen international law to be based leads us to conclude, beyond all doubt, that the circumstances surrounding and characterizing the case preclude the international wrongfulness of the conduct adopted by the organ.

139. Here again, however, it is interesting to see whether the positions taken by Governments in cases which present features of the above kind confirm this conclusion or contradict it—although the latter would be surprising. Naturally enough, in view of the particular characteristics of the theory of fortuitous event, the cases available for consideration relate almost entirely to the adoption by State organs of conduct conflicting with obligations "not to do", namely, obligations specifically requiring the organ to refrain from the action actually taken. The number of such cases is small; we shall simply select a few which lend particular emphasis to our conclusions.

140. In 1881, during the war between Chile and Peru, the Chilean military authorities in occupation of the town of Quilca twice confiscated the goods of some Italian traders. Following claims by the Italian Chargé d'Affaires at Santiago, the Chilean 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". This assertion being patently equivocal, 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 (particularly authoritative in view of the competence of the eminent jurist who expressed it) 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 where 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.[285]

141. 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* passed it. The United States Government sought and obtained reparation, having maintained that:

> While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the *unavoidable class** whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the

[284] See para. 104 above.

[285] For example, flood water, caused by a tidal wave, entering the harbour premises where the neutral goods were situated alongside enemy goods and destroying any markings whereby the goods could be recognized. For a description of the case, see S.I.O.I.–C.N.R. (*op. cit.*), vol. II, pp. 867 *et seq.*

Chattanooga, in the course of her regular passage through the public channel, came into the line of fire.[286]

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 joint and also precise belief that an act committed by a State organ in a situation which might rightly be definable as a fortuitous event does not entail the international responsibility of the State.

142. During the 1914–1918 war, the belligerents often invoked factors such as fog, cloud and atmospheric disturbance as reasons for aircraft unintentionally flying off their course and passing over neutral territory without the knowledge or fault of the pilot. This happened when Allied aircraft making for Friedrichshafen flew over Swiss territory in November 1914. The First Lord of the Admiralty said in Parliament on 26 November that the Allied pilots had violated Swiss airspace unintentionally because high altitude and lack of visibility had prevented them from realizing that they were off course. When the town of Goes (the Netherlands) was bombed by a German zeppelin airship, the German Government stated that the pilots had lost their way in thick cloud. Similar excuses were offered for violations of Danish, Norwegian and Swedish airspace. It should be noted that some of them were rejected by the countries concerned, but solely on the ground that the alleged physical circumstances had not existed in the case in point, and not because these countries refused to recognize the actual principle involved in the excuses.[287]

143. 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. The discussion therefore turned not on the validity, which was in no way disputed, of the principle that conditions constituting a fortuitous event precluded the wrongfulness of an act committed by the State in those conditions and not in conformity with an international obligation, but solely on the factual existence of those conditions in the given case.[288]

144. 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 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 was accidental. 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:

> The airplane and crew attempted at all times to follow the course so given for Belgrade, but while the crew, and in particular the pilots, believed that the plane was flying that course, it was actually blown by winds the existence and direction of which the pilots did not then know or have any warning of, and the velocity of these winds accelerated the speed of the plane considerably beyond the speed at which the pilots believed the plane was flying. The plane, therefore, flew somewhat north of the expected course and covered a distance considerably greater than the pilots then thought or had reason to believe they were covering.[289]

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[286] M.M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office, 1937), vol. I, p. 221, and Secretariat Study, para. 130.

On the other hand, we do not feel that a sound precedent, for our present purpose, is provided by the Dogger Bank case, which arose out of an incident on the night of 21–22 October 1904 when the Russian fleet, *en route* for the Far East under Admiral Rojhdestvensky, met a number of British trawlers in fog in the North Sea and, mistaking them for Japanese warships from which it anticipated an attack, opened fire and sank some of the trawlers. The International Commission of Inquiry, composed of five admirals of different nationalities, found that the Russian admiral's mistake had been unintentional and due to the fog, and it accordingly rejected the United Kingdom's claim that the admiral should be punished. The Russian Government had already offered the United Kingdom compensation for the loss and damage caused by the incident, however, and an indemnity of £65,000 was eventually paid. In these circumstances, it is not clear whether the compensation should be regarded as a humanitarian and *ex gratia* gesture or as reparation for an act acknowledged to be wrongful. We cannot therefore say whether the incident was treated as a case of fortuitous event precluding any wrongfulness and responsibility, or instead as an unintentional wrongful act having less solemn consequences than the punishment of the organ committing it, but nevertheless entailing an international responsibility of the State in the form of an obligation or reparation. See A. Mandelstam, "La commission internationale d'enquête sur l'incident de la Mer du Nord", *Revue générale de droit international public* (Paris), vol. XII (1905), pp. 161 *et seq.*, pp. 351 *et seq.*; and Secretariat Survey, para. 129.

[287] On the other hand, in cases in which occurrences (such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915 and of Porrentruy by a French aviator on 26 April 1917) were ascribed to negligence on the part of the aviators and not to fortuitous events, the belligerents undertook to punish the offenders and make reparation for the loss and damage. See Secretariat Survey, paras. 255 and 256.

[288] See Secretariat Survey, para. 147.

[289] *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of United States of America* (note to the Hungarian Government), p. 14. On the following page, the United States Government added:

> "The crew selected for the flight were competent for the purpose ... The aircraft and its equipment ... were in sound flying condition."

This itemization of facts sounds almost like a description of a typical "fortuitous event" . . .

145. So far, we have discussed the effect of a fortuitous event in precluding the wrongfulness of an act of the State in relation only to conduct by States which is not in conformity with international obligations "not to do", that is, to refrain from a specific act. Theoretically, it is less conceivable that a fortuitous event can enter into consideration in regard to the fulfilment of an obligation "to do", that is, to perform a certain act rather than refrain from it. Within the vast range of these obligations there is, however, one well-known area which merits some attention in this context—that of so-called obligations "of prevention". We use this term to denote those obligations which require of the State action that is designed to prevent the occurrence of events injurious to foreign States and aliens—events which, as we have many times had occasion to state, may have their origin either in natural causes or, more frequently, in the acts of individuals, and at all events of persons whose acts are not attributable to the State itself. The fortuitous element may operate to preclude the wrongfulness of conduct by a State which is not in conformity with one of these obligations of prevention, although in somewhat different forms from those to which we have drawn attention in connection with obligations not to commit certain acts. Where the obligation is to ensure that an event due to another does not occur, what may be "fortuitous" is the occurrence of the event itself. In other words, the obviously unexpected and unforeseeable nature of such an event gives its possible occurrence the appearance of a fortuitous event, and it is that which may have made it impossible for the State organs to realize that their conduct might have been such as not to have the effect of preventing the event as the obligation required. Since this quality of fortuitous event, if present, removes the possibility of charging the State with culpable negligence,[290] it may serve, at the international level, as justification for any failure in prevention. A few cases drawn from intentional jurisprudence will serve as examples.

146. 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. But the British Government replied that no negligence was attributable to the Canadian authorities and that what had occurred could in no way have been foreseen. In its decision in the *Saint Albans Raid* case, the American and British Claims Commission set up under the Treaty of 8 May 1871 rejected the United States claim and pointed out in particular that the Canadian authorities could not have discovered the preparations for the raid, which had been planned and arranged in the greatest secrecy.[291]

147. More or less in the same period, a vessel carrying Mr. Wipperman, United States Consul in Venezuela, ran aground on an infrequented stretch of the Venezuelan coast. Indian tribes attacked the vessel and looted the Consul's belongings. The United States Government demanded reparation from Venezuela, claiming that the latter had failed in its duty to protect a foreign consul. The dispute was referred to the United States of America/Venezuelan Claims Commission set up under the Convention of 5 December 1885. On behalf of the Commission, Commissioner Findlay rejected the American claim on the ground that there could be no possible parallel between the case of a consul residing in a large city who was attacked by hostile individuals whom the police or army ought to keep under control and:

> the *accidental** injury suffered by an individual in common with others, not in his character as consul, but as passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages which *no reasonable foresight could prevent** . . .
>
> . . .
>
> *there is nothing . . . to show that the government had any notice of the incursion or any cause to expect that such a raid was threatened** . . . the raid was one of those *occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide.**[292]

148. Commissioner Findlay took a similar position in his opinion in the *Brissot et al.* case. Rejecting Venezuela's responsibility for damage suffered by the American vessel *Apure*, which was attacked by a group of rebels while it was carrying General García, President of one of the States forming the Republic of Venezuela, the Commissioner pointed out that the Venezuelan Government:

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[290] By this, we do not of course mean to limit 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 solely to those in which the event in question, because of its unexpected and unforeseeable nature, assumes the appearance of a genuinely fortuitous event. There may be other convincing reasons for excluding the presence of such negligence, taking into account as well that the degree of diligence required for the purpose of prevention varies according to the content of the obligation and the specific features of each particular case.

[291] 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.***" (Moore, *History and Digest . . .* (*op. cit.*), vol. IV, p. 4054 (Secretariat Survey, para. 339).)

[292] *Ibid.*, vol. III, pp. 3040–3043 (Secretariat Survey, paras. 349–350).

... surely had *no means of knowing of or anticipating such a murderous outbreak** ... General García and his detachment of troops on board the *Apure* ... certainly do not appear to have apprehended any difficulty at this particularly point. *The attack was in the nature of an embuscade and complete surprise.** It would be wholly unwarranted therefore 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.[293]

149. Lastly, there is the decision of 19 May 1931 of the United Kingdom/Mexico 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 held that a Government could not be held responsible for failure to prevent an injurious act where that failure was due not to negligence but to its being genuinely impossible for the Government authorities to take immediate protective measures in the face of a "situation of a very sudden nature".[294] This case, like the others already cited, 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 cannot appear as anything other than a fortuitous event.

150. Legal writers have not made any very substantial contribution to the definition of a fortuitous event. Doctrine[295] has been largely taken up with the debate between the proposition that the international responsibility of States for acts which are not in conformity with an international obligation is an "objective" responsibility[296] and the contrary proposition 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.[297] Writers, and particularly those (the greater number) who subscribe to the second proposition, have concentrated on defining "negligence" and determining the dividing line between conduct which remains "excusable", even though not in conformity with an international obligation, and conduct which must be recognized as a genuine "breach" of that obligation. Obviously, however, for the advocates of the second approach, a fortuitous event in the sense in which we have described it—namely a situation brought about by some sudden and unforeseeable external factor, making it impossible for the State organ to realize that the conduct it has adopted was not in conformity with the international obligation—comes beyond any shadow of doubt under the heading of circumstances which preclude any culpable negligence by that organ, and hence the international wrongfulness of its act or omission. Even those who see international responsibility as a responsibility independent of the "fault" of the organ which engages in the conduct do not go so far as to repudiate something so self-evident as the preclusion of the State's responsibility for conduct adopted in a fortuitous event situation. On the contrary, they include the authors of some of the most recent and searching studies who take an open stand in support of this view.[298]

151. As regards the codification drafts, admittedly they do not refer specifically to "fortuitous event" as being among the circumstances which preclude the wrongfulness of the conduct of the State;[299] however, many of them make the existence of the international responsibility of the State generally conditional on whether the acts giving rise to that responsibility, or at least the acts of omission,[300] are tainted by bad faith or negligence. Other drafts lay down the same condition in regard to the more restricted field with which they are concerned, namely acts causing injury to the person or property of aliens.[301] Yet others do likewise in the case of acts which are not in conformity with obligations of prevention.[302] The comments in the previous paragraph with regard to the legal writers who express comparable views therefore apply to these codification drafts as well; there is no doubt that the latter include fortuitous event among the circumstances in which international responsibility does not arise. A point which may be of interest is that article 7 of the 1961 revised preliminary draft of García Amador, dealing with the determination of the inter-

[293] *Ibid.*, p. 2969 (Secretariat Survey, para. 352).

[294] United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 159 (Secretariat Survey, para. 463).

[295] A full account appears in Secretariat Survey, paras. 488 *et seq.* See also the thorough review of the various positions given by Luzzatto, *loc. cit.*, pp. 53 *et seq.*

[296] For the principal examples, see Secretariat Survey, footnotes 703–722.

[297] *Ibid.*, footnotes 683–702.

[298] Luzzatto, *loc. cit.*, p. 93, maintains that obligations to make reparation can arise out of acts of the State despite the fact that the acts in question cannot possibly be regarded as "wrongful" since neither bad faith nor negligence is involved. But he also points out that such an obligation to make reparation may not exist where the act of the State was due to *force majeure* or fortuitous event.

[299] See Secretariat Survey, paras. 561 *et seq.*

[300] See the second paragraph of article 1 of the draft prepared by K. Strupp (*Yearbook ... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX) and article 3 of the draft prepared by A. Roth (*ibid.*, annex X).

[301] See art. 1 of the draft of the Japanese branch of the ILA and the International Law Association of Japan (*ibid.*, p. 141, annex II), and art. 1 of the resolution adopted in 1927 by the Institute of International Law (*Yearbook ... 1956*, vol. II, pp. 227–228, document A/CN.4/96, annex 8).

[302] See arts. 10, 11, 12 and 14 of the draft prepared by the Harvard Law School in 1929 (*ibid.*, p. 229, annex 9) and art. 3, paras. 1(*a*) and (*b*), and arts. 5–13 of the draft which it prepared in 1961 (*Yearbook ... 1969*, vol. II, pp. 143 *et seq.*, document A/CN.4/217 and Add.1, annex VII).

national responsibility of the State for injuries caused to an alien by the conduct of individuals, states expressly, in regard to the determination of such responsibility, that the circumstances to be taken into account "shall include, in particular, the extent to which the injurious act *could have been foreseen** ...".[303] It therefore follows that "fortuitous event" is necessarily excluded from those cases in which responsibility can be established, since a fortuitous event is by definition an *unforeseeable* event.

152. The conclusion we had drawn from the general bases of international law[304] can now be said to have been reinforced by our subsequent analysis of State practice, international jurisprudence and the opinions of legal writers. It may therefore be taken as established that, in the case of a fortuitous event—in other words, where there is a situation in which, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to be aware that its conduct is not in conformity with the international obligation—the conduct is not internationally wrongful and there is no ensuing responsibility. Having said that, it is hardly necessary to add that the "justifying" effect of a fortuitous event, in the same way as that of *force majeure*, does not last beyond the period during which the conduct in question continues to be due to the fortuitous event. Once the author of the conduct realizes that its conduct conflicts with an international obligation, the conduct will become wrongful if it continues and if the organ does not immediately modify it so as to bring it into conformity with the obligation.[305]

153. In the light of the various considerations set forth above, we would propose the following articles for the approval of the Commission in connection with the two questions dealt with in this section.

Article 31. Force majeure

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise.

2. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is likewise precluded if the author of the conduct attributable to the State has no other means of saving himself, or those accompanying him, from a situation of distress, and in so far as the conduct in question does not place others in a situation of comparable or greater peril.

3. The preceding paragraphs shall not apply if the impossibility of complying with the obligation, or the situation of distress, are due to the State to which the conduct not in conformity with the obligation is attributable.

Article 32. Fortuitous event

The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to realize that its conduct is not in conformity with the international obligation.

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[303] *Yearbook ... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum.

[304] See para. 138 above, *in fine*.

[305] In 1915, two German zeppelins airships entered the airspace of the Netherlands, a neutral State; at a certain moment, their position was signalled to them and they were required to land, yet 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 the 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.

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/322 AND ADD.1 AND 2*

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

Draft articles on succession in respect of State archives, with commentaries

[*Original: French*]
[*18, 29 and 31 May 1979*]

CONTENTS

* Incorporating document A/CN.4/322/Corr.1.

ABBREVIATION

UNESCO United Nations Educational, Scientific and Cultural Organization

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

Introduction

1. In the period from 1968 to 1978, the Special Rapporteur submitted ten reports on the problems arising in connection with the succession of States in respect of matters other than treaties. Because of the vastness of the subject, which touches on succession to public property, public debts, the legislation and internal law of the predecessor State, the legal status of the inhabitants (in particular, their nationality), territorial problems, acquired rights and other matters, as long ago as 1968 the International Law Commission decided, on the Special Rapporteur's suggestion, that its researches should be limited to the topic *succession of States in economic and financial matters*, "on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later".[1]

2. As the Special Rapporteur and the Commission advanced in their research, they discovered that there was an abundance of material relating to the subject, but they also realized how complex and difficult it was, with the consequence that, even if limited to "succession of States in economic and financial matters", it was found to be still too broad for a first stage of codification. Even in confining his study to public

[1] *Yearbook ... 1968*, vol. II, p. 221, document A/7209/Rev.1, para. 78.

property and public debts in the context of State succession in economic and financial matters, the Special Rapporteur ran the risk of straying into the study of three categories of public property and public debts: property and debts of the State, property and debts of territorial authorities other than States, and property and debts of public enterprises or public bodies—quite apart from the property and debts of the territory affected by the State succession. For this reason the Commission decided in 1973, at its twenty-fifth session, after full discussion and on the proposal of the Special Rapporteur, that for the time being the study should be confined to one only of the three categories of public property and public debts—the category concerning the State.[2]

3. By the end of its thirtieth session, in 1978, and after having considered the subject for several years, the Commission had adopted a series of draft articles on succession to State property and State debts, the text of which is reproduced below.

TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION (ARTICLES 1 TO 25)

INTRODUCTION

Article 1. Scope of the present articles

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

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

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

Article 3. Use of terms

For the purposes of the present articles:

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

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

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

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

(*e*) "third State" means any State other than the predecessor State or successor State;

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

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

PART I
SUCCESSION OF STATES TO STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

Article 4. Scope of the articles in the present Part

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

Article 5. State property

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

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

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

Article 7. Date of the passing of State property

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

Article 8. Passing of State property without compensation

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

Article 9. General principle of the passing of State property

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

[Article 11. Passing of debts owed to the State

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates, shall pass to the successor State.]

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

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

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

Article 12. Transfer of part of the territory of a State

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

* Provisional designation.

2. In the absence of an agreement:

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

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

Article 13. Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

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

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

(*b*) Movable State property of the predecessor State other than the property mentioned in subparagraph (*a*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

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

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

Article 14. Uniting of States

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

Article 15. Separation of part or parts of the territory of a State

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

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

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

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

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

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

Article 16. Dissolution of a State

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

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

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

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

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

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART II
SUCCESSION OF STATES TO STATE DEBTS

SECTION 1. GENERAL PROVISIONS

Article 17. Scope of the articles in the present Part

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

Article 18. State debt

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

Article 19. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article 20. Effects of the passing of State debts with regard to creditors

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

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:

(*a*) the agreement has been accepted by that third State or international organization; or

(*b*) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

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

Article 21. Transfer of part of the territory of a State

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

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

Article 22. Newly independent States

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its actlvity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

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

Article 23. Uniting of States

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

2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Article 24. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

Article 25. Dissolution of a State

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

4. However, when at its twenty-eighth session, in 1976, the Commission considered the Special Rapporteur's eighth report, some of its members expressed the strong hope that he would supplement his draft articles concerning State property, which were drafted in abstract terms, by some articles dealing with a special category of State property, specifically State archives. This wish was reflected in the Commission's report, which also mentioned that the Special Rapporteur was prepared to submit some articles on State archives[3] on account of the special importance of archives in the life of nations and of the prominence which disputes relating to archives had received in international relations. The present report is intended to be a response to this request.

5. This study consists of two chapters:

(*a*) Chapter I will deal with *State archives in modern international relations*, and will deal with the following topics: (i) a definition of archives affected by State succession; (ii) the role of archives in the modern world; (iii) claim to archives in the context of the protection of the cultural heritage of peoples; (iv) history of disputes concerning archives in the context of State succession; (v) general principles concerning succession to State archives.

(*b*) Chapter II will deal with the *problems of the transfer of State archives in each type of case of State succession* and will contain a draft article relating to each type of case.

[3] See *Yearbook ... 1976*, vol. II (Part Two), p. 126, document A/31/10, para. 103. In his statement to the Sixth Committee of the General Assembly, the Chairman of the Commission referred to this wish expressed by some of its members (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 13th meeting, para. 44; and *ibid., Sessional fascicle*, corrigendum). Some representatives on the Sixth Committee stated that they were "pleased to note that the Commission had commissioned a special study by the Special Rapporteur on the question of succession to archives" (statement by the representative of the United Kingdom: *ibid.*, 18th meeting, para. 39; and *ibid., Sessional fascicle*, corrigendum).

CHAPTER I

State archives in modern international relations and in the succession of States

A. Definition of archives affected by the succession of States

6. The Special Rapporteur does not intend, unless the Commission advises him otherwise, to devote a specific article to the definition of archives. He believes that, in the draft articles under preparation, the definition of State property *in abstracto* applies perfectly to the case of archives as State property regarded *in concreto*. However, although there is no need for an article defining archives in the draft under consideration, it is important to bear in mind certain

elements which make it possible to determine *the concept of archives* and to know exactly what is covered by the subsequent proposed articles concerning the disposition of archives in the case of succession of States. The elements referred to below will give some idea of the complexity of the problem under consideration. The concept of archives and the frontiers of the archival science are not easy to determine, particularly in view of the overlapping of items in archives, museums, iconographic collections and libraries.

7. The data given below for the information of members of the Commission are for the most part taken from the excellent and erudite general report drawn up by Mr. Yves Pérotin for the Seventh International Round Table Conference on Archives, on the basis of the replies given by 33 States to a questionnaire.[4] Obviously the jurist and the archivist do not follow an identical approach. The following two points will be considered below:

(*a*) content of the concept of archives;

(*b*) definition of archives in the light of State practice in the matter of succession of States.

1. Content of the concept of archives

8. From the answers to the questionnaire drawn up by the International Conference of the Round Table on Archives it can be inferred that "archives" are generally taken to mean: "(*a*) *the documentary material amassed by institutions or natural or legal persons in the course of their activities, and deliberately preserved**; (*b*) the institution which looks after this documentary material; (*c*) the premises which house it".[5] For the purpose of the present draft articles only the first limb of the definition is relevant, which regards archives as movable property; the reference to the custodial institution and to the premises will be disregarded at this point, for these are dealt with in the draft articles concerning immovable property. But this definition (which, *prima facie*, gives only a vague idea of the wealth of material it covers) concerns both public and private archives. Since these draft articles are concerned with succession to State property, the discussion which follows will relate only to "the documentary material constituted by State institutions in the course of their activities and deliberately preserved by them".

9. An *archival document* may be in written form or unwritten. The physical nature of the document is irrelevant. An archival document is anything which contains *"authentic data which may serve scientific, official and practical purposes**", according to the reply of Yugoslavia to the questionnaire drawn up by the International Round Table Conference on Archives.[6]

10. In his earlier reports,[7] the Special Rapporteur drew a distinction between *administrative* and other archives, particularly *historical* archives, not with a view to justifying a different treatment for each category, but to provide a list of examples of State policy with regard to the transfer of archives. Some experts in archival science however apply this distinction, observing that administrative archives serve administrative purposes, whereas archives as such are used for purposes of scholarship. However, the two categories are not completely water-tight, first, because historical archives are frequently no more than old administrative archives, and secondly, because administrations sometimes consult historical archives in their day-to-day business, and conversely scholarly research workers make greater use of current administrative archives whenever access to them is not forbidden by national legislation.

11. In any case, it is not easy to define archives, because there is no clear division between the categories of archival, library and museum items. The *criterion of writing* is not as clear-cut as might at first be supposed. Not all written material is necessarily part of the archives, and not all unwritten material must necessarily be excluded from archives. Of course, "the preservation of written sources" remains the very basis for the constitution of State archives, but the criterion of *the physical appearance of the object*, and even that of its origin, play a part in the definition of archival documents. Engravings, drawings and plans which include no writing may be archival items. The archivist attaches a single condition to their inclusion: they must be part of an archive file. Obviously, as far as the State is concerned they are archival documents. It is at the stage following their recovery by the State that the conditions of the archivist come into play in order to decide whether such items should be kept by an archive institution, a library, a museum, or simply by a body which deals with day-to-day administrative matters.

12. *Numismatic collections* are sometimes an integral part of an archival collection. Quite apart from historic collections of paper money, or samples or dies or specimens of bank notes or stamps, there are even collections of coins in national archival collections or national libraries. This is the case in Romania, Italy, Portugal, England (where the Public Record Office

[4] See France, Direction des archives de France, *Actes de la septième Conférence internationale de la Table ronde des archives, Le concept d'archives et les frontières de l'archivistique* (Paris, Imprimerie nationale, 1963), p. 7.

[5] *Ibid.*, p. 9.

[6] *Ibid.*, p. 10.

[7] Cf. particularly *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226; *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282; *Yearbook ... 1976*, vol. II (Part One), p. 55, document A/CN.4/292.

owns a collection of stamps and counterfeit coins) and in France (where the Bibliothèque nationale in Paris houses a large numismatic collection from the Cabinet des médailles).

13. *Iconographic documents*, which are normally kept in museums, are sometimes kept in national archival institutions, most frequently because they belong to archival collections. Iconographic documents which have to do with important persons or political events are filed and cared for as part of the national archives. This is the case in England, where the Public Record Office has a large collection of iconographic documents as well as a large series of technical drawings from the Patent Office; in Italy, where the Archivio centrale dello Stato keeps photographs of all political, scientific, and ecclesiastical notables; and in Argentina, where the Archivo gráfico fulfils the same function.

14. In Romania, all documents on parchment, paper, glass or film form an integral part of the archives, in accordance with precise rules based on their physical form, and they are kept and looked after in the national archival institutions. The difficulty in drawing a distinction between what forms part of the archives and what has to do with iconographic documents in museums and libraries becomes clear from an analysis of certain national legislation, such as the Czechoslovak interministerial decision of 25 February 1959, or the Hungarian Decree-Law No. 29 of 30 July 1950, both of which attempt, with difficulty, to establish criteria for the allocation of such items.

15. *Photographic prints* are part of the archives themselves in certain countries. Thus, in Poland the national archives receive prints from State photographic agencies. Under Argentine legislation, "drawings, paintings and photographs which concern aspects of the country or its personalities" are considered to be "historic documents", and should therefore be part of the national archival collection, although the Special Rapporteur is not certain that this is the case.

16. Some *sound documents* and *cinematographic films* are considered to be "archives" under the law of many countries (for example, Czechoslovakia, France, Sweden) and are therefore allocated under certain conditions either to the State archival administration or to libraries or museums or to other institutions. In cases where they are allocated to the State archival administration, sound documents must be considered an integral part of the archives and must be treated in the same way as the latter in the case of succession of States. In the United States of America, commercial films are subject to copyright and are registered with the Library of Congress, whereas cinematographic productions by the army and certain American public institutions are placed in the State archives. In Finland, a committee chaired by the director of the national archives is responsible for the establishment and preservation of cinematographic archives.[8]

17. Should *archives* and *libraries* be treated on the same footing? Since his third report,[9] the Special Rapporteur has dealt simultaneously with the problems of archives and libraries, offering the same solution for both. There can be no insurmountable difference in nature between an archival collection and a library collection. While archives are generally thought of as "documents forming part of an organic whole", whereas libraries are composed of works considered to be "isolated or individual units", it is nevertheless true that the distinction is not absolute, which means that archival documents are frequently received in libraries and conversely library items are sometimes taken into the archives. The inclusion of library documents in the archives is not limited only to rare or out-of-print books, which may be said to be "isolated units", or to manuscripts, which by their nature are "isolated units". Conversely, libraries acquire or receive as gifts or legacies the archives of important persons or statesmen. There are therefore certain areas in which archives and libraries overlap, and these are extended by the system of the statutory deposit of copies of printed works (including the press) in certain countries, and by the fact that the archival administration sometimes acts as the author or publisher of official publications.

18. Similarly, *archives* and *museums* cannot be placed in completely separate categories: some collections of archives are housed in museums, and various museum pieces are found in archives. Mr. Pérotin states in his report that:

> ... in England, it is considered normal that archival documents connected with museographical collections should follow the latter and, conversely, that certain objects (such as chests) should be treated in the same way as papers; ... local museums own archival documents that have been bought, or received as gifts, or come from learned societies .... In the Netherlands, historical atlases are cited as an example of documents legitimately kept in museums, while dies of seals are kept in the archives. In the state of Westphalia, reference is made to chests and other objects which by their nature belong to the archives .... In the USSR, collections of manuscript documents provisionally kept in the national museums are supervised by the Archives; the major autonomous "archive museums", established by special decision (Gorky, Mendeleev, etc.), are not exempt ....
>
> ... In Portugal, ... the Viseu regional museum keeps some of the parchments from the cathedral chapter of the See, and the remainder are in the district archives or in Lisbon in the Torre do Tombo.... In Turkey, ... the archives of the palace of the former sultans are kept in the Topkapi-Sayari museum with part of the records of the religious tribunals, whereas the provincial counterparts of those records are, in exactly nineteen cases, kept in museums.[10]

19. The meaning of "archives" becomes even clearer, and the abundance of the material it covers in many countries becomes more evident, if it is remembered

[8] For other examples, see France, *Le concept d'archives* ... (*op. cit.*), pp. 30–31.

[9] *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226.

[10] France, *Le concept d'archives* ... (*op. cit.*), pp. 45–46.

that *objects seized by the police or customs authorities* and *exhibits related to criminal proceedings* are sometimes part of the archives, or are divided between criminological museums and national archives. In the United States of America, the judicial authorities decide whether such exhibits should be placed in the archives. In many States, *models, drawings, prototypes, scale models* and *samples* are sometimes placed in the national archives, as are certain *official gifts* offered to the head of State. In the United States, since Roosevelt's time, the "presidential libraries", which belong to the national archives, keep such gifts.

2. Definition of archives in the light of State practice in the matter of succession of States

20. The range of the items which are transferable in the event of a succession of States should be taken in the broadest sense, unless the predecessor and successor States have expressly agreed otherwise. It should cover "archives and State documents *of every kind*". The successor State is bound by the meaning attached by the predecessor State to the term "State archives" in conformity with its own legislation in force at the time of the succession of States, if the treaty governing the devolution of the archives concerning the territory transferred has not defined the content and nature of those archives differently. It is the domestic law in force in the predecessor State which indicates what was meant by "State archives", namely, written, sound, photographic or graphic material and, secondly, objects of all kinds accompanying these documents as "archives by reason of their purpose". The problem raised by the Special Rapporteur is not at this stage whether all State archives belonging to the predecessor State are transferred to the successor State. That is not the question. The problem at the present stage is merely what can be understood by "State archives". The problem of the *link between State archives and the territory* involved in the succession of States will be discussed subsequently, with a view to determining the categories of State archives liable to be transferred to the successor State. The "archives–territory" link will be considered in the context of the archives belonging to or concerning the territory.

21. The expression "archives of every kind" covers the ownership, type, character, category and nature of the items and documents, and suggests all the wealth of material mentioned in paragraphs 9 to 19 above, by reference to the domestic law of the predecessor State. The expression "State archives of every kind" refers in the first place to *ownership*, in other words archives of every kind belonging to the predecessor State. It also refers to the type of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative, regulatory or judicial, financial, fiscal or cadastral, etc. The *character* of these items is likewise immaterial (whether they are secret or accessible to the public).

22. The question of the *nature* or *category* of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc. Lastly, "archives of every kind" should be understood to mean all *varieties* of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind";[11] "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";[12] "all title-deeds, plans, cadastral and other registers, and papers";[13] "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded",[14] "archives and objects of historical value";[15] "all archives having a general historic interest", as opposed to "archives which are of interest to the local administration";[16] "all documents exclusively referring

[11] This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace–Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 29–30, 42 and 81); as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93, concerning Austria (*ibid.*, p. 361); and in the Treaty of Trianon of 4 June 1920: art. 77, concerning Hungary (*ibid.*, vol. 113, p. 518).

[12] Art. 3 of the Treaty of Peace between the German Empire and France signed at Frankfurt on 10 May 1871 (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689).

[13] Art. 8 of the Additional Agreement of the Treaty of Peace signed at Frankfurt on 11 December 1871 (*ibid.*, 1875), vol. XX, p. 854).

[14] Art. 1, para. 3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (*Supplement to the American Journal of International Law* (New York), vol. 11 (1917), p. 61).

[15] Art. 37 (concerning Ethiopia) of the Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 142). On the basis of that article and article 75 (*ibid.*, p. 157), Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204–216).

[16] Art. VI of the Treaty of cession of the territory of the Free Town of Chandernagore between India and France, signed at Paris on 2 February 1951 (*ibid.*, vol. 203, pp. 158–160).

to the sovereignty relinquished or ceded . . ., the official archives and records, executive as well as judicial";[17] "documents, deeds and archives . . ., registers of births, marriages and deaths, land registers, cadastral papers . . .",[18] and so forth.

23. One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia,[19] concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations. Article 2 reads as follows:

> The expression "archives and documents of an administrative character" shall be construed as covering the documents of the central administration and those of the local public administrative authorities.
>
> The following [in particular shall be covered] . . .:
>
> Documents . . . such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;
>
> Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practise certain professions;
>
> Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities . . .;
>
> The expression "historical archives and documents" shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest.

The enumeration given in article 6 of the same Agreement rounds off the definition of "administrative" archives.

24. This definition of archives by indicative enumeration, rather than by uncertain application of indefinable criteria, has the advantage of giving an idea of the richness of the material of all kinds of an historical, cultural, administrative, technical or scientific nature which is covered by the notion of archives as seen by expert archivists, and as it is retained, in whole or in part, in one or more of its aspects, by States when a succession of States takes place. To what extent, and according to what criteria and modalities, the transfer of State archives is carried out in the case of a transfer of territory will become evident later on in this report. For the time being, this enumerative definition has the advantage of giving a broad idea of the importance and role of archives in modern international relations.

B. The role of archives in the modern world

1. The "paper war"

25. Archives, jealously preserved, are the essential instrument for the administration of a community, as has been seen above. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a "paper war" which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth. According to a group of experts convened by UNESCO in March 1976,

> Archives are an essential part of the heritage of any national community. Not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights.[20]

26. The destructive hatchet and torch of the wars which have eternally afflicted mankind have seriously impaired the integrity of archival collections. In some cases, the importance of documents is such that the victor hastens to transfer these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the spoliation of its records. All, or almost all, annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territory. Without being under any delusion as to the draconian practice of the victors who carried off archives and recklessly disrupted established collections, doctrine considered clauses for the handing over of archives to the annexing State as implicit in the few treaties from which they had been omitted.[21] These practices have

[17] Art. VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (English text in W.M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909* (Washington D.C., U.S. Government Printing Office, 1910), vol. II, p. 1693).

[18] Art. 8 of the Frontier Treaty between the Netherlands and the Federal Republic of Germany, signed on 8 April 1960 at the Hague (United Nations, *Treaty Series*, vol. 508, p. 154).

[19] Agreement, signed at Rome on 23 December 1950, between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (*Ibid.*, vol. 171, p. 291).

[20] UNESCO, "Final report of consultation group to prepare a report on the possibility of transferring documents from archives constituted within the territory of other countries" (CC-76/WS/9), p. 2. The meeting was held in co-operation with the International Council on Archives.

[21] L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* [thesis] (Paris, Giard et Brière, 1915), *passim* and in particular pp. 44 and 49.

been followed in all periods and in all countries. The fact is that archives handed over to the successor State, forcibly if necessary, served primarily as *evidence* and as *title deeds* to the annexed territory and were used as instruments for the administration of the territory—and are so used even more nowadays. In addition to these "evidentiary" and administrative functions, they also sometimes served political purposes.

27. Charles Braibant and Robert-Henri Bautier have shown how archives have sometimes been used for political purposes, and not simply to establish the cultural heritage of a country. In their view, for example, Napoleon's ideas on archives were entirely political; he never considered their historical value. His intention was to

> use archives, including the collections brought to Paris from all parts of Europe on his orders, for very specific political purposes. Written instructions issued by him have been found, ordering documentary material to be assembled on the violations of the law of nations by England throughout history, as well as other instructions relating to the temporal rule of the Holy See.[22]

28. In 1808, Napoleon I ordered the acquisition of the Hôtel Soubise so that all the public archives scattered throughout Paris could be brought together in one place. One writer states that, as a result of this consolidation,

> the Emperor, who was interested in archives and who was not satisfied with ordinary measures, had the grand idea of bringing the archives of Europe to Paris. He considered it logical, after having subjugated the territories, to gather together the instruments, papers and documents concerning their administration or history (letter from Napoleon to the Minister of the Interior, dated 15 February 1810, after his first visit to the Hôtel de Soubise) .... As a result, most of the archives of the Vatican, Liguria, Piedmont, Savoy and Geneva (1809–1811) were transported to Paris between 1809 and 1813. A large proportion of the archives of Vienna (1809) and Spain (1812) were also brought to this repository, which was to be situated in a building with a storage capacity of 100,000 cubic metres, and the contruction of which had begun on the left bank of the Seine between the Iena and Concorde bridges.[23]

29. However, these remarks should be qualified by the observation that the archives brought from Vienna on the orders of Napoleon I contained archives which themselves had been taken from Belgium by Austria. Moreover, the vast operation undertaken by Napoleon, however outrageous and however much in conformity with the ideas of the time in respect of annexation of territories, nevertheless had the useful result of causing France to restore to the Netherlands in 1814, after the fall of the Napoleonic empire, 3,000 crates of Dutch political, diplomatic and judicial archives which had been removed from the Netherlands by Austria and which Napoleon I had brought back from Vienna to Paris.

30. The Treaties resulting from the Congress of Vienna in 1815, the Treaties of Versailles, Neuilly, Saint-Germain-en-Laye and Trianon, which terminated the First World War, and the peace treaties concluded at the end of the Second World War, brought only a relative degree of order to the problems of State archives, since the just restitutions which the vanquished were required by the victors to make to third States could not erase the memory of the removals—with varying degrees of justification—of archives by conquering States for their own benefit.

31. The Hitler regime is known to have systematically exploited the archives of territories conquered by force during the Second World War. This was the case, for instance, with the archives of Moravia, in the Sudetenland. In so doing, the German Third Reich obviously had ulterior political motives, not simply in respect of the whole of Europe, but regarding the Mediterranean, North Africa and the Middle East as well. It is also known that Hitler's troops removed from various countries not only archives, but also works of art and objects which formed part of the cultural and historical heritage of the occupied countries.[24] The victors of 1945 who crushed the Hitlerite regime accorded extra attention to the question of archives and confiscated those which were in the possession of the Third Reich wherever they

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[22] France, Direction des Archives, *Actes de la sixième Conférence internationale de la Table ronde des archives; Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), p. 133.

[23] Jacob, *op. cit.*, pp. 60–61.

Mr. Jean Favier, the present director of Archives de France, states that:

> "In 1810, General Kellerman began the shipment of the Spanish archives; of the 500 vehicles needed, only 30 left Simancas with material for the new Spanish section of the imperial archives. Daunou [the archivist of the Napoleonic Empire] himself sent 3,139 crates of documents from Vienna. Part of the archives of Piedmont, Florence, Pisa, Sienna, Parma and Piacenza reached the banks of the Seine. More than 35,000 cartons left Germany. The Vatican archives represented a choice prize, and it was Napoleon's intention to use possession of them to bring pressure to bear on the Government of the Church. Daunou travelled to Rome and dispatched 450 vehicles containing 12,147 crates of archives .... The restoration of these archives to their respective countries was a slow and difficult undertaking. Some remained in France; many disappeared in transit; a number of wagons never reached Rome, because of the hazards of the journey. The collections relating to the Netherlands, and coming from Vienna, were deposited in Brussels. Some diplomatic records from Simancas were not returned to Spain until 1941." (J. Favier, *Les archives*, 3rd ed., rev., "Que sais-je?" series, No. 805 (Paris, Presses universitaires, 1975), p. 35).

[24] As a consequence of the Hitlerite plundering, the 18 signatory countries of the "London Declaration" of 5 January 1943 reserved:

> "all their rights to declare invalid any *transfers** of, or *dealings** with, *property**, *rights** and *interests** of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected." (M.M. Whiteman, *Digest of International Law* (Washington, D.C., United States Department of State, 1967, vol. 8, p. 1202.)

were found, the better to ascertain and pin-point the political and military liabilities of the Hitlerite regime.

32. In so doing, the Allies were simply dispensing justice. But, like all victors of all periods, they found it difficult to resist the temptations of their victories over both Germany and Japan. As a result, archives of German origin, concerning the *history* of the German Reich and its *Länder* from *1867* to 1945 were confiscated after the Second World War by France, the United Kingdom, the United States of America and the USSR.[25] In addition, a vast stock of German and Japanese *scientific and technical documents* was seized by the Americans. It was microfilmed and placed, by the Department of Commerce, at the disposal of American users. A technical information clearing house was set up in the Department of Commerce to be responsible for the selection and communication of the information.[26] Part of the historical archives was later restored to the German post-war Government.[27] The peace treaties reflected the Allies' concern not to overlook the important problem of archives in the modern world, and a number of provisions, which are considered below, were inserted into the peace treaties for this purpose.

2. The age of information

33. The modern world is undergoing a scientific and technological revolution which has changed the factual background to the question of archives and, it would seem, must inevitably have an effect on the succession of States in this regard. The difficulties which used to arise between States because archives were indivisible and reproducing them was a very lengthy task no longer exist to such an extent, owing to modern reproduction methods. In the past, the problem was solved in a drastic manner, and the archives went to whoever fared best on the field of battle. The old idea of the indivisibility of archives, which aroused fears of the breaking up of collections and was responsible in some cases for the preservation of the integrity of historical depositories, is more easily accepted by the parties, because photocopying and microfilming and other modern techniques make it possible to find solutions that are better suited to the situations which arise. The predecessor State can, without harm, leave to the successor State the archives to which it is entitled, in the assurance that they can be rapidly and conveniently reproduced. Moreover, UNESCO is assisting States with the microfilming of archives.[28]

34. Consequently, the phenomenal progress made in the reproduction of documents can, by simplifying it, radically change the factual background of the problem of the succession of States in respect of archives. New methods of reproduction, and also of printing, such as programmed "cold typesetting", photocomposition with recording "terminals", or typesetting by optical scanner, fully automatic page-setting and the introduction of visual display "terminals" for all these reproduction or printing operations can bring within the easy reach of man things which have been largely inaccessible to him in the past.

35. The scientific and technological progress which has made this revolution in reproduction and printing possible has also radically altered the very concept of archives and documentation. Documentation units, libraries, collections of old or recent archives, centres for analysis and indexing, cataloguing and distribution throughout the world, and principally in the United States of America, are experiencing an astonishing revolution in their organization and operation, as a result of the development of automatic systems. Remote cataloguing, automatic data processing, the possibility of long-distance consultation of archive file-indexes, the steadily increasing number of terminals, which *eliminate the problems of distance and time* in gaining access to documentation, is evidence of this information revolution. As a result of the developments in data processing, the acquisition, cataloguing, storage, referencing, description of acquisitions, indexing, analysis, summarizing, evaluation, compilation, publication and distribution of documents have become appreciably easier and more accessible to larger numbers of users.

36. Because of the "documentary revolution" which is now beginning to take place before our eyes, the

[25] See R. Wolfe, ed., *Captured German and related records: A National Archives conference: papers and proceedings of the Conference on Captured German and Related Records, November 12–13, 1968, Washington, D.C.* (Athens, Ohio, Ohio University Press, 1975); H. Lötzke and H.S. Brather, *Übersicht über die Bestände des Deutschen Zentralarchivs Potsdam* (Berlin, Rütten und Loening, 1957).

[26] Cf. J.-L. Crémieux-Brilhac, "Documents et réflexions sur quelques développements récents de l'informatique documentaire aux Etats-Unis—Part 2: l'informatique au service du transfert des connaissances (Paris, La Documentation française, 1977). Extract, "Deux grands organismes nationaux de documentation", in *Problèmes politiques et sociaux* (Paris), La Documentation française, No. 321 (14 October 1977), p. 12.

[27] See, for example, the exchange of letters constituting an agreement between the United States of America and the Federal Republic of Germany relating to the transfer of German files and archives, Bonn, 14 March 1956 and Bonn/Bad Godesberg, 18 April 1956 (United Nations, *Treaty Series*, vol. 271, p. 325).

[28] At its eighth session (Montevideo, in 1954), the General Conference of UNESCO decided to set up a "mobile microfilm unit" and to make it available to States requesting it. This unit, whose services have already been employed by many States, is made available to the State with its facilities and equipment and the personnel qualified in all techniques and applications of microfilming, microphotography, paleography and the conservation of archives. The mobile unit was set up mainly in view of the risks to which archives are exposed in certain areas of the world through climate, insects, earth tremors, and so forth. However, there is certainly no reason why it could not be used at the request of States wishing to settle a dispute over archives by microfilming them.

problem of archives may in future take on a new form. In a recent work, it is stated:

> The revolution in the storage and transfer of knowledge has begun. The computer is one of the instruments of this revolution; it is also the manifestation of it. Thanks to the computer and all the latest means of transmission and communication (satellites or television, for example) which supplement older methods such as the book, we are plunging into *the age of information. . . . This is a major political phenomenon which can change power relationships at both the national and international levels**, broaden the means of legislative control, change the methods of administrative action and, finally, bring about a new type of "information power".[29]

37. It is perfectly clear, therefore, that the question of archives is today one of cardinal importance. *Information, knowledge and know-how have become one of the keys to power.* Because the possession and utilization of documents and archives of all sorts have become so necessary in the modern world, many countries have extensively computerized these sectors, with the result that the computer, crammed with documents and archives which it digests, has itself become an invaluable and irreplaceable archive. However, the undisputed reign of the computer, which is not within the reach of all countries, is on the verge of creating monopolies of information, and hence of decision-making, in international relations. Thus *the possession of archives and documents, and their effective and rational use demonstrate the full political and economic impact of the information system.* They confer extraordinary significance and a new importance on the problem of the succession of States in respect of archives.

38. Scientific and technological progress have indeed both simplified and complicated the problem of archives. On the one hand, they have made information, and therefore documents, one of the keys to power; on the other hand, they have made available to mankind unprecedented means of reproduction and distribution. But, by the same token, they have created a whole series of new difficulties. In the field of archives, documentation and information, as in other fields, an appalling gulf is forming between the developed and the other countries, comparable to the gulf that separates the world of the prehistoric plough from that of the miracle of electronics. The solutions to be found to the problems of archives in the context of succession of States, in particular of succession in consequence of decolonization, must take account of the fact that the means of reproduction which the developed countries have mastered to a high degree should make it easier for the latter to transfer or to restore the originals of archives to the less developed countries in all cases in which they ought to be returned to them. The development of documentary data processing and the spread of automation should serve to promote both the transfer of knowledge and the socio-cultural enrichment of the poorer countries.

39. It has been shown that microfilm and modern methods of reproduction, which produce copies so faithful as to rival the original, can be considered as the modern remedy for "archivistic ills" by nipping in the bud disputes between States in respect of archives. While the progress achieved in reproduction is undoubtedly impressive, the problem would remain unsettled if the State entitled to the return of the originals of its archives received only the microfilm or some other reproduction of them. There is an immeasurable difference between the value of an original picture and that of a copy, however perfect it might be. Some historical archives, for example, are of irreplaceable value to a country's cultural heritage. This touches on another aspect—the cultural value of archives—which is dealt with later.

C. The claim to archives and the protection of the national cultural heritage

40. The problem discussed in this study on State archives *covers a field that is at once larger and more circumscribed than the cultural heritage* which is currently the legitimate concern of UNESCO, at the request of the majority of its Member States. The archives which are the subject of this study represent only part of the cultural heritage in cases where they comprise historical or cultural documents. However, they are more than merely "cultural" in cases where they involve documents required for a country's routine, day-to-day and current administration. The study does not ignore the other problems connected with the cultural heritage—pictures, sculptures, statues, works of art, zoological, botanical, archaeological or mineralogical specimens, etc. These are, however, covered by the relevant draft articles relating to the transfer of State property in the event of a succession of States, provided that, and in so far as, these works of art constitute State property.

1. Action by UNESCO

41. UNESCO has focused its attention both on the problem of archives as such and on the question of archives as part of a people's cultural heritage.

(a) *Action taken by UNESCO with a view to the restitution of archives*

42. Referring mainly to colonial occupation, UNESCO emphasized the importance [of archives] for the general, cultural, political and economic history of the countries which were under foreign . . . domination and called for the conclusion of bilateral agreements for the transfer of archives to recently independent successor States. At its eighteenth session, held in Paris in October–November 1974, the General Conference of UNESCO adopted the following resolution:

[29] J. Michel and J.-L. Crémieux-Brilhac, "La révolution documentaire aux Etats-Unies", *Problèmes politiques et sociaux*, (*op. cit.*), p. 3.

The General Conference,

Bearing in mind that a great number of Member States of UNESCO have been in the past for longer or shorter duration under foreign domination, administration and occupation,

Considering that archives constituted within the territory of these States have, as a result, been removed from that territory,

Mindful of the fact that *the archives in question are of great importance for the general, cultural, political and economic history of the countries which were under foreign occupation, administration and domination,**

Recalling recommendation 13 of the Intergovernmental Conference on the Planning of National Documentation, Library and Archives Infrastructures, held in September 1974, and desirous of extending its scope,

1. *Invites* the Member States of UNESCO to give favourable consideration to the possibility of *transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements**;

2. *Recommends* that, in consultation with the appropriate non-governmental organizations, the Director-General envisage the possibility of a detailed study of such transfers and that he inform the nineteenth session of the General Conference thereof.[30]

43. Furthermore, at the twentieth session of the General Conference the Director-General of UNESCO submitted a report in which he set out:

> principles and guidelines ... to provide to all Member States an instrument of reference intended to facilitate negotiations leading to the conclusion of special agreements, either bilateral or, if appropriate, multilateral, with a view to the resolution of conflicting archival claims,[31]

and went on to say:

> Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through bilateral or multilateral negotiations and agreements between the States involved.[32]

(b) *Action taken by UNESCO for the restitution of archives as part of the reconstitution and protection of the national cultural heritage*

44. The concern, as described above, that UNESCO has shown for problems of archives as such has been combined with an equal concern for archives considered as important parts of the cultural heritage of nations. UNESCO and its committees and groups of experts have at all times considered archives as "an essential part of the heritage of any national community", a heritage which they are helping to reconstitute and whose restitution or return to the country of origin they are seeking to promote. In their view, historical documents, including manuscripts, are "cultural property" forming part of the cultural heritage of peoples.[33]

45. The solutions which the Commission might reach in the matter of succession to State archives should therefore, in cases where the archives are of historical or cultural interest, take generously into account the plea made in 1977 by the Director-General of UNESCO for the return of an irreplaceable cultural heritage to those who created it. This appeal arose out of a resolution adopted by the General Conference of UNESCO at its nineteenth session, which invited the Director-General:

> (*a*) to take all necessary measures with a view to the establishment, by the General Conference at its twentieth session, of an intergovernmental committee entrusted with the task of seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost them as a result of colonial or foreign occupation, ...
>
> (*b*) to launch an appeal to Member States to take all measures likely to bring about a state of mind conducive to the return of cultural property to the countries of origin, ...[34]

The appeal launched by the Director-General contains the following passages:

> The vicissitudes of history have ... robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment.
>
> ...
>
> The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.
>
> They know, of course, that art is for the world and are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. They are happy that men and women elsewhere can study and admire the work of their ancestors. They also realize that certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed.
>
> These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are

[30] UNESCO, *Records of the General Conference, Eighteenth Session, Resolutions* (Paris, 1974), pp. 68–69, resolution 4.212.

[31] UNESCO, "Report by the Director-General on the possibility of transferring documents from archives constituted within the territory of other countries (document 20 C/102 of 24 August 1978), para. 18.

[32] *Ibid.*, para. 19.

[33] See documents of the nineteenth session of the General Conference of UNESCO (Nairobi, October–November 1976), in particular, "Report by the Director-General on the Study on the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements" (document 19 C/94 of 6 August 1976); the report by the Director-General at the following session of the General Conference (document 20 C/102 (*loc. cit.*)); report of the Committee of Experts which met from 29 March to 2 April 1976 at Venice (document SHC-76/CONF.615/5); report of the Committee of Experts to promote the restitution or return of cultural property (Dakar, 20–23 March 1978) (document CC-78/CONF.609/3); and Statutes of the Intergovernmental Committee for the promotion of the return of cultural property to its country of origin or its restitution in the case of illegal appropriation (UNESCO, *Records of the General Conference, Twentieth Session, Resolutions* (Paris, 1978), pp. 92–93, resolution 4/7.6/5, annex).

[34] *Ibid., Nineteenth Session, Resolutions* (Paris, 1976), p. 48, resolution 4.128.

the most vital and whose absence causes them the greatest anguish.

This is a legitimate claim.

...

I solemnly call upon the Governments of the Organization's Member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned, in order to encourage a fairer international exchange of cultural property; ...

...

I call on universities, libraries ... that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

...

I call on historians and educators to help others to understand the affliction a nation can suffer at the spoilation of the works it has created. The power of the *fait accompli* is a survival of barbaric times and a source of resentment and discord which prejudices the establishment of lasting peace and harmony between nations.

Finally, I appeal with special intensity and hope to artists themselves and to writers, poets and singers, asking them to testify that nations also need to be alive on an imaginative level.

Two thousand years ago, the Greek historian Polybius urged us to refrain from turning other nations' misfortunes into embellishments for our own countries. Today when all peoples are acknowledged to be equal in dignity, I am convinced that international solidarity can, on the contrary, contribute practically to the general happiness of mankind.

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilisations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.[35]

(c) *The right to a collective "cultural memory"*

(i) *A new international cultural order*

46. "The men and women of these countries have the right to recover these cultural assets which are part of their being."[36] This sentence from the appeal by the Director-General of UNESCO to all States sums up perfectly the touching quest of the countries which have escaped from the dark night of colonialism and are looking for their *lost collective memory*. At the same time it expresses *the right of peoples to a cultural identity which constitutes the very basis of their national identity*. The question of the restitution of cultural property, including historical or cultural archives, is therefore not one of "*Kulturkampf*" nor of narrow nationalism. The "right to a cultural memory" provided a particularly significant title for a symposium held at Palermo (Italy) in October 1978 to consider in a spirit of co-operation the problem of "cultural treasures in exile"—in other words, the restitution to former colonial countries of their cultural heritage. There is an ever-growing movement towards a *new international cultural order* linked with the new international economic and legal order. The development is multi-dimensional, and therefore includes an undeniable cultural aspect.[37]

47. All or almost all the sources for the history of the African continent at present depend on Europe, in so far as they are conserved in European archives. The same is true of the Arab world, Asia and Latin America.[38] Though politically decolonized, the States of the third world still remain dependent in terms of their archives and history. Yet the right of each country to its archival heritage is incontestable. The archive documents constitute for each people a precious part of its cultural and historical heritage, as well as an essential instrument for the management of public affairs.

48. An example has been noted of an African country which, for its newly built national museum, had to be content with reproductions and photographs of its own works of art when faced with the refusal of Western museums to return to it at least one or two pieces. The example of Nigeria is well known, where an episode in the war of conquest by the United Kingdom led to the dispersal of a great cultural heritage, notably bronzes and ivory masks classified among the masterpieces of the world. Some of them left Nigeria for museums in the United Kingdom, others followed the tortuous paths of the semi-licit art market and ended up either in other European or North American museums, or in private collections. A representative at the Palermo symposium caused a sensation by revealing that ... 11,000 specimens of Ecuadorian art of inestimable value, are to be found ... in the hands of a private collector in Milan (Italy), and that, in spite of all its efforts, the Government at Quito had not succeeded in obtaining restitution of even a part of them.

(ii) *The "four principles of Palermo"*

49. At the Palermo round table (October 1978), UNESCO attempted to define, first, the *nature* of the objects which might be claimed (and among these cultural archives and historical documents were again mentioned) and, secondly, the concept of *country of origin* entitled to claim the restitution of cultural objects and works of art. The problems are far from simple, and there is no point in concealing their complexity. The definition of cultural property alone

[35] *The Unesco Courier* (Paris), 31st year, July 1978, pp. 4–5.

[36] *Ibid.*, p. 4.

[37] Cf. M. Bedjaoui, *Towards a new international economic order* (Paris, UNESCO, 1979), pp. 75 *et seq.* and 245 *et seq.*

[38] For evidence of this statement, see the study by Christian Gut and Marieke Housseau, the result of a monumental analysis of information provided by the official State archive bodies (C. Gut and M. Housseau, "Eléments statistiques pour mesurer l'ampleur du problème", in *Dix-Septième Conférence internationale de la Table ronde des archives*, "Constitution et reconstitution des patrimoines archivistiques nationaux" (Paris, Imprimerie nationale, 1980), append. 1).

presents almost insurmountable problems. Certain works have a universal value, either because of the message they transmit or the personality of their authors. National cultural assets, on the other hand, are objects constituting the essential wealth of a country's cultural memory and identity.

50. The nations of the third world fully realize that certain cultural assets have in the course of time become rooted in the history of the "borrower" country, and these nations are in fact prudent and selective in their claims. Thus they only call for restitution of the cultural or historic assets whose absence, in the criterion of the Director-General of UNESCO, "causes them the greatest anguish"—in other words, the art treasures most representative of the past and of their national culture.

51. In 1970, Belgium and Zaire, signed an agreement providing for the restitution to the former colony of objects representative of Zairian art. The directors of the Royal Museum of Central Africa, at Tervuren, have already returned certain objects of great value, and they are currently training Zairian experts to conserve them in their own country. Australia is doing the same for Papua New Guinea, which has been able to open a museum at Port Moresby thanks to the return of a large number of objects from Australian collections. In 1976, the Netherlands agreed to return to Indonesia certain assets of historical interest. France concluded an agreement with Laos in 1950, undertaking to return a number of works of art, and in 1968 France agreed to the restitution to Algeria of 300 museum pieces. Italy has undertaken to return to Ethiopia the famous Axum stele, an example of the Coptic splendour of the early Christian era.

52. Nevertheless, in defence of their refusal to make such restitution *de jure*, many countries continue to plead, as happened during the Palermo meeting, "the psychological aspects and the feelings of guilt associated with the act of restitution", in so far as that act seems to imply that the possession of the cultural property, historical archives, works of art etc. by the predecessor State was unlawful. But the situation will hardly be improved by maintaining the *status quo*, especially in view of the growing number of claims, which is bound to increase with time. In any event, in order to break down the psychological barriers, four principles were put forward at Palermo by way of suggestions, but were not discussed:

(*a*) Each people has the right as well as the duty to possess, conserve and transmit to posterity its own cultural heritage.

(*b*) All nations have the duty to grant aid and support to any people seeking to attain these objectives, in particular by returning any essential parts of that people's heritage which are kept elsewhere as a result of plunder, theft or illicit traffic. The aid takes the form also of scientific, technical and possibly financial co-operation in the reconstitution of the heritage.

(*c*) Each people has the duty to safeguard the survival of its cultural heritage by setting up museums equipped with the appropriate facilities for the satisfactory conservation of the objects.

(*d*) Each people should be aware that it is also in its own interest to have, distributed throughout the world, examples of the national culture as an essential contribution towards understanding between nations. Consequently, international or bilateral agreements leading to the restitution of works of art might at the same time contribute towards well-organized and official displays of those "cultural ambassadors" which are, in another country, the art treasures and traditional handicrafts of a foreign nation. This could be achieved on the basis of donations and long-term loans, as well as by the organization of an art market governed by internationally unified legislation.

53. Hand in hand with the essential restitutions should go a policy of long- or short-term deposits, and in particular exchanges of works of art between countries, once all question of ownership had been clarified, which together would constitute an effective method of making culture universal instead of letting it remain the monopoly of a few old-established States. It is in this way that all peoples will learn how each contributed towards "universal civilization", as René Maheu called it,[39] and "how man became human", to echo the title of an excellent recent book by Roger Garaudy.[40]

2. Action by the United Nations

54. The protection and restitution of cultural and historical archives and works of art, with a view to the preservation and future development of cultural values, have received a great deal of attention in the United Nations, as evidenced in General Assembly resolutions 3026 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975 and 31/40 of 30 November 1976. The resolution of 30 November 1976 contains the following passages:

The General Assembly,

...

Convinced that the promotion of national culture enhances a people's ability to understand the culture and civilization of other peoples and thus has a most favourable impact on international co-operation,

Convinced also that the protection by all means of national culture and heritage is an integral part of the process of preservation and future development of cultural values,

...

3. *Affirms* that the *restitution** to a country of its *objets d'art*, monuments, museum pieces, *manuscripts*,* *documents** and any other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values.

3. Action by the Conferences of non-aligned countries

55. The Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers

[39] R. Maheu, *La civilisation de l'universel* (Paris, Laffont, 1966).

[40] R. Garaudy, *Comment l'homme devint humain* (Paris, Jeune Afrique, 1978).

from 5 to 9 September 1973, had adopted a Declaration on the Preservation and Development of National Cultures, which stresses:

the need to reaffirm national cultural identity and eliminate the harmful consequences of the colonial era, so that ... national culture and traditions will be preserved.[41]

56. At the following summit meeting, which took place at Colombo from 16 to 19 August 1976, two resolutions on the subject were adopted by the Heads of State or Government of Non-Aligned Countries.[42] Resolution No. 17 contains the following passages:

RESTITUTION OF ART TREASURE AND *ANCIENT MANUSCRIPTS** TO THE COUNTRIES FROM WHICH THEY HAVE BEEN LOOTED

The Fifth Conference ...

...

1. *Recalls* the terms of the resolution adopted by the VIIth Islamic Conference of Foreign Ministers, held in Istanbul (Turkey),

2. *Reaffirms* the terms of the United Nations General Assembly resolution 3187 (XXVIII) and General Assembly resolution 3391 (XXX) concerning the restitution of works of art and *manuscripts** to the countries from which they have been looted,

3. *Requests* urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin,

4. *Requests* the Panel of Experts appointed by UNESCO which is entrusted with the task of restoring those works of art and manuscripts to their original owners, to take the necessary measures to that effect.

D. History of the disputes concerning archives in the context of the succession of States

57. The Special Rapporteur considers that, for the purpose of giving a general historical conspectus of the disputes relating to archives, he cannot do better than to submit a table of the agreements pertaining to transfers of archives concluded from 1600 to the present time. He has drawn up the table essentially on the basis of reports and tabulations prepared by Mr. Robert-Henry Bautier,[43] Mr. Charles Kecskeméti,[44] Mr. Bernard Mahieu[45] and Mr. Christian Gut.[46] The authors of these tabulations have indicated that they have taken into account the agreements discussed and referred to by the Special Rapporteur in his eighth report submitted to the Commission in 1976.[47]

58. Relying on all the works cited above, and on the agreements mentioned in his third, fourth, sixth and seventh reports,[48] the Special Rapporteur submits the following table, which makes no claim to be exhaustive. In so far as the table does not mention certain agreements which deal with archives but which are mentioned in the tabulations prepared by the expert archivists named above, the reason is that the treaties in question do not touch on the topic of the succession of States. A number of (mainly medieval) treaties concerning Europe which antedate the year 1600 the year chosen by the Special Rapporteur as the starting point, and some others later than 1600 are referred to in a doctoral thesis cited earlier in this report.[49]

[41] Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Economic Declaration", sect. XIV (A/9330 and Corr.1, pp. 73–74).

[42] Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, annex IV, resolutions Nos. 17 and 24 (A/31/197, pp. 136 and 148).

[43] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 11–56.

[44] "Les contentieux archivistiques: etude préliminaire sur les principles et les critères à retenir lors des négociations", UNESCO document PGI-77/WS/1, reproduced in: *Dix-Septième Conférence internationale de la Table ronde des archives*, "Constitution et reconstitution des patrimoines archivistiques nationaux" (1977), document 2.

[45] "Tableau historique des accords portant sur des transferts d'archives": *ibid.*, "Constitution et reconstitution des patrimoines archivistiques nationaux", (1977), appendix 2.

[46] "Constitution et reconstitution des patrimoines archivistiques nationaux" in: France, Direction des archives de France, *Actes de la dix-septième Conférence internationale de la Table ronde des archives* (Paris, Imprimerie nationale (at press)).

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

[48] *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226; *Yearbook ... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1; *Yearbook ... 1973*, vol. II, p. 3, document A/CN.4/267; *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[49] Jacob, *op. cit.*, *passim*.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
1	17 January 1601	Treaty of Lyons	France/Savoy	Cession by the Duchy of Savoy of the territories of Bresse, Bugey, Gex and Valromey to France. Handing over of legal documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
2	26 January 1622	Peace of Nikolsburg	Holy Roman Empire/ Transylvania	Return by Transylvania of the archives of the Chamber of Szepes seized during the military campaign and agreement for the exchange of authentic copies in respect to the archives of the seven counties of north-eastern Hungary ceded to Transylvania.
3	13 August 1645	Treaty of Brömsebro, art. 29	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
4	30 January 1648	Treaty of Münster, art. 69	Spain/United Provinces of the Netherlands	Handing over of archives to the United Provinces.
5	24 October 1648	Treaty of Münster, art. 110	France/Holy Roman Empire	*Status quo* as regards archives removed.
6	24 October 1648	Treaty of Osnabrück, art. 16	Sweden/Holy Roman Empire	Reciprocal handing over of archives.
7	22 July 1657	Treaty of Wehlau	Poland/Transylvania	Return of cultural property.
8	25 February 1658	Treaty of Roskild, art. 10	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
9	7 November 1659	Treaty of the Pyrenees, art. 54	France/Spain	Specifies a time-limit of three months for the handing over of archives to the successor State.
10	3 May 1660	Treaty of Oliva, art. 9	Sweden/Poland	Return of the archives of the Polish Chancellery (Treaty implemented in 1798: archives handed over to Prussia).
11	27 May 1660	Treaty of Copenhagen, art. 14	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
12	26 December 1661	Treaty of Partition of territories beyond the Meuse, art. 6	Spain/United Provinces	Return of archives removed.
13	17 September 1678	Treaty of Nimeguen, art. 20	France/Spain	Reciprocal handing over of archives (following the cession and return of territories). Distinction drawn between *historical* documents (which the 17th century treaties called "literary"), which remain with the predecessor State, and *administrative* archives, which pass to the successor State (treaty of 5.2.1679, art. 22; treaty of 17.7.1679, art. 6). Return of the Lille and Ghent archives (treaty of 17.9.1678, art. 20); of Lorraine archives (treaty of 5.2.1679, art. 22).
14	5 February 1679	Treaty of Nimeguen, art. 22	France/Holy Roman Empire	
15	17 July 1679	Treaty of Nimeguen, art. 6	France/Holy Roman Empire	
16	26 September 1679	Treaty of Lund, art. 12	Denmark/Sweden	Handing over to the annexing State of letters and papers, irrespective of their nature, concerning administration (justice, the militia, taxes).
17	20 September 1697	Treaty of Ryswick, art. 16	France/Spain	Reciprocal handing over of archives (upon the cession and return of territories).
18	11 April 1713	Treaty of Utrecht, art. 22	France/Austria/United Provinces	Mutual cession of archives with the ceded provinces.
19	15 November 1715	Barrier Treaty	England/Holy Roman Empire/United Provinces	Roermond archives left intact, after the partition of Gelderland; handing over of inventories; issue of copies.
20	20 November 1719	Treaty of Stockholm, art. 3	Sweden/Hannover	Handing over of Bremen–Verden archives to Hannover.
21	21 January 1720	Treaty of Stockholm, art. 11	Sweden/Prussia	Reciprocal handing over of archives.
22	3 June 1720	Treaty of Stockholm, art. 11	Sweden/Denmark	Return of archives removed.
23	30 November 1721	Treaty of Nystad, art. 3	Sweden/Russia	Mutual cession of archives (operation continued until 1825).
24	28 August 1736	Convention of Vienna	Austria/France	Upon the cession of Lorraine and the Duchy of Bar to France, the archives followed the provinces, the Duke retaining his personal papers.
25	7 August 1743	Treaty of Åbo, art. 11	Sweden/Russia	Return of archives removed.
26	20 February 1746	Capitulation of Laeken, art. 14	France/Austria	Maintenance of archival collections intact.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
27	18 October 1748	Treaty of Aachen, art. 11	France/Austria	Mutual cession of the archives of territories ceded and returned.
28	24 March 1760	Treaty of Limits, art. 16	France/Sardinia	Handing over by both parties in good faith, within a period of six months, of documents and title deeds concerning reciprocal cessions and those of territories exchanged under the treaties of Utrecht, Lyons and other earlier treaties.
29	November 1762	Negotiations	France/Savoy	Division of the archival collection of the Chambéry Accounts Office (one of two).
30	10 February 1763	Treaty of Paris, art. 22	France/England	Handing over of archives on the basis of the principle of functional connection (not implemented).
31	15 February 1763	Treaty of Hubertsburg	Prussia/Poland	Handing over by Prussia to Poland of archives belonging to Polish offices.
32	15 February 1763	Treaty of Hubertsburg	Prussia/Austria	Demand by Frederick II that Austria faithfully return all archives of Silesian localities, which were returned to him.
33	16 May 1769	Treaty of Versailles, art. 38	France/Austria	Reciprocal handing over of archives for all ceded provinces.
34	11 September 1772	Declaration of the Empress Maria Theresa (Vienna)	Austria/Poland	Declaration of claims to Polish cultural property.
35	13 September 1772	Declaration of King Frederick II (Berlin)	Prussia/Poland	Declaration of claims to Polish cultural property.
36	18 September 1772	Declaration of St. Petersburg	Russia/Poland	Declaration of claims to Polish cultural property.
37	16 March 1775	Treaty of Warsaw (first partition of Poland)	Austria/Poland	Archives remained in the ceded territories; commissioners were given responsibility for determining what was to be sent to Poland; authentic copies issued to Polish nationals for fixed charge.
38	20 October 1795	Treaty of St. Petersburg (third partition of Poland)	Russia/Prussia/Austria	Archives taken to Russia and then divided on the basis of territorial connection.
39	17 October 1797	Treaty of Campoformio, art. 13	France/Austria	Return by Austria of archives taken from the Austrian Netherlands.
40	9 February 1801	Treaty of Peace of Lunéville, art. 17	France/Austria	Return by Austria of archives taken from the Austrian Netherlands.
41	1 October 1801	Treaty of San Ildefonso	Spain/France	Cession of Louisiana to France: archives repatriated, except papers relating to frontiers.
42	30 April 1803	Treaty of Paris	France/United States of America	Handing over of deeds of ownership and sovereignty to the United States of America.
43	7 July 1807	Treaty of Tilsit	France/Prussia	Handing over of archives to the Grand Duchy of Warsaw and to the Netherlands (local archives and Berlin documents).
44	17 September 1809	Treaty of Fredrikshamm	Sweden/Russia	Transfer of archives by Sweden upon the cession of Finland to Russia.
45	2 December 1813	Secret Treaty of Frankfurt	Austria and its allies/ Elector of Hesse	Devolution of archives centralized at Cassel under the Kingdom of Westphalia; establishment of a Commission to separate the papers, instruments and documents belonging to the provinces formerly part of the Kingdom of Westphalia and to hand over to each sovereign those relating to the territories governed by him.
46	14 January 1814	Treaty of Kiel, art. 21	Sweden/Denmark	Handing over of archives upon the cession of Norway to Sweden.
47	30 May 1814	Treaty of Paris	France/Allied Powers	Return of archives assembled in Paris by Napoleon I.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
48	29 March 1815	Protocol on the cessions by the King of Sardinia to the Canton of Geneva	Sardinia/Switzerland	Undertaking by the King of Sardinia to cede to the Canton of Geneva "the deeds, land registers and documents concerning things ceded as soon as possible" (art. 4).
49	29 March 1815	Treaty between Prussia and Hannover, art. 8	King of Prussia and the King of England in his capacity as King of Hannover	Reciprocal handing over within two months of "Crown deeds, documents and papers of the ceded territories".
50	3 May 1815	Treaty of Vienna, art. 38	Russia/Prussia for their respective territories in former Poland	Reciprocal return of archives concerning ceded territories; any document concerning both parties to be held by the party in possession of it, but an attested and authenticated copy to be given to the other party.
51	18 May 1815	Convention	Prussia/Saxony	The originals to be retained by Saxony, which shall hand over authenticated copies to Prussia.
52	7 June 1815	Treaty of Vienna, art. 14	Sweden/Prussia	Handing over of archives to Prussia (upon the cession of Swedish Pomerania).
53	16 March 1816	Treaty of Turin	Sardinia/Switzerland	Upon the delimitation of the frontiers between Sardinia and the Canton of Geneva, division of archives (including the apportionment of memoranda) on the basis of the principle of territorial connection.
54	7 October 1816	Boundary Treaty signed at Cleves, art. 44	Prussia/Netherlands	Handing over of administrative archives to the new authorities of the ceded territory; the administrative archives of communes divided by the new boundary to be handed over to the State receiving the chief town of the commune, which must "give access thereto to the other party whenever necessary".
55	11 November 1817	Treaty of Berlin	Prussia/Sweden	Reciprocal return of archives concerning the ceded territories.
56	22 February 1819	Treaty of Washington	Spain/United States of America	Handing over to the United States of America of documents relating to the ownership and sovereignty of Florida.
57	1 September 1819	Convention	Sweden/Denmark	Confirmation of the Treaty of Kiel (handing over of archives upon the cession of Norway to Sweden).
58	19 April 1839	Treaty of London, art. 13, para. 5	Netherlands/Belgium	Handing over of archives to Belgium (administrative files of the period 1815–1830).
59	5 November 1842	Convention	Netherlands/Belgium	Handing over of archives to Belgium pursuant to the Treaty of London.
60	13 September 1851	Convention	Denmark/Sweden/Norway	Handing over of documents by Denmark to Norway.
61	10 November 1859	Treaty of Zurich, arts. 2 and 15	France/Austria/Sardinia	Handing over by Austria of documents concerning Lombardy.
62	24 March 1860	Treaty of Turin	France/Sardinia	Cession of Savoy and Nice to France; establishment of a joint commission to prepare the transfers.
63	23 August 1860	Convention of Paris	France/Sardinia	Agreement on the cession to France of administrative, religious and judicial archives, the French Government to return Sardinian royal archives; provision made for copies of documents.
64	21 November 1860	Convention (Turin)	France/Sardinia	Handing over of archives; negotiations continued until 1949; transfers completed in 1952.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
65	30 October 1864	Treaty of Vienna, art. 20	Prussia/Austria/Denmark	Handing over by Denmark of current files and archives taken from the Duchies (Schleswig, Holstein, Lauenburg); implemented in 1876.
66	3 October 1866	Treaty of Vienna, art. 18	Austria/Italy	Reciprocal handing over of administrative files on the basis of respect of archival collections.
67	30 March 1867	Convention on the cession of territory (Alaska)	United States of America/ Russia	Handing over to the United States of America of local archives existing in Alaska.
68	14 July 1868	Convention of Florence	Austria/Italy	Concluded upon completion of the work of the bilateral commission responsible for the implementation of the Treaty of Vienna.
69	10 June 1871	Treaty of Frankfurt, arts. 3 and 18	Germany/France	Reciprocal handing over of administrative files (however, documents transferred from Strasbourg and Colmar to other German provinces in accordance with the principle of territorial connection).
70	11 December 1871	Supplementary Convention of Frankfurt	Germany/France	Cession of archives in pursuance of the Treaty of Frankfurt.
71	26 April 1872	Convention of Strasbourg	Germany/France	Special Convention concerning the archives of the Strasbourg Academy.
72	10 December 1898	Treaty of Paris, art. 8	Spain/United States of America	Handing over to the United States of America of deeds of sovereignty concerning Puerto Rico, Guam and the Philippines. Cession to Cuba of local archives.
73	27 April 1906	Exchange of Notes constituting a Convention	Sweden/Norway	Division of previously joint archives of consulates.
74	4 August 1916 (published on 25 January 1917)	Convention for the purchase of territory, art. 1, para. 3	Denmark/United States of America	Upon the cession of the Virgin Islands by Denmark to the United States of America.
75	24 January 1918	Decree of People's Commissars (Moscow)	USSR/Poland	Decree on the preservation of monuments belonging to the Polish nation; return of cultural property.
76	28 June 1919	Treaty of Versailles, part III, sect. I, art. 78	Germany/Belgium	Cession of archives; in addition, article 158 concerns the handing over of the archives of Kiaochow by Germany to Japan.
77	28 June 1919	Treaty of Versailles, part III, sect. V, art. 52	Germany/France	Cession of archives.
78	10 September 1919	Treaty of Saint-Germain-en-Laye, arts. 93, 97, 192, 193, 194, 196, 249 and 250	Austria/The Allied Powers	Handing over by Austria of the archives of ceded territories; return of archives removed (Italy, Czechoslovakia, Romania, Poland, Yugoslavia).
79	27 November 1919	Treaty of Neuilly-sur-Seine, art. 126	Bulgaria/Kingdom of the Serbs, Croats and Slovenes	Handing over by Bulgaria of archives removed from the territory of the former Kingdom of Serbia.
80	9 January 1920	Financial Agreement (Paris Agreement)	Germany/Poland	Return of collections of archives to Poland.
81	2 February 1920	Treaty of Tartu	FSRSR (Federal Socialist Republic of Soviet Russia)/Estonia	Awarding the archives of local institutions to Estonia.
82	4 May 1920	Convention, arts. 5, 6 and 7	Austria/Italy	In pursuance of article 196 of the Treaty of Saint-Germain-en-Laye, Austria to cede to Italy all historical archives originating from territories transferred to Italy, with the exception to those removed to Austria before 1790 and those not meeting the criteria of territorial connection to origin.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
83	18 May 1920	Convention	Austria/Czechoslovakia	Handing over of historical collections of Bohemia concentrated in Vienna, and of files subsequent to 1888.
84	2–4 June 1920	Treaty of Trianon, art. 77, paras. 175–178	Hungary/The Allied Powers	Cession of files less than 30 years old to Czechoslovakia and to the Kingdom of the Serbs, Croats and Slovenes, and to Romania (uniting of Transylvania and Banat to Romania).
85	12 July 1920	Treaty of Moscow, art. 9	FSRSR/Lithuania	Awarding the archives of local institutions to Lithuania.
86	10 August 1920	Treaty of Sèvres, art. 1	Italy/Poland/Romania/ Kingdom of the Serbs, Croats and Slovenes	States which were formerly part of the Austro-Hungarian monarchy or whose territories include part of the monarchy's former domain, to return each other's military, civil, financial and legal archives and provide for mutual exchange of information.
87	10 August 1920	Treaty of Sèvres, art. 1	Turkey/the Allied Powers	Handing over of the archives of ceded territories by Turkey and return of archives removed.
88	11 August 1920	Treaty of Moscow, art. 11	FSRSR/Latvia	Awarding archives of local institutions to Latvia.
89	14 October 1920	Treaty of Dorpat [Tartu], art. 29	FSRSR/Finland	Mutual handing over of archives concerning solely or mainly the other party and its history.
90	12 November 1920	Treaty of Rapallo, art. 2	Italy/Kingdom of the Serbs, Croats and Slovenes	Delimitation of the territory of Zara with provision, in a separate convention, for the division of the archives between the territory assigned to Italy and that remaining attached to the Kingdom of the Serbs, Croats and Slovenes.
91	18 March 1921	Treaty of Riga, art. 11	Poland/FSRSR	Return of archives removed; handing over to Poland of archives of central administrations responsible mainly for Polish affairs.
92	5 October 1921	Convention of Vienna, arts. 1–22	Austria/Romania	Handing over by Austria to Romania of archives, *objets d'art* and scientific and bibliographical material.
93	6 April 1922	Convention, arts. 1–6	Austria/Hungary/Italy/ Poland/Romania/ Czechoslovakia/ Kingdom of the Serbs, Croats and Slovenes	Intended to settle various difficulties arising as a result of the application of the Treaty of Saint-Germain-en-Laye, the convention provides for exchanges of copies of documents, the allocation of archives relating to industrial property, refers to the obligation to respect of collections and contemplates the preparation of lists of claims.
94	10 April 1922	Convention	Germany/Denmark	Mutual cession of administrative archives.
95	18 June 1922	Agreement of Oppeln	Germany/Poland	Handing over of administrative documents to Poland.
96	14 October 1922	Agreement of Vienna	Romania/Czechoslovakia	Mutual handing over of archives concerning the other party (inherited from the former Austro-Hungarian monarchy).
97	23 October 1922	So-called "Santa Margherita" Protocol and Exchange of Notes, arts. 23, 25, 26, 27, 28, 29, 30 and 31	Italy/Kingdom of the Serbs, Croats and Slovenes	Settlement of practical questions relating to the application of clauses of the Treaty of Rapallo, respect of archival collections (but reciprocal access and copies), principle of functional connection, the archives of the Republic of Venice relating to Zara remaining intact in the possession of the Kingdom of Italy.
98	27 February 1923	Agreement	France/Austria	Reciprocal handing over of documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
99	3 May 1923	Convention of Danzig	Italy/France/Japan/ United Kingdom	Archives building and its contents returned to the city of Danzig, with the exception of archives returned to Poland; agreements may be made between Poland and Danzig for the conservation and management of these documents.
100	14 June 1923	Agreement of Poznán	Germany/Poland	Handing over of documents of waterway co-operatives and dike conservation associations.
101	26 June 1923	Convention	Austria/Kingdom of the Serbs, Croats and Slovenes	Pursuant to application of the Treaty of Saint-Germain-en-Laye: handing over by the Kingdom of the Serbs, Croats and Slovenes of archives removed and of archives of administrations of ceded territories; a start was made with the implementation of this convention.
102	24 July 1923	Treaty of Lausanne, arts. 67 and 139	United Kingdom/France/ Italy/Japan/Greece/ Romania/Kingdom of the Serbs, Croats and Slovenes/and Turkey	Reciprocal handing over of administrative documents concerning Turkey, Greece, Romania, the Kingdom of the Serbs, Croats and Slovenes, and former Turkish territories, with provision for the making of copies and photographs.
103	24 November 1923	Convention of Belgrade	Romania/Kingdom of the Serbs, Croats and Slovenes	Reciprocal handing over of archives.
104	16 April 1924	Convention of Bucharest	Hungary/Romania	Reciprocal handing over of archives.
105	12 August 1924	Convention of Belgrade	Italy/Kingdom of the Serbs, Croats and Slovenes	An instrument of general scope relating to the return of cultural property, documents, etc., the handing over of which had suffered some delay.
106	31 October 1924	Protocol of Vienna, arts. 1–9	Italy/Austria	Protocol supplementary to the Convention of 6 April 1922 on archives: archives having a functional connection to be ceded to Italy, those on sovereignty remaining in Austria; provision for reciprocal free access and copies, agreement on communications to individuals and their limits; agreement on military archives.
107	3 December 1924	Convention of Bucharest, arts. 1 (para. 5) and 18	Hungary/Romania	Exchange of papers relating to judicial proceedings, land registers and registers of births marriages and deaths.
108	17 January 1925	Protocol of Vienna	Italy/Austria	Convention supplementary to that of 31 October 1924 (No. 105), settling certain points relating to lists of documents to be returned to Italy by Austria and to the conditions of the return itself.
109	23 April 1925	Treaty of conciliation and arbitration	Poland/Czechoslovakia	Mutual handing over of archives inherited from the Austro-Hungarian monarchy concerning either party.
110	20 July 1925	Convention of Nettuno, arts. 1–15	Italy/Kingdom of the Serbs, Croats and Slovenes	Convention made pursuant to the treaty concerning Fiume signed at Rome on 27 January 1924: agreement on the maintenance at Fiume of the archives of the town and district, and handing over of the archives relating to Fiume kept in the territory of the Kingdom of the Serbs, Croats and Slovenes; conversely, the Kingdom to receive all archives concerning the territory transferred to it.
111	28 May 1926	Convention of Baden	Austria/Hungary	Handing over of collection of archives to Hungary; establishment of a permanent Hungarian delegation at Vienna.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
112	27 December 1926	Agreement of Berlin	Germany/Poland	Handing over to Poland of administrative documents and registers of births, marriages and deaths.
113	15 October 1927	General Arbitration Convention	Denmark/Iceland	Reciprocal handing over of documents.
114	26 October 1927	Convention	Poland/Czechoslovakia	Mutual handing over of archives inherited from the Austro-Hungarian monarchy concerning either party.
115	23 May 1931	Convention of Rome, arts. 1–9	Italy/Czechoslovakia	Settlement concerning an exchange of documents or copies relating to military personnel who had been members of the former Austro-Hungarian army.
116	26 October 1932	Agreement of Vienna	Austria/Poland	Handing over of archives to Poland (implementation in 1938).
117	30 January 1933	Convention of Belgrade, arts. 1–11	Romania/Yugoslavia	Reciprocal exchange of archives.
118	15 December 1933	Convention	Germany/Denmark	Mutual cession of archives.
119	1934	Decision of Congress of the United States of America	United States of America/ Philippines	Transfer to the Philippines of archives seized in 1902.
120	2 February 1935	Agreement of Rome, arts. 15–16	Austria/Italy	General cultural agreement providing, as regards archives, for exchanges of originals or copies, subject to observance of the rule on respect of collections; direct loans between repositories of the two States.
121	16 February 1935	Cultural Convention, arts. 13–15	Hungary/Italy	Containing clauses, with regard to Hungary, analogous to those relating to Austria in the Agreement mentioned above.
122	31 May 1935	Protocol of Return	Romania/USSR	Return of 1,443 crates of archival documents and securities evacuated to Moscow by the Romanian Government in 1917.
123	1937	Exchange of Notes	Denmark/Norway	Transfer of archives from Denmark to Norway.
124	23 November 1938	Cultural Agreement, art. 27	Germany/Italy	Agreement for facilitating the reciprocal loan of documents between both States in the interest of scientific research.
125	23 March 1939	Agreement of Tokyo	Italy/Japan	Convention on cultural collaboration.
126	7 September 1940	Treaty of Craiova, annex B, item 2	Bulgaria/Romania	Cession of archives of the southern Dobrudja and issue of authentic copies of central archives to Bulgaria.
127	December 1940	Exchange of letters constituting an Agreement	Spain/France	Handing over to Spain of the Simancas archives, which had been transferred to France by Napoleon I and had remained in Paris after 1814 (implemented in May–July 1941).
128	8 April 1943	Agreement of Bucharest	Italy/Romania	Convention on cultural collaboration (denounced on 4 March 1950).
129	11 February 1945	Yalta Conference	USSR/United States of America/United Kingdom	Laid down the principles governing reparations.
130	2 August 1945	Potsdam Agreements	USSR/United States of America/United Kingdom/France	Specified the terms for the return of property looted in the occupied territories, particularly Poland.
131	20 February 1945	Act No. 10 of the Allied Control Council [Germany], art. 2, para. 1(b)	Allied Powers	Any looting of public property declared to be a war crime.
132	12 February 1946	Mutual Agreement	Poland/Czechoslovakia	Reciprocal return of archives.
133	27 January 1947	Aide-mémoire relating to the Peace Treaty with Germany	Poland/United Nations	Documents transmitted to the United Nations by the Polish Government, for the Conference of Deputy Ministers for Foreign Affairs preceding the Peace Treaty with Germany; reaffirmation of Poland's claims to the return of collections of archives.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
134	10 February 1947	Treaty of Paris, arts. 7, 12, 23, 25, 29, 37, 75, 77 and 78; Annex X, art. 4; Annex XIV, arts. 1 and 7	Italy/Allied Powers	Return by Italy to France of archives relating to Savoy and Nice antedating 1860 and not yet returned, pursuant to the instruments of 24 March and 23 August 1860. Return by Italy to China of archives and cultural property relating to Tientsin. Cession or return to Yugoslavia of archives which had been removed or those which should be ceded to Yugoslavia pursuant to the Agreements of 1924 and 1928, and those relating to newly ceded territories (Istria, Zara, etc.). Cession to the territory of Trieste of all archives and property concerning it. Return by Italy to Albania and to Ethiopia of archives removed from those territories.
135	10 February 1947	Treaty of Paris, particularly chap. V, art. 22	Bulgaria/Finland/ Romania/Allied Powers	Return to Bulgaria, Finland and Romania of all looted documents and property, or compensation by articles of equal value (principal Powers concerned: Poland, Czechoslovakia, Yugoslavia).
136	10 February 1947	Treaty of Paris, art. 11	Hungary/Allied Powers	Handing over to Czechoslovakia and Yugoslavia of historical archives constituted on territories ceded between 1848 and 1919.
137	19 October 1947	Protocol of Sofia	Bulgaria/Romania	Return by Romania to Bulgaria of archives and official documents.
138	28 August 1948	Convention	Hungary/Romania	Exchange of court papers and administrative documents.
139	8 March 1949	Exchange of letters constituting an Agreement	France/States of former Indochina	*Status quo* with respect to possession of archives.
140	1 August 1949	Exchange of letters constituting an Agreement	France/Italy	Protocol concluding the work of the joint Franco-Italian commission appointed pursuant to article 7 of the Treaty of Paris: Handing over to France of documents of local interest (Savoy, Nice, Bresse, Bugey, Gex), extracted from collections maintained in Italy. Handing over of documents relating to Italian local history maintained in French archives. Provision for the preparation of a protocol on reciprocal loans.
141	6 August 1949	Exchange of letters constituting an Agreement	Italy/Yugoslavia	Settlement of questions pending between the two countries, under article 67 and paras. 16 and 17 of annex XIV to the Treaty of Paris; procedure to be followed in the case of claims relating to archives.
142	4 November 1949	Agreement of Paris	France/Italy	Cultural convention providing for exchanges of information and documentary material.
143	14 January 1950	Declaration	United Nations	Concerning the devolution to the various States concerned of material of artistic, historical and bibliographical interest recovered in Germany by the allied armies.
144	15 January 1950	Exchange of letters constituting an Agreement	France/States of former Indochina	Agreement on the division of archives.
145	22 November 1950	Agreement on the importation of educational, scientific and cultural materials	States Members of the United Nations and of UNESCO	General agreement on the free circulation of documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
146	15 December 1950	Resolution 388 A (V) of the General Assembly of the United Nations, art. 1, para. 2	Italy/Libya/United Nations	Independence of Libya; transfer to Libya of relevant documents of an administrative character or of technical interest.
147	23 December 1950	Agreement of Rome, arts. 1–9	Italy/Yugoslavia	Agreement relating to the division of archives and documents of administrative and historical interest relating to the territories ceded pursuant to the Treaty of Paris; criteria of functional relevance to be observed, but also those of territorial origin; establishment of a joint commission with headquarters at Gorizia.
148	2 February 1951	Agreement of Paris	France/India	Agreement made in consequence of the cession by France to India of the former *comptoir* of Chandernagore; France to maintain the historical archives and India to receive archives necessary for administration.
149	8 November 1951	Agreement of London	Italy/United Kingdom	Agreement laying down identical conditions in both countries for the access of research workers to documents.
150	5 December 1951	Agreement of Rome	Italy/Netherlands	General agreement on cultural collaboration.
151	24 March 1952	Agreement of Rome, art. 12	Austria/Italy	Confirmation of the provisions of articles 15 and 16 of the cultural agreement of 2 February 1935; general agreement on cultural collaboration.
152	25 April 1952	Protocol of agreement	Norway/Sweden	Cession of archives to Norway.
153	30 June 1953	Exchange of letters constituting an Agreement	Federal Republic of Germany/France	Settlement of the Alsace–Lorraine dispute; maintenance of the *status quo* and microfilming.
154	8 September 1953	Exchange of letters constituting an Agreement	Federal Republic of Germany/France	Same object as the above-mentioned exchange of letters.
155	30–31 October 1953	Standing convention	Belgium/Netherlands	Exchange of archives on the basis of the principle of functional connection.
156	5 October 1954	Memorandum of agreement signed at London	United Kingdom/United States of America/ Italy/Yugoslavia	Italy to resume possession of the territory of Trieste and the zones hitherto administered by the allied military government; Italy thus legitimately retains custody of the archives relating to the region.
157	6 October 1954	Agreement of Paris, arts. 1–5	France/Italy	Handing over by Italy to France of administrative, functional, domanial, notarial (original) and historical archives (in the form of microfilm) relating to the ceded territories of Tenda and Briga.
158	21 October 1954	Agreement of New Delhi, art. 33	France/India	Agreement identical with that concerning Chandernagore and relating to the former French *comptoirs* of Yanaon, Pondicherry, Karikal and Mahé; France to retain custody of the historical archives.
159	15 May 1955	Treaty of State signed at Vienna	Austria/four Occupying Powers (United States of America, United Kingdom, USSR, France)	Return of archives and cultural property (Austria, Italy, Yugoslavia)
160	2 October 1956	Convention	Hungary/Yugoslavia	Handing over of documents to Yugoslavia.
161	28 March 1958	Exchange of letters constituting an Agreement	Poland/Czechoslovakia	Settlement of various questions in dispute, some of them concerning archives.
162	19 April 1958	Protocol of agreement	Hungary/Yugoslavia	Handing over of documents to Yugoslavia.
163	8 April 1960	Frontier Treaty signed at The Hague, art. 8	Netherlands/Federal Republic of Germany	Reciprocal cession of archives corresonding to ceded territories.
164	28 September 1960	Exchange of letters (Moscow)	Romania/USSR	Handing over of archives by the USSR to Romania.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
165	3 December 1960	Agreement of Rome	Italy/Yugoslavia	The contracting parties undertake to facilitate the access of each other's research workers to archives, libraries and museums, very particularly in the case of documents relating to the history of either of the States concerned.
166	29 May 1961	Protocol of agreement	Poland/German Democratic Republic	Mutual return of archives which had been removed.
167	15 September 1961	Protocol of agreement, arts, 1, 2 and 3	Italy/Yugoslavia	Agreement for the settlement of questions relating to the return of archives to Yugoslavia, providing for the handing over of the last documents (many of them from the archives of Trieste) and payment of a sum to meet the cost of the microfilming of documents relating to Yugoslav territory of the period from 1718 to 1918, which will remain in Trieste.
168	17 May 1965	Agreement of Rome	France/Italy	Amendment of article 1 of the Agreement of 4 November 1949.
169	21 September 1965	Protocol	Italy/Hungary	The contracting parties will facilitate study of archival material in both countries, in the interest of historical research and within the limits allowed by the respective regulations.
170	23 December 1966	Exchange of letters constituting an Agreement	France/Algeria	Elaboration of principles governing consultation and collaboration in the matter of archives.
171	7 June 1967	Protocol of Return	France/Algeria	Handing over to Algeria of a first batch of historical archives concerning the period prior to 1830.
172	1 September 1972	Convention of The Hague	The Netherlands/ Indonesia	Mutual microfilming.
173	9 April 1973	Agreement of Mogadishu	Italy/Somalia	Addendum to the cultural agreement of 26 April 1961.
174	31 December 1974	Treaty of Lisbon	Portugal/India	Recognition of India's sovereignty over Goa, Damān, Diu, Dadra and Nagar Aveli; cession to India of administrative, judicial and other archives; transfer to Portugal of other documents; provision for authentic copies.
175	14 March 1975	Exchange of Notes constituting an Agreement	Portugal/India	Conservation in India of archives originating in the ceded territories which concern other Indian territories; conversely, archives in Portugal concerning the ceded territories but also other Indian territories will remain in the former metropolitan country.
176	10 April 1975	Protocol of Return	France/Algeria	Handing over of a second batch of archives concerning the period prior to 1830.
177	22 April–20 May 1975	Exchange of diplomatic correspondence	France/Algeria	Algeria reserves its rights to its historical archives antedating colonization; France declares that it has returned everything that was returnable and declares itself prepared to permit the microfilming of its collections, both of documents dated before 1830 and those of later date.
178	5 July 1975	General Co-operation Agreement, art. 6	Portugal/Cape Verde	Each country will deliver to the other authentic copies of documents held in its archives.
179	12 July 1975	General Co-operation Agreement, art. 5	Portugal/Sao Tome and Principe	Each country will deliver to the other authentic copies of documents held in its archives.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*concluded*)

No.	*Date of treaty*	*Title of treaty and indication of pertinent articles*	*Signatory States*	*Object of treaty*
180	2 October 1975	General Co-operation Agreement, art. 5	Portugal/Mozambique	Same provisions as under No. 178 above.
181	10 November 1975	Agreement of Osimo	Italy/Yugoslavia	Convention on cultural collaboration.
182	22 November 1975	Recommendation of Djakarta	Netherlands/Indonesia	Joint recommendation by experts concerning cultural co-operation (including the transfer of archives).
183	28 January 1977	Memorandum of Willemstad	Netherlands/Antilles	Convention on cultural collaboration prepared by the Inter-Governmental Commission of the Antilles.

E. General principles respecting succession to State archives

59. The drafting of an international law concerning archives is proving a difficult and slow process. Nevertheless, we are gradually emerging from the general confusion which had long prevailed in this field and which is explained to a large extent by the power relationships reflected in the frequently uncompromising provisions concerning archives in peace treaties between States. But before identifying the general principles which, seemingly, should govern succession to State archives, one should draw the conclusions from State practice, as it is reflected in the foregoing table.

1. GENERAL REMARKS ON THE PRACTICE FOLLOWED BY STATES: CONCLUSIONS DRAWN FROM THE STUDY OF THE FOREGOING TABLE

60. Even a cursory look at State practice in respect of succession to State archives discloses a number of facts:

(*a*) Archival clauses are very *common* in treaties on the cession of territories concluded between *European Powers*, and are almost always *absent* in *cases of decolonization.*

(*b*) The removal of archives is a universal and timeless phenomenon. In almost all cases, they are returned sooner or later to their rightful owners, except, it seems, in cases of decolonization. But time had not yet run its full course or produced its effect in this field.

(*c*) Archives of an *administrative or technical nature* concerning the territory affected by the succession of States pass to the successor State in *all types of State succession*, and generally without much difficulty.

(*d*) Archives of an *historical nature* pass to the successor State depending to some extent on the circumstances; archivists cannot always explain their transfer to the successor State nor, in the converse case, can jurists explain why they are kept by the predecessor State.[50]

61. With regard to the first conclusion, practically all treaties on the transfer of territory concluded in Europe *since the Middle Ages* contain special, and often very precise, clauses concerning the treatment of the archives of the territories to which the succession of States relates.[51] The cases of State succession dealt with in such treaties cover, by and large, according to the classification used by the Commission, those concerning the transfer of a part of a territory of one State to another State and the separation of one or more parts of the territory of a State.

62. Conversely, in modern cases of decolonization, very few treaty provisions exist regarding the treatment of archives, despite the very large number of newly independent States. The absence of archival clauses from agreements relating to the independence of colonial territories seems the more surprising as these agreements, of which there are many, govern after all succession not only to immovable but also to movable property, i.e. property of the same type as the archives themselves.[52]

[50] These various conclusions are, with some minor differences, those drawn by Kecskeméti in his study "Les contentieux archivistiques ..." (*loc. cit.*) [see footnote 44 above], which eventually constituted the substance of UNESCO document 20 C/102 (see footnote 31 above).

[51] See the illuminating historical study by Jacob, *op. cit.*

[52] There are very many treaties relating to the transfer of *judicial archives* in cases of *decolonization.* However, this fact by no means contradicts the Special Rapporteur's general remarks. Such cases involve the transfer of judicial records of litigation still under adjudication in courts of appeal or cassation situated in the territory of the former administering Power and involving nationals of the newly independent State. The predecessor State cannot continue to adjudicate cases henceforward falling under the judicial sovereignty of the successor State. Many agreements on this subject could be cited. See, for example, as regards France and the newly independent territories: Agreement concerning the transitional provisions in respect of justice between France and the Central African Republic of 12 July 1960 (*Journal officiel de la République Française, Lois et décrets* (Paris), 92nd year, No. 176 (30 July 1960), p. 7043, and *Materials on succession of*

(*Continued on next page.*)

63. There are many reasons for this. In the first place, decolonization cannot be total and instantaneous *ab initio*; rather, at least to begin with, it is purely nominal, and only gradually acquires more substance and reality, so that the question of archives seldom receives priority treatment during the early, almost inevitably superficial, stage of decolonization. Secondly, newly independent States are plunged straightaway into day-to-day problems and have to cope with economic or other priorities which absorb all their attention and prevent them from perceiving immediately the importance of archives for their own development. Thirdly, the under-development inherited in all fields by newly independent States is also reflected precisely in an apparent lack of interest in the exercise of any right to the recovery of archives. Lastly, and above all, the power relationships existing between the former administering Power and the newly independent State most often enables the former to evade the question of the transfer of archives and to impose unilateral solutions of its own choice in this respect. For all these reasons, and doubtless others besides, provisions relating to archives are absent from almost all independence agreements.

2. General principles concerning succession to State archives

(a) *Restitution and co-operation*

64. In view, firstly, of the fearful complexity of the problem of archives, secondly of the pride of national leaders in matters of archives belonging to or concerning their respective countries, and finally of the acquisitive impulse of archivists of all countries, and until the still far-off time when the archives of all States are considered "a common heritage of mankind" accessible to all, the Commission might, if it considers it advisable, confine itself to establishing a general legal framework for succession to State archives, leaving the States concerned to find flexible solutions from case to case, in the light of all the special circumstances. However, the Commission cannot usefully suggest valid solutions, offering scope for co-operation among States, unless it takes account of the recommendations of the international organizations, in particular UNESCO, which reflect the *new, contemporary demands of States with regard to their right to archives and to their cultural heritage.*

65. More generally, the Commission should take fully into account the current of opinion now materializing, *quite apart from any question of State succession*, in support of promoting cultural exchanges among States and, in this context, facilitating access to the historical archives of countries for researchers from other countries or for the microfilming of archival collections by other interested States.[53] For example, independently of any question of State succession, Italy has concluded a considerable number of cultural agreements, some of which facilitate access to and, if necessary, the reproduction of Italian archives.[54]

66. It is perfectly clear—and this remark is relevant also to the study of disputes concerning archives in the

(*Footnote 52 continued.*)

States in respect of matters other than treaties (United Nations publication, Sales No. E/F.77.V.9), p. 150); Agreement between France and Chad of the same date (*Journal officiel de la République française* (*op. cit.*), p. 7044, and *Materials* ... (*op. cit.*), p. 157); Agreement between France and the Congo of the same date (*Journal officiel* ... (*op. cit.*), p. 7043, and *Materials* ... (*op. cit.*), p. 163); Agreement between France and Gabon of 15 July 1960 (*Journal officiel* ... (*op. cit.*), p. 7048, and *Materials* ... (*op. cit.*), p. 182); Agreement between France and Madagascar of 2 April 1960 (*Journal officiel* ... (*op. cit.*), 92nd year, No. 153 (2 July 1960), p. 5968, and *Materials* ... (*op. cit.*), p. 290); Agreement between France and the Federation of Mali of 4 April 1960 (*Journal officiel* ... (*op. cit.*), p. 5969, and *Materials* ... (*op. cit.*), p. 315); exchange of letters between France and Upper Volta of 24 April 1961 relating to the transfer of records pertaining to cases pending in the Conseil d'Etat and the Cour de cassation (*Journal officiel* ... (*op. cit.*), 94th year, No. 30 (5–6 February 1962), p. 1315, and *Materials* ... (*op. cit.*), p. 439); exchange of letters between France and Dahomey of 24 April 1961 (*Journal officiel* ... (*op. cit.*), p. 1285, and *Materials* ... (*op. cit.*), p. 128); exchange of letters between France and Mauritania of 19 June 1961 (*Journal officiel* ... (*op. cit.*), p. 1335, and *Materials* ... (*op. cit.*), p. 343); exchange of letters between France and Niger of 24 April 1961 (*Journal officiel* ... (*op. cit.*), p. 1306, and *Materials* ... (*op. cit.*), p. 372); exchange of letters between France and the Ivory Coast of 24 April 1961 (*Journal officiel* ... (*op. cit.*), p. 1269, and *Materials* ... (*op. cit.*), p. 231); and others.

[53] There is, of course, also an Agreement on the importation of educational, scientific and cultural materials (with protocol), opened for signature at Lake Success, N.Y., on 22 November 1950, adopted under the aegis of UNESCO (United Nations, *Treaty Series*, vol. 131, p. 25).

[54] See *inter alia*, the Agreement of London (Italy/United Kingdom) of 8 November 1951, which provides for equal treatment for the access of research workers to documents; the Agreement of Rome (Italy/Netherlands) of 5 December 1951, concerning cultural co-operation; the Agreement of Rome (Italy/Austria) of 24 March 1952, on cultural co-operation; the Agreement of Rome (Italy/Spain) of 11 August 1955, on exchanges of documents and information; the Bonn Agreement (Italy/Federal Republic of Germany) of 8 February 1956, on the same subject; the Agreement of Rio de Janeiro (Italy/Brazil) of 6 September 1958, on the same subject; the Agreement of Rome (Italy/Iran) of 29 November 1958, to facilitate reciprocal access of researchers to archives and libraries; the Agreement of Moscow (Italy/USSR) of 9 February 1960 on exchanges of documents and information; the Agreement of Lima (Italy/Peru) of 8 April 1961, on the same subject; the Agreement of Buenos Aires (Italy/Argentina) of 12 April 1961, on the same subject; the Agreement of Rome (Italy/Somalia) of 26 April 1961, on the same subject; the Agreement of Bogota (Italy/Colombia) of 30 March 1963, on the same subject; the Agreement of Warsaw (Italy/Poland) of 26 March 1965, on the same subject; the Protocol of 21 September 1965 (Italy/Hungary), to facilitate the study of archival material in both countries; the Agreement of Rome (Italy and ten South American countries) of 1 June 1966, on exchanges of documents; the Agreement of Mexico City (Italy/Mexico) of 23 August 1966, on the same subject; the Agreement of Osimo (Italy/Yugoslavia) of 10 November 1975, on cultural co-operation.

succession of States—that *from the earliest times, every State has possessed archives of interest to every other State.* For example, most of the historical archives relating to Australia and its territories are kept in the United Kingdom. The historical archives of Argentina are to be found mainly in Spain, at the Archivo Histórico Nacional in Madrid, and in France, in the Manuscripts Department of the Bibliothèque Nationale, in Paris. Important archives concerning the history of Barbados from the fifteenth century are kept in Spain, the United States of America and the United Kingdom. Large collections of archives concerning the history of Belgium are kept in Austria, Spain, France, Luxembourg, the Netherlands and the Vatican. Historical archives concerning Brazil are to be found in Spain, Portugal, Italy, the United Kingdom, Sweden, Switzerland, Austria, the USSR and the United States of America. *Documents relevant to the study of the history of Bulgaria are scattered throughout 24 different countries*, including such newly independent States as Egypt, Tunisia and Morocco. The history of Canada owes much to collections of archives kept in France, the Vatican, the United Kingdom and the USSR. *Archives relating to the history of France are to be found in collections kept in a score of countries*, in particular, the Federal Republic of Germany, Belgium, Bulgaria, Canada, the Congo, Czechoslovakia, Greece, Italy, the Netherlands, Romania, Senegal, Sweden, the USSR, the United States of America, the Vatican and Yugoslavia. Archives relating to Poland can be found in the Federal Republic of Germany, Sweden, the United States of America and the United Kingdom. Important historical documents concerning the history of the United States of America, France and the United Kingdom are kept in Canada. In the Congo, the national archives of Brazzaville contain important collections concerning the former territories of French Equatorial Africa, and archives concerning the States which constituted former French West Africa are to be found in Dakar (Senegal), having been assembled there by France.[55]

67. Two conclusions can be drawn from the foregoing. Firstly, it is worth noting that (*a*) *every State can help every State in compiling the history of every State*, and (*b*) by so doing, can make all countries aware of their interdependence in respect of historical archives so that they will be capable, in the words of UNESCO, of "managing mankind's knowledge" together.[56] However, the intricate interrelationships of archive problems which this interdependence of States in the field of archives tends to suggest, cannot conceal the obvious fact that *it is the most developed States that can and should provide most assistance to the others.* It is not surprising that this should be so in the field of archives, since it is also perfectly clear in the field of development in general. Secondly, if such an identifiable trend towards archival co-operation among States exists today, thereby making the archives of some States more readily accessible to others which yet have no claim to the ownership thereof, *then* a fortiori *the claims of successor States to archives in which they do have a right of ownership, under the rules of the succession of States, can no longer be disregarded.*

(*b*) *Demythification of the problems concerning, disputes over archives*

68. In his intelligent study cited earlier, Kecskeméti calls for the demythification of the problems raised by disputes over archives. Referring first to States against which claims concerning archives are made, i.e. generally the *predecessor States*, he rightly points out that:

(i) The transfer of originals, provided that it is legally justified and is carried out in accordance with archival principles, should not be regarded as a depletion of the national heritage.

While it is the duty of archivists to ensure the integrity of the national heritage, nevertheless, as regards archives, irregular accretions are just as contrary to the concept of integrity as are removals.

(ii) Delaying tactics such as failure to communicate information can only prolong disputes. It is better to arrive at an agreement based on mutual trust, rather than to protract the dispute.

(iii) Microfilming is not a panacea, but simply a technical process which makes it possible to copy the originals and to transport the copies easily and cheaply. The microfilming of all or of part of document collections for countries so requesting, while it is a solution as far as providing access to documents is concerned, is nevertheless not a solution if the documents in question are legally part of the heritage of the requesting country. Microfilms can just as easily be produced for the purpose of being kept *in situ* after the transfer of the originals.[57]

69. One might add that the restitution of archives by the predecessor State (particularly those of a historical or cultural nature) undeniably comes up against difficulties, not the least of which is the psychological obstacle. As the Special Rapporteur has pointed out,[58] there is an incriminating aspect to the act of restitution, for it seems to imply that the holding of the archives by the predecessor State was unlawful. However, the *status quo* and the extension of the claim, which will inevitably grow with the passage of time, will make the holding of archives appear increasingly unlawful and intolerable.

[55] See C. Gut, "Constitution et reconstitution des patrimoines archivistiques nationaux", and in particular "Eléments statistiques pour mesurer l'ampleur du problème", C. Gut and M. Housseau (Dix-Septième Conférence internationale de la Table ronde des archives, 1977, report and appendix 1), which give an impressive survey of the archives concerning each State that are kept by other States. All the information contained in the foregoing paragraph is drawn from this rich report.

[56] UNESCO, *Thinking ahead: UNESCO today and the challenges of tomorrow* (Paris, 1977), p. 353.

[57] Kecskeméti, *loc. cit.*, para. 1.2.

[58] See para. 52 above.

70. So far as the *requesting States* are concerned, Kecskeméti attempts to demonstrate that their claims in respect of archives can be credible only if they are capable of guaranteeing the physical preservation of the archives. This argument, which is actually addressed to the newly independent States, carries no conviction, since, in the first place, it could provide predecessor States with the pretext which they often seek for refusing to return archives and, secondly, the recognition of a right in a certain property cannot be subordinated to the manner in which its titular owner may dispose of his property. Far sounder is the other argument put forward by the same writer, that

> ... documents which are the subject of dispute *are of concern to both parties*,* since they are the product and testimony of a common history (predecessor States and successor States ...).
>
> *All negotiation begins with recognition of this mutual interest*,* even if the two parties have different views on *the events* to which the documents relate and *the place* in which they should be kept.[59]

(c) *Obligation to negotiate and to settle disputes concerning archives*

71. The Commission has adopted a number of articles, some general, others specific to each type of State succession, but all of them proclaiming the principle of the transfer of movable and immovable goods to the successor State. It seems clear that as far as archives are concerned this principle of transfer is even more imperative, since while it may be possible to conceive of a State without a navy, for example, it is impossible to imagine one without archives; for together with other State property they constitute the elements which are the most essential and the most common—so much so that they can be said to be inherent in the State's very existence.

72. It follows that if, because of specific circumstances, the transfer of State archives to the successor State either did not take place or was only partially carried out, thus creating a dispute, the predecessor State and the successor State should be under a duty to negotiate in good faith and with unimpeachable determination to work out a satisfactory solution in order to settle the dispute over archives that has arisen. As the Director-General of UNESCO has said:

> Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through the negotiation and bilateral or multilateral negotiations and agreements between the States involved.[60]

(d) *Transfer of originals pursuant to the principle of the territorial origin of archives*

73. Archivists make a "distinction between archives which are *organically* of interest to a country, constituting its *title deeds* (origin), and those which, while of some relevance to the country in question, for one reason or another do not belong to it, but simply relate to it (relevance)".[61] The first principle, known as the *principle of territorial origin*, applies in cases of the removal of archives from the territory affected by the succession of States. In theory, its application presents no major difficulties, since "in most cases of this type, the right of ownership is automatically determined by the reasons for and the date of the removal, as well as by the date of the establishment of the documents".[62]

74. It is in pursuance of the principle of the territorial origin that the successor State can be said to have the right to the restitution of archives of all kinds (historical, cultural, administrative) which "originate" from the territory or which, in other words, *belong* to it. These are archives which are linked to the territory. This is clearly the case, first, of all the administrative archives of the territory to which the succession of States relates. It is just as clearly the case of archives *antedating* the exercise of sovereignty by the (predecessor) State which had removed the archives—for example, historical archives dating from before the colonization of a territory and removed by the administering Power, or those which had been removed by the preceding successor State (which became the predecessor State in the most recent succession of States) in the case of the transfer of part of one State's territory to another State.

75. The principle of the territorial origin does not, however, constitute a criterion which is reliable in all circumstances for the allocation of archives to the successor State. In the case of decolonization, for example, so-called archives of sovereignty, with the aid of which the colonial Power conducted the political administration of the territory and which were kept in the capital of the territory before being removed to the metropolitan territory when the territory attained independence, should normally be governed by the principle of territorial origin. Such archives, originating from and of *organic* interest to the territory—the territory which was the reason for the creation of these archives and which has ensured their preservation—are not readily, to say the least, transferred to the newly independent State by the predecessor State.

(e) *Transfer of originals pursuant to the principle of functional connection of archives*

76. The administrative and technical archives of the territory affected by the succession of States pass to

[59] Kecskeméti, *loc. cit.*, para. 1.2.

[60] UNESCO, document 20 C/102 (*loc. cit.*), para. 19.

[61] C. Laroche, "Les archives françaises d'outre-mer", *Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer, Séances des 4 et 18 mars 1966* (Paris), t. XXVI, vol. III (March 1966), p. 129.

[62] Kecskeméti, *loc. cit.*, para. 3.2.1.

the successor State in pursuance of the principle of territorial origin, as explained above.[63] They also pass to the successor State pursuant to the *principle of functional connection*, which means that the States concerned are expected to do everything possible in order to ensure the satisfactory operation, regular functioning, normal management and administrative continuity of the territory affected by the succession of States. According to the principle of territorial origin, archives are transferred because they *belong* to the territory in question, whereas according to the principle of functional connection, archives *relating* to the territory may be transferred.

77. However, the application of the principle of the functional connection suffers from more overlapping and uncertainty than does the application of the principle of the territorial origin. An example is the case where the inhabitants of the territory involved leave it in order to settle definitively in the territory of the predecessor State, or where the territory ceded is divided among several successor States and the archives, kept in the capital of the transferred territory, are in the possession of the successor State to which the capital had been ceded. In these cases the archives in question have a functional "relevance" for all concerned. In such cases, the problem can only be resolved through the microfilming or reproduction of the originals. The preparation of substitute copies and their delivery to all the interested States make it possible to safeguard another principle, the one to which archivists rightly attach especial value: the principle of *respect for the integrity* of archival collections. And this brings us to yet one other principle, that of *common heritage.*

(f) *Concept of archives as a common heritage*

78. Consistent with the views of Kecskeméti, the Director-General of UNESCO sets forth this concept as follows:

> Where an archives group or a body of archives results from the activity of an administration where succession is shared between the predecessor State and two or more successor States—i.e. where the archives form part of the national heritages of two or more States but cannot be divided without destroying its juridical, administrative, and historical value—as a realistic solution recourse should be had to the concept of *joint heritage.* The practical result of the application of this concept is that the archives group is left physically intact in one of the countries concerned, where it is treated as part of the national archival heritage, with all of the responsibilities with respect to security and handling implied thereby for the State acting as the owner and custodian of that heritage. The States sharing this joint heritage should then be given rights equal to those of the custodial State.[64]

As one can clearly perceive, this principle has evolved very satisfactorily from the need to reconcile the "heritage" principle of archives with the principle of respect for the integrity of archival collections.

(g) *Principle of the territoriality of archives*

79. Over and above the respect due to what are known as the principles of territorial origin and of functional connection, another doctrine, that of the *territoriality of the archives*, gradually evolved from the practice of States, for it had become manifest in the course of practice that the above principles were by no means unambiguous and were open to various, not to say divergent, interpretations. The "territoriality" of the archives should be taken to denote the devolution of a territory's documents in such a way as to settle its rights, enable it to meet its obligations, preserve continuity in the administration of the territory, and protect the interests of the local population—in short, in a manner which will contribute to the *viability* of the territory to which the succession of States relates. But the meaning of the principle of territoriality should not, mistakenly, be construed narrowly, as the term might suggest. Archives have of course "*a natural purpose which is determined*", according to one author, "*by the territory* to which they relate and in which they should, as far as possible, be preserved. Archives have a useful purpose in that they serve the administration of their territories."[65] However, the principle of the territoriality of archives is not necessarily a mere physical criterion of geographical location; in other words, it does not simply mean the preservation *in situ* of the archives of the territory to which the succession of States relates. It should apply to archives which *concern* or *relate* to the territory as well as to those which *belong* to the territory. It is in this sense that the application of this principle has to be reconciled with the other principles—and that is not always easy.

80. Finally, in cases where the archival dispute arising from the succession of States is not settled by the application of any of the above principles, either singly or in combination, there are other solutions which may be used.

(h) *Subsidiary principles: right to a substitute copy and right to reparation*

(i) *Right to a substitute copy*

81. The right to a substitute copy is exercisable only in cases where it would be physically impossible to accede to the successor State's request for the originals of the State archives to which it might be entitled by virtue of the rules governing the succession of States. This situation arises where there are several successor States, or in cases where the mutilation of the integrity of the archival collection would appear to be most damaging. The development of techniques of *facsimile* or microfilm reproduction mentioned by the Special

[63] See para. 74.

[64] UNESCO, doc. 20 C/102 (*loc. cit.*), para. 25.

[65] Jacob, *op. cit.*, p. 10.

Rapporteur[66] makes this an easy solution, but raises the problem of who would defray the cost of these processes. To the Special Rapporteur, it seems clear that the predecessor State is bound to provide at its own expense any copy of a document of which it cannot transfer the original to which the successor State would be entitled.

(ii) *Right to reparation through delivery of documents of equivalent value*

82. A kind of "right to reparation" came into being through the treaty practice arising out of the peace treaties of 1947 which terminated the Second World War. The provisions of these treaties state that, if it should be impossible to restore certain archival collections or documents that are to be handed over, "objects of the same kind and of approximately equivalent value" are to be delivered.[67]

83. This solution has not found favour with certain archivists; for example, M. Bautier takes the view that an archival document is by definition irreplaceable, but he prefers, curiously enough, that substitutes should be made by microfilming process at the expense of the State which has to make good the wrong occasioned by the non-delivery of the original.[68] In some cases, archives have, in fact, inestimable historical value which is in any case independent of their "operational" value. Consequently, while the microfilm copy satisfies the researcher, it impoverishes the cultural and historical heritage. Only compensation of comparable historical value would appear to be just in such a case. This does not mean that microfilming does not serve a useful purpose. In this way, the twofold requirement of the historical value and the administrative value of the archive in question can be satisfied.

3. Proposals for a draft article

84. After the foregoing analysis, the Commission may wish to consider a draft article of a general character on the transfer of archives to a successor State, applicable to *all types of State succession.* The draft article might be inserted in section 1 (General provisions) of part I (Succession of States to State property.)[69] It would be based on article 9, which lays down the general principle of the passing of State property. Since, however, that article deals only with the transfer of State property "situated in the territory to which the succession of States relates", it would be usefully supplemented by the draft article on archives, for archives are movable objects which might well no longer be physically present in the territory in question, having been removed by the predecessor State just before the date of the succession of States.

85. This, then, would be a reason of some weight for adopting a draft article in general terms setting forth a principle concerning the transfer of archives which, although modelled on article 9, would appropriately supplement it by a reference to property (archives) situated *outside* the territory to which the succession of States relates.

86. There is another reason why the Commission might wish to consider the drafting of a general article on the succession of State archives—the reason which, indeed, justifies this entire report on the subject: *archives, as State property, constitute a very specific case.* The principle of the transfer of State property taken *in abstracto* applies to all property, whether movable or immovable, and is applicable readily to concrete situations involving the transfer of such property as administrative premises or buildings of the State, barracks, arsenals, dams, military installations, all kinds of research centres, factories, manufacturing facilities, railway equipment, including both rolling stock and fixed installations, airfields, including their movable and immovable equipment and installations, claims outstanding, funds, currency, etc. By virtue of their nature, all these forms of State property are susceptible to appropriation and hence to assignment to the successor State, as appropriate, in keeping with the rules for the succession of States. *Such is not necessarily the case with archives, which, by virtue of their physical nature, their contents, and the function which they perform, may seem to be of interest at one and the same time to the predecessor State as well as to the successor State.*

87. Obviously, a State building situated in the territory to which the succession of States relates can only pass to the successor State or, where there is more than one successor State, to one of them subject to compensation awarded to the others. Similarly, monetary reserves—such as gold, for example—can be transferred *physically* to the successor State, or apportioned between the predecesser State and the successor State, or among several successors, if the one or other solution is agreed upon by the parties. There is nothing in the physical nature of State property of this kind that would stand in the way of any solution that is agreed upon by the States concerned.

88. Archives, by contrast, may prove to be *indispensable* both to the successor State and to the predecessor State, and owing to their nature they cannot be *divided* or *split up. However, State archives are objects which have the peculiarity of being reproducible, which is not true of the other fixed and movable property involved in the succession of States. Of all State property, archives alone are capable of being duplicated, which means that both the right of the successor State to recover the archives and the*

[66] See paras. 33–39 above.

[67] For example, Treaty of Peace with Italy, art. 75, para. 9 (United Nations, *Treaty Series*, vol. 49, p. 40).

[68] France, *Les archives dans la vie internationale* (*op. cit.*), p. 141.

[69] For the text of all the articles adopted by the Commission to date, see para. 3 above.

interest of the predecessor State in their use can be satisfied. This peculiarity of archives, as State property, seems to be sufficient reason for the adoption of a specific draft article.

89. If these considerations are thought sufficient to justify the adoption of a general article, it might be drafted on the following lines:

Article A. Transfer of State archives

1. Except as otherwise agreed or decided, and subject to the provisions of paragraph 3 below, State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates, or that belong to that territory, shall pass to the successor State.

2. The successor State will permit any appropriate reproduction of the State archives that pass to it, for the purposes of the predecessor State [or of any interested third State].

3. Except as otherwise agreed or decided, the predecessor State will keep the originals of the State archives referred to in paragrah 1 above, if they are archives of sovereignty, subject to the proviso that it will authorize any appropriate reproduction thereof for the purposes of the successor State.

90. In the above draft, the Special Rapporteur has attempted to take into account all relevant elements of the problem. It will be observed that:

(*a*) Priority is given to *agreement between the parties*, which thus are free to agree upon any specific solution called for by special circumstances;

(*b*) In principle, State archives of whatever kind pass to the successor State;

(*c*) In particular, State archives which "belong" to the transferred territory pass to the successor State on the basis of the *principle of territorial origin*, or *a fortiori*, on the basis of the *patent reality*. For example, the archives in question may be old historical archives that were held in the transferred territory even *before* it came under the authority of the predecessor State, which authority has been extinguished by the succession of States. They may also be administrative archives proper to the transferred territory;

(*d*) The transfer also covers documents which have an *exclusive connection* with the territory. It is the *direct archives–territorial link* which prevails, pursuant to the principle of the territorial origin of the archives. Examples of this category are administrative archives, known as "local" archives, situated in the territory to which the succession of States relates;

(*e*) The transfer covers furthermore documents which have a *principal connexion* with the territory. In this case, the documents have a stronger tie with the transferred territory than with that of the predecessor State. By reason of the respect for the integrity of the archival collections, which must not be mutilated, and the principle of the functional connection, these archives must pass to the successor State. These State archives which relate principally to the transferred territory may have been located at all times in the capital of the predecessor State or may have been removed from the transferred territory just before the date of the succession of States;

(*f*) In the latter case, however, concerning State archives relating principally to the transferred territory, the Special Rapporteur proposes that *political* archives known as "archives of *sovereignty*" should not pass to the successor State, though the latter may obtain any appropriate reproduction. This is the purpose of paragraph 3, which provides an *exception to the rule of transfer*, qualified however, by the right to obtain a substitute copy;

(*g*) Lastly, the principle of the transfer of State archives to the successor State has a counterpart in the predecessor State's right to obtain a substitute copy for its own purposes, and in this way, the predecessor State's cultural needs, or even merely administrative or technical needs, can be satisfied. It is possible to visualize a case where a portion of the population of the territory affected by the succession of States has decided to leave it and to settle in the territory of the predecessor State. Problems of administrative management concerning this part of the population can only be dealt with by the predecessor State to the extent that the successor State places at its disposal the archives which concern these nationals (such as registers of births, marriages and deaths). This is the reason why the Special Rapporteur has made provision, in paragraph 2, for the same right to obtain substitute copies for the benefit of any third State in whose territory a portion of the population of the transferred territory may have settled after the date of the succession of States. However, he has put this "right" of the third State in square brackets, in order to indicate his hesitation in this case.

91. The next task is to draft special provisions relating to State archives in respect of each type of succession of States. This is the object of chapter II.

CHAPTER II

Provisions peculiar to each type of succession of States with regard to State archives

A. Transfer of part of a State's territory

92. We shall first consider the practice of States, without however losing sight of the fact that this practice derives above all from peace treaties, which are generally based not so much on equitable decisions as on political solutions reflecting the power relationship of victor and vanquished. We shall then try to draw some conclusions from this practice of States and outline proposals for more equitable solutions.

1. TRANSFER TO THE SUCCESSOR STATE OF ALL ARCHIVES RELATING OR BELONGING TO THE TRANSFERRED TERRITORY

(a) *Sources*

93. This practice, about which there seems to be no doubt, originated a long time ago in territorial changes carried out as early as the Middle Ages. It is illustrated by examples taken from the history of France and Poland.[70] In France, King Philippe Auguste founded his "Repository of Charters" in 1194, which constituted a collection of the documents relating to his kingdom. When in 1271 King Philip III (the Bold) inherited the lands of his uncle, Alphonse de Poitiers (almost the entire south of France), he immediately transferred the archives relating to these lands to the Repository: title deeds to land, chartularies, letter registers, surveys and administrative accounts. This practice continued over the centuries as the Crown acquired additional lands. The same happened in Poland from the fourteenth century onwards during the progressive unification of the kingdom through the absorption of the ducal provinces: the dukes' archives passed to the King along with the duchies. Thus, the transfer principle has been applied for a very long time, even though, as we shall see, the reasons for invoking it varied.

(b) *Archives as evidence*

94. Under the old treaties, archives were transferred to the successor State primarily as evidence and as titles of ownership. Under the feudal system, archives represented a legal title to a right. That is why the victorious side in a war made a point of removing the archives relating to their acquisitions, taking them from the vanquished enemy by force if necessary; their right to the lands was guaranteed only by the possession of the "terriers". An example of this is provided by the Swiss Confederates who, in 1415, *manu militari* removed the archives of the former Habsburg possessions from Baden Castle.[71]

(c) *Archives as instruments of administration*

95. As from the sixteenth century, it came to be realized that while archives constituted an effective legal title they also represented a means of administering the country. It then became the accepted view that, in a transfer of territory, it was essential *to leave to the successor as viable a territory as possible* in order to avoid disruption of management and to facilitate proper administration. Two possible cases may arise:

(i) *Case of a single successor State*

96. All administrative instruments are transferred from the predecessor State to the successor State, the said instruments being understood in the broadest sense: fiscal documents of all kinds, cadastral and domanial registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and prison archives, etc. Hence it became customary to leave in the territory all the written, pictorial and photographic material necessary for the continued smooth functioning of the administration.

97. For example, in the case of the cession of the provinces of Jämtland, Härjedalen, Gottland and Ösel, the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark provided that all judicial deeds, registers and cadastral documents (article 29) as well as all information concerning the fiscal situation of the ceded provinces must be delivered to the Queen of Sweden. Similar provisions were subsequently accepted by the two Powers in their peace treaties of Roskilde (26 February 1658; article 10) and Copenhagen (27 May 1660; article 14).[72] Article 69 of the Treaty of Munster (30 January 1648) between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, as well as judicial records, *concerning* any of the United Provinces, associated regions, towns ... which exist in courts, chancelleries, councils and chambers ... shall be delivered ...".[73] Under the Treaty of Utrecht (11 April 1713), Louis XIV ceded Luxembourg, Namur and

[70] Cf. France, *Les archives dans la vie internationale* (*op. cit.*), pp. 12 *et seq.*

[71] As these archives concerned not only the Confederates' territories but also a large part of South-West Germany, in 1474 the Habsburgs of Austria were able to recover the archives not concerned with Confederate territory.

[72] France, *Les archives dans la vie internationale* (*op. cit.*), p. 16.

[73] *Ibid.*

Charleroi to the (Netherlands) States General "with all papers, letters, documents and archives *relating to* the said Low Countries".[74]

98. Almost all treaties concerning the transfer of part of a territory, in fact, contain a clause relating to the transfer of archives, and for this reason it is impossible to list them all. Some treaties are even accompanied by a separate convention dealing solely with this matter. Thus, the Convention between Hungary and Romania signed at Bucharest on 16 April 1924,[75] which was a sequel to the peace treaties marking the end of the First World War, dealt with the exchange of judicial records, land registers and registers of births, marriages and deaths, specifying how the exchange was to be carried out.

(ii) *Case of more than one successor State*

99. The examples given below concern old and isolated cases and cannot be taken to indicate the existence of a custom, but the Special Rapporteur felt it useful to mention them because the approach adopted would today be rendered very straightforward through the use of modern reproduction techniques.

100. Article 18 of the Barrier Treaty of 15 November 1715, concluded between the Holy Roman Empire, England and the United Provinces, provides that the archives of the dismembered territory, Gelderland, would not be divided among the successor States but that an inventory would be drawn up, one copy of which would be given to each State, and the archival collection would remain intact and at their disposal for consultation.[76] Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815[77] refers to "deeds and papers which ... are of common interest to both parties". The solution adopted was that Saxony would keep the originals and provide Prussia with certified copies.

101. Thus, regardless of the number of successors, the entire body of archives remained intact in pursuance of the principle of the conservation of collections for the sake of facilitating administrative continuity. However, this same principle and this same concern were to give rise to may disputes in modern times as a result of a distinction made between administrative archives and historical archives.

(d) *Archives: historical fund or cultural heritage*

102. According to some writers, administrative archives must be transferred to the successor State in their entirety, while so-called historical archives, in conformity with the principle of the integrity of the archival collection, must remain part of the heritage of the predecessor State unless they were established in the transferred territory through the normal functioning of its own institutions. This argument, although not without merit, is not supported by practice: history has seen many cases of transfers of archives, historical documents included.

103. For example, article 18 of the Treaty of Vienna (3 October 1866) by which Austria ceded Venezia to Italy provides for the transfer to Italy of all "title deeds, administrative and judicial documents ..., *political and historical documents** of the former Republic of Venice", while each of the two parties undertakes to allow the others *to copy "historical** and political documents which may concern the territories remaining in the possession of the other Power and which, in the interests of science, cannot be separated from the archives to which they belong".[78]

104. Other examples of this are not difficult to find. Article 29, paragraph 1 of the Peace Treaty between Finland and the FSRSR signed at Dorpat on 14 October 1920 provides that:

> The contracting parties undertake to return as soon as possible archives and documents which belong to public administrations and institutions, which are situated in their respective territories and which concern solely or largely the other contracting party *or its history**.[79]

2. ARCHIVES REMOVED FROM OR CONSTITUTED OUTSIDE THE TRANSFERRED TERRITORY

105. There would seem to be ample justification for accepting as adequately reflecting the practice of States the rule whereby the successor State is given all the archives, historical or other, relating or belonging to the transferred territory, even if these archives have been removed from or are situated outside this territory.

106. The Treaties of Paris (1814) and of Vienna (1815) provided for the return to their place of origin of the State archives that had been gathered together in Paris during the Napoleonic period.[80] Under the Treaty of Tilsit (7 July 1807), Prussia, having returned that part of Polish territory which it had conquered, was obliged to return to the new Grand Duchy of Warsaw not only the current local and regional archives relating to the restored territory but also the relevant State documents ("Berlin Archives").[81]

[74] *Ibid.* p. 17.

[75] League of Nations, *Treaty Series*, vol. XLV, p. 331.

[76] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 17–18.

[77] G.F. de Martens, ed., *Nouveau Recueil de Traités* (Gottingen, Dieterich, 1887), vol. II (1814–15), repr., p. 276.

[78] France, *Les archives dans la vie internationale* (*op. cit.*), p. 27.

[79] League of Nations, *Treaty Series*, vol. III, p. 25.

[80] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 19–20. See also paras. 27–29 above.

[81] France, *Les archives dans la vie internationale* (*op. cit.*), p. 20.

107. In the same way, Poland recovered the central archives of the former Polish State which had been transferred to Russia at the end of the eighteenth century, as well as those of the former autonomous Kingdom of Poland for the period 1815–1863 and the following period up to 1876. It also obtained the documents of the Office of the Secretary of State for the Kingdom of Poland (which acted as the central Russian administration at St. Petersburg from 1815 to 1863), those of the Tsar's Chancellery for Polish Affairs, and lastly, the archival collection of the Office of the Russian Ministry of the Interior responsible for agrarian reform in Poland.[82]

108. Reference can also be made, in addition to the examples given in the Special Rapporteur's previous reports, to the case of the Schleswig archives. Under the Treaty of Vienna of 30 October 1864, Denmark had to cede the three duchies of Schleswig, Holstein and Lauenberg. Article 20 of the said treaty provided as follows: "title deeds, administrative documents and documents relating to civil justice that concern the ceded territories and are part of the archives of the Kingdom of Denmark" will be transferred, along with "all parts of the archives of Copenhagen that belonged to the ceded duchies and were taken from their archives".[83]

109. For a more detailed examination of this practice of States (although, in general, it would be wrong to attach too much importance to peace treaties, where solutions are based on a given "power relationship"), a distinction can be made between two cases, namely that of archives removed or taken from the territory in question and that of archives constituted outside that territory but relating directly to it.

(a) *Archives which have been removed*

110. Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State. There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and of 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows:

> If any of these items [archives, documents, registers, etc.] had been removed, they will be restored by the French Government on the demand of the German Government.[84]

This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles (28 June 1919), the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.[85]

111. Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the Treaty of Rapallo (12 November 1920) and the Treaty of Rome (27 January 1924) which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.[86] The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the return to Yugoslavia of all archives "which are in the possession *or which will come into the possession** of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations", and adds that "should the material referred to *not be in Italy,** the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".[87]

112. However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains ... archives relating to the ceded territory which are preserved in a repository situated outside that territory".[88] Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it:

> Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or also documents of a purely historical nature?[89]

113. The fact is that these writers hesitated to support the generally accepted rule and even went so far as to formulate a contrary rule because they accorded excessive weight to a court decision which

[82] *Ibid.*, pp. 35–36.

[83] *Ibid.*, p. 26.

[84] G.F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1874), vol. XIX, p. 689.

[85] Part III, sect. V, art. 52, concerning Alsace–Lorraine (*ibid.* (Leipzig, Weicher, 1923), 3rd series, vol. XI, pp. 380–381).

[86] Art. 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVIII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

[87] United Nations, *Treaty Series*, vol. 171, p. 293.

[88] F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, Sirey, 1910), p. 128, para. 99.

[89] P. Fauchille, *Traité de droit international public* (8th edition of *Manuel de droit international public* by H. Bonfils) (Paris, Rousseau, 1922), vol. I, part 1, p. 360, para. 219.

was not only an isolated instance but also bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace–Lorraine, ruling that:

> the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, *was in no way divested of that right by the change of nationality imposed on a part of its territory.**[90]

It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.[91] Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

114. The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to at least one interpretation of the texts, this practice seems to indicate that only *administrative archives* should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside of it or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich (10 November 1859) between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombardy.[92] If there is justification for interpreting in a very strict and narrow way the expressions used—which apparently refer only to *items relating to current administration*—it may be concluded that the *historical part* of the imperial archives at Vienna relating to the ceded territories was now affected.[93]

115. Article 2 of the Treaty of the same date between France and Sardinia[94] refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.[95] Similarly, a convention between France and Sardinia signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860, confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10, which is cast in the same mould as the articles cited above when it states:

> Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.[96]

116. The Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives relating to the territory affected by the change of sovereignty, which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership were claimed by the successor. If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.[97]

[90] Judgement of the Court of Nancy of 16 May 1896, case of Dufresne *v.* the State (M. Dalloz *et al.*, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, 1896* (Paris, Bureau de la jurisprudence générale, 1896) part 2, p. 412.

[91] The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

[92] Art. 15 of the Franco-Austrian peace treaty signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, 1861), vol. I, p. 10; M. de Clercq, *Recueil des traités de la France* (Paris, Durand et Pedone-Lauriel, 1880), vol. VII (1856–1859), p. 647).

[93] For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870–1871", *Revue générale de droit international public* (Paris), vol. XVIII (1911), p. 35; and *idem*, *Le Traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, footnote 2.

[94] Art. 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (*op. cit.*), p. 14; and de Clercq, *op. cit.*, p. 652).

[95] Art. 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (*op. cit.*), pp. 22–23; de Clercq, *op. cit.*, pp. 661–662).

[96] de Clercq, *op. cit.*, vol. VIII (1860–1863), p. 83; de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1869), vol. XVII, part II, p. 25.

[97] Art. 10 of the Convention of 23 August 1860 between France and Sardinia (see note 96 above) provided that France

(*Continued on next page.*)

117. What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some ninety years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government:

*all archives, historical and administrative, prior to 1860, which concern the territory ceded** to France under the Treaty of 24 March 1860 and the Convention of 23 August 1860.[98]

118. Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the succession of States, even if those archives have been removed or are situated outside that territory.

(b) *Archives established outside the territory*

119. This section concerns items and documents that relate to the territory involved in the succession of States but that have been established and have always been kept outside this territory. Many treaties include this category among the archives that must revert to the successor State. As mentioned above,[99] under the Peace Treaty of 1947 with Italy, France was able to obtain archives relating to Savoy and Nice established by the city of Turin. Under the Peace Treaty of 1947 with Hungary, Yugoslavia obtained all the eighteenth-century archives concerning Illyria that had been kept by Hungary.[100] Under the Craiova agreement of 7 September 1940 between Bulgaria and Romania concerning the cession by Romania to Bulgaria of the Southern Dobruja, Bulgaria obtained, in addition to the archives in the ceded territory, certified copies of the documents being kept in Bucharest and relating to the region newly acquired by Bulgaria.

120. What happens if the archives relating to the territory affected by the change in sovereignty are situated neither within the frontiers of this territory nor in the predecessor State? Article 1 of the agreement between Italy and Yugoslavia signed at Rome on 23 December 1950 provides that,

should the material referred to not be in Italy, the Italian Government *shall endeavour** to recover and deliver it to the Yugoslav Government.[101]

In other words, to use terms dear to French civil law experts, what is involved here is not so much an "obligation of result" as an "obligation of means".[102]

121. The rule concerning the transfer to the successor State of archives relating to a part of another State's territory is taken to be so obvious that there is no risk of its being jeopardized by the lack of references to it in agreements. This is the view of one writer, who states:

Since the delivery of public archives relating to the ceded territories is a necessary consequence of annexation, it is hardly surprising that in many treaties of annexation there is no clause concerning this *obligation.** It is implied, for it follows from the renunciation by the ceding State of all its rights and titles in the ceded territory.[103]

The terminology used has aged, and annexation itself is obsolete. However, the idea on which the rule is based is still valid, the object being, according to the same author, to "provide (the successor State) with whatever is necessary or useful for the administration of the territory".[104]

(*Footnote 97 continued.*)

was to *return* to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

[98] United Nations, *Treaty Series*, vol. 49, p. 132.

[99] Para. 117 above.

[100] Art. 11 of the Peace Treaty with Hungary of 10 February 1947 (United Nations, *Treaty Series*, vol. 41, p. 178).

[101] *Ibid.*, vol. 171, p. 292.

[102] There are other cases in history of the transfer to the successor State of archives constituted outside the territory involved in the succession of States. These examples do not fall into any of the categories provided for in the system used here for the succession of States, since they concern changes in colonial overlords. These outdated examples are mentioned here solely for information purposes. (In old works, they were regarded as transfers of part of a territory from one State to another or from one colonial empire to another.)

The protocol concerning the return by Sweden to France of the Island of St. Barthélemy in the West Indies states that:

"papers and documents of all kinds relating to the acts [of the Swedish Crown] that *may be in the hands of the Swedish administration** ... shall be delivered to the French Government" (art. 3, para. 2 of the Protocol of Paris of 31 October 1877 annexed to the Treaty between France and Sweden signed at Paris on 10 August 1877 (de Martens, ed., *Nouveau recueil général de traités*, 2nd series (Göttingen, Dieterich, 1879), vol. IV, p. 368).

In section VIII of the Treaty of Versailles, concerning Shantung, art. 158 obliges Germany to return to Japan the archives and documents relating to the Kiaochow territory "*wherever they may be**". (*British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922) p. 81.)

Article 1 of the Convention between the United States and Denmark of 4 August 1916, concerning the cession of the Danish West Indies, awards to the United States any archives in Denmark concerning these islands (for reference, see footnote 14 above), just as article VIII of the Treaty of Peace between Spain and America of 10 December 1898 had already given the United States the same right with regard to archives in Spain relating to Cuba, Puerto Rico, the Philippines and the island of Guam (Malloy, *Treaties, Conventions, International Acts ...* (*op. cit.*), p. 1693).

[103] Jacob, *op. cit.*, p. 11.

[104] *Ibid.*

3. THE "ARCHIVES–TERRITORY" LINK

122. As has been mentioned above, State practice shows that the link between archives and the territory to which the succession of States relates is taken very broadly into account. But the nature of this link should be made quite clear. Expert archivists generally uphold two principles, that of *territorial origin* and that of *territorial or functional connection*, each of which is subject to various and even different interpretations, leaving room for uncertainties.

123. What seems to be obvious is that the successor State cannot claim just any archives; it can claim only those that relate exclusively or principally to the territory. But what does "relate to" cover? The term may be construed in two ways.

124. First, there are archives which were acquired before the succession of States, either by or on behalf of the territory, against payment or free of cost, and with funds of the territory or otherwise.[105] From this first standpoint, such archives "belong" to the territory and must follow its destiny on the succession of States. In order to do so, it is not necessary that the archives should relate to the territory, since it is quite conceivable that the latter may have acquired, free of cost or against payment, historical, cultural or other documents concerning other parts of the world.

125. Secondly, the organic link between the territory and the archives relating to it must be taken into account.[106] However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as a whole and ... refer only incidentally to the ceded territory", they "remain the property of the predecessor State, [but] it is generally agreed that copies of them shall be furnished to the annexing State at its request".[107] The "archives-territory" link was specifically taken into account in the aforementioned Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.[108]

126. Attention is drawn at this point to the decision of the Franco-Italian Conciliation Commission which held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn in the Treaty of Peace with Italy, must be assigned in their entirety to France, the successor State, whenever they related to the ceded territory.[109]

127. As was mentioned in an earlier context by the Special Rapporteur, after the Franco-German war of 1870 the archives of Alsace–Lorraine were handed over to the German successor State. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives–territory" link was applied only the case of documents considered to be "of secondary interest to the German Government".[110]

4. SPECIAL OBLIGATIONS OF THE SUCCESSOR STATE

128. The practice of States shows that many treaties impose upon the successor State an essential obligation which constitutes the normal counterpart of the predecessor State's duty to transfer all archives to the successor State. Territorial changes are often accompanied by population movements (new frontier lines which divide the inhabitants on the basis of a right of option, for instance). Obviously this population cannot be governed without, at least, administrative archives. Consequently, in cases where archives pass to the successor State by agreement, it cannot refuse to deliver to the predecessor State, upon the latter's request, any copies it may need. Any expense involved must of course be defrayed by the requesting State. (It

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[105] Article 11 of the Treaty of Peace of 1947 with Hungary (see footnote 100 above) rightly states, in para. 2, that the successor States, Yugoslavia and Czechoslovakia, shall have no right to archives or objects "acquired by purchase, gift or legacy" or to "original works of Hungarians".

[106] Under the Treaty of Peace of 1947, in art. 11. para. 1 (see footnote 100 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [and] which *originated in those territories** ...".

[107] C. Rousseau, *Droit international public*, (Paris, Sirey, 1977), vol. III, p. 384. Cf. also, D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. 1: *Internal Relations*, pp. 232–233.

[108] Article 6 of the Agreement (see footnote 87 above) provides that archives which are indivisible or of common interest to both parties

"shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, *according to the extent of the territory or the number of persons, institutions or companies to which these documents relate.** In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original".

[109] Decision No. 163, rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII, (United Nations publication, Sales No. 64.V.3) p. 503). This decision includes the following passage:

"Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State *if they concern the territory ceded or relate to property transferred** (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory** (*ibid.*, pp. 516–517).

[110] Convention of 26 April 1872, signed at Strasbourg (de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1875), vol. XX, p. 875).

might be useful to extend this possibility even to a third State, since the latter may receive populations which originate from the territory affected by the succession and which constitute a relatively large minority in that third State).

129. Clearly, however, the successor State is obliged to hand over copies only of administrative documents used for current administration. Furthermore, the handing over of these papers must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file of a military base it has constructed in the territory or the penal record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived.

130. The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned convention of 4 August 1916 between the United States of America and Denmark providing for the cession of the Danish West Indies stipulates in the third paragraph of article 1 that:

> ... archives and records shall be carefully preserved, and authenticated copies thereof, as may be required shall be at all times given to the ... Danish Government, ... or to such properly authorized persons as may apply for them.[111]

5. Time-limits for handing over the archives

131. These time-limits vary from one agreement to another. The finest example of the speed with which the operation can be carried out is undoubtedly to be found in the Treaty of 26 June 1816 between the Netherlands and Prussia, article XLI of which provides that:

> ... archives, maps and other documents ... shall be handed over to the new authorities at the same time as the territories themselves.[112]

6. State libraries

132. Already in his third report the Special Rapporteur explained how difficult it was to find information about the transfer of libraries.[113]

Three peace treaties signed after the First World War nevertheless expressly mentioned that libraries must be restored at the same time as archives. The instruments in question are the Treaty of Moscow (11 August 1920) between the RSFSR and Latvia, art. 11;[114] the Treaty of Moscow (12 July 1920) between the RSFSR and Lithuania, art. 9;[115] and the Treaty of Riga (18 March 1921) between Poland, the RSFSR and the Ukraine, art. 11, para. 1.[116] In those treaties the following formula is used:

> The Russian Government shall at its own expense restore to ... and return to the ... Government *all libraries,** records, museums, works of art, educational material, documents and other property of educational and scientific establishments, *Government,** religious and communal *property** and property of incorporated institutions, in so far as such objects were removed from ... territory during the world war of 1914–1917, and in so far as they are or may be actually in the possession of the Governmental or Public administrative bodies of Russia.

7. Conclusions to be drawn from the practice of States and proposals for a draft article

133. The conclusions and solutions to which this study of State practice gives rise would not appear to provide very promising material on which to base a proposal for an acceptable draft article on the problem of succession to State archives in the event of the transfer of part of a State's territory to another State. There are many reasons why the solutions adopted in treaties cannot be taken as an absolute and literal model for dealing with this problem in our draft article:

(*a*) First, it is clear that *peace treaties are almost inevitably an occasion for the victor to impose on the vanquished solutions which are most advantageous for the former.* Germany, the victor in the Franco-German war of 1870, dictated its law as regards the transfer of archives relating to Alsace–Lorraine right until 1919, when France, in turn, was able to dictate its own law for the return of those same archives, as well as others, relating to the same territory. History records a great many instances of such reversals, involving first the break-up and later the reconstitution of archive collections, or, at best, global and massive transfers one day in one direction and the next day in the other.

(*b*) *The solutions offered by practice are not very subtle nor always equitable.* In practice, decisions concerning the transfer to the successor State of archives of every kind—whether as documentary evidence, instruments of administration, historical material or cultural heritage—are made without sufficient allowance for certain pertinent factors. It is true that in many cases of the transfer of archives, including central archives and archives of an historical character relating to the ceded territory, the predecessor State was given an opportunity to take copies of these archives.

(*c*) As regards this type of succession one should bear in mind the general provisions of the articles already adopted, lest the solutions chosen conflict, without good reason, with those general provisions.

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[111] For reference, see footnote 14 above.

[112] de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1877), vol. III (1808–1818) (reprint), p. 41.

[113] *Yearbook ... 1970*, vol. II, p. 161, document A/CN.4/226, part two, paras. (47) *et seq.* of the commentary to article 7.

[114] League of Nations, *Treaty Series*, vol. II, p. 221.

[115] *Ibid.*, vol. III, p. 129.

[116] *Ibid.*, vol. VI, p. 139.

134. In this connection, reference is made to draft *article 9*, which lays down a general principle concerning the passing of State property *in abstracto*. That article reads as follows:

> Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, *is situated in the territory** to which the succession of States relates shall pass to the successor State.

Another pertinent provision is that in *article 12*, paragraph 1 of which places the emphasis on the *agreement* between the predecessor State and the successor State, and paragraph 2(*b*) of which states that, in the absence of such an agreement,

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

135. As regards the application of these provisions to the case of archives, in the event of the transfer of part of a State's territory, these various provisions combined produce the following result: (a) *The general principle is that State archives situated in the transferred territory pass to the successor State*; (b) *it is sound practice that the passing of such archives should be settled by agreement*; *and* (c) *it is recognized that in the absence of an agreement at least the archives connected with the activity of the predecessor State in respect of the territory transferred pass to the successor State.*

136. Actually, when adopting article 9, the Commission was thinking mainly of *immovable* property which, by its very nature, perforce remains in the part of the territory transferred and hence is bound to pass to the successor State. If the article were applied to *movable* property, it might well be nothing more than a specious tribute to ingenuousness and naïveté or an inducement to the predecessor State to take away the movable property. Applied to archives, article 9 would mean that the successor State will receive only those archives that it happens to find in the territory transferred to it.

137. It should not be forgotten that, in the view of the Commission, *the type of succession referred to here concerns the transfer of a small portion of territory.* The problem of State archives where part of a territory is transferred may be stated in the following terms:

(*a*) State archives of every kind that have a direct and necessary link with the management, administration and development of the part of the territory transferred must unquestionably pass to the successor State. The basic principle is that the part of territory concerned must be transferred to the successor State *in an irreproachable condition of viability.* Two possible cases may arise:

(i) State archives which were *situated in the transferred territory*, such as the archives constituted *locally* by the predecessor State for the purpose of administering the part of the territory in question, must pass to the successor State. This is the obvious, wise and equitable solution. It may happen, however, that in consequence of the transfer of a part of one State's territory to another State, some or many of the inhabitants, preferring to retain their nationality, leave that territory and settle in the other part of the territory which remains under the sovereignty of the predecessor State. The State archives that were situated in the transferred territory, such as taxation records or records of births, marriages and deaths, concern these transplanted inhabitants. It will then be for the predecessor State to ask the successor State for all facilities, such as microfilming, in order to obtain the archives necessary for administrative operations relating to its evacuated nationals. In no case, however, inasmuch as it is a minority of the inhabitants which emigrates, may the successor State be deprived of the archives necessary for administrative operations relating to the majority of the population which stays in the transferred territory.

(ii) The second case concerns *State archives which are not and never have been situated in the part of territory transferred, but which have a direct and necessary link with the management, administration and development* of that part of the territory. For example, if a predecessor State which is highly centralized has built up a large collection of central archives concerning each part of its territory, then a problem will arise if part of these archives concerns the management of the part of territory transferred but the central archives are an indivisible entity. In such a case, equity will probably demand that the successor State may obtain microfilms or copies of the documents which are necessary for the proper administration of the territory transferred to it.

(*b*) All the foregoing remarks concern the case of State archives which, *whether or not situated* in the part of territory transferred, have a direct and necessary link with its administration. This means, by and large, State archives of an administrative character. There remains the case of State archives of an *historical or cultural* character. If these historical archives have at all times been situated in the part of territory transferred, there is a strong presumption that they are distinctive and individualized and constitute a homogeneous and autonomous collection of archives directly connected with and forming an intergral part of the historic and cultural heritage of the transferred territory. In logic and equity, this property should pass to the successor State even if the predecessor State chose to remove it before transferring the part of territory in question. These items must be returned to their "home ground". If, on the other hand, the State archives concerning the history and culture of the part of territory transferred have never been situated in that

part of the territory, there is an equally strong presumption that they are an integral part of the collection of national historical archives. Logic and equity demand that this indivisible collection should not be tampered with, and that the successor State should have no right in such archives.

138. By *a contrario* reasoning, it follows from the comments above[117] that where the archives are not State archives at all, but are *local* administrative, historical or cultural archives, owned in its own right by the part of territory transferred, they are not affected by these draft articles, for these articles are concerned with State archives. Local archives which are proper to the territory transferred remain the property of that territory, and the predecessor State has no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.

139. These various points may be summed up as follows:

Where a part of a State's territory is transferred by that State to another State,

(*a*) State archives of every kind having a *direct and necessary link with the administration of the transferred territory* pass to the successor State if they are situated in the transferred territory. If, on the other hand, they form an inseparable part of the national archives on a centralized predecessor State and are kept (as often happens) in its capital, the successor State obtains a *copy* of that part of the archives which concerns the administration of the transferred territory.

(*b*) State archives of an *historical or cultural* character which relate to the part of territory transferred (principle of connection) and which are kept in that region (principle of origin) pass to the successor State. However, if they have at all times been kept outside the part of territory transferred or if they form part of a collection of archives whose unity must be preserved, they remain the property of the predecessor State.

(*c*) Whatever their nature or contents, *local* archives proper to the part of territory transferred are not affected by the succession of States.

(*d*) Because of the *administrative needs* of the successor State, which is responsible for administering the part of territory transferred, and of the predecessor State, which has a duty to protect its interests as well as those of its nationals who have left the part of territory transferred, and secondly, because of the problems of the *indivisibility of certain collections of archives* that constitute an administrative, historical or cultural heritage, the only desirable solution that can be visualized is that the parties should settle an intricate and complex issue *by agreement*. Accordingly, in the settlement of these problems, over all the solutions put forward, priority should be given to agreement between the predecessor State and the successor State. This agreement should be based on *principles of equity* and should take account of all the special circumstances, particularly of the fact that the part of territory transferred has contributed, financially or otherwise, to the formation and preservation of the archive collections. The principles of equity relied upon should make it possible to take account of various factors, including the requirements of viability of the transferred territory and apportionment according to the shares contributed by the predecessor State and by the territory separated from that State.

140. The substance of the foregoing considerations might be summed up in a draft article reading as follows:

Article B. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

(1) The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

(2) In the absence of agreement,

(*a*) The following archives pass to the successor State:

(i) archives of every kind belonging to the territory to which the succession of States relates,

(ii) the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;

(*b*) The following archives remain with the predecessor State:

the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.

(3) The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives.

B. Newly independent States

1. Historical background and new problems

141. The problem raised by the claiming and attribution of archives of colonial territories which have become independent is entirely topical. It is bound up with the modern process of decolonization. In the past, the problem was not always given much thought by a colonial Power which ceded or surrendered one of its overseas territories to another colonial

[117] Para. 137.

Power, within the context of the imperial rivalries of the time. Archives, especially those of an administrative nature, remained in the dependent territory and shared its destiny. But it also happened, especially in the case of more important archives, that the colonial Power repatriated the archives, with or without agreement. Thus Spain, having ceded Louisiana to France in 1802, immediately repatriated all the archives and agreed to hand over to France only papers "relating to the limits and demarkation of the territory".[118] However, when France in turn sold Louisiana to the United States, the Franco-American Treaty of 30 April 1803 provided for the handing over of "archives, papers, and documents relating to the lands and to *sovereignty**."[119] The difference is explained by the fact that the former case was one of forcible transfer of territory and the latter a voluntary cession.

142. When the United Kingdom, which had taken possession of the Ionian Islands, authorized those territories to unite with Greece, it transferred all the archives relating to the islands to London.[120] France, for its part, practised at an early stage a particular form of "repatriation" of colonial archives, typical of the French centralizing spirit: a royal edict of 1776 set up the "Depôt des papiers publics des colonies", which was to receive every year, at Versailles, copies of papers of court record-offices, notaries' records, registers of births, marriages and deaths, and so forth.[121]

143. Many examples could be given to illustrate the absence during that period of any rule with regard to the devolution of archives other than that based on the power relationship and on the circumstances specific to each case of enforced surrender or voluntary cession (against payment) of a colonial territory. The same was true of the nineteenth-century cases of the decolonization of the Spanish possessions in the Americas. The new States of Latin America had at their disposal the local administrative archives left behind by Spain, from which they constituted their own collections. But the bulk of the historical collections and documents "of sovereignty" relating to the Spanish conquest is to this day part of the State archives of Spain. The decolonization which followed the Second World War did not substantially change this situation, in the sense that the colonial Powers generally removed and kept archives relating or belonging to the dependent territories left by them. The novel phenomenon which has been observable for the past ten to fifteen years is, however, the ever growing claim by the newly independent States to their archives and the appearance of *archive disputes* between those young States and their former colonizers. The present period, which might be described as a second stage—that of "decolonization in depth"—has brought a fresh realization, thanks especially to the work of UNESCO, of the need for newly independent States to claim and to recover their *archives as instruments of their development and as an expression of their cultural heritage*. In this sense, it can be said that the present sequels of decolonization are raising the problem of archives in terms of the *right to development, right to information, and right to cultural identity within the framework of the establishment of a new international order* in all spheres.

144. It is becoming more and more imperative that the successor State should receive all archives—historical, administrative, cultural or other—belonging or relating to the hitherto dependent territory, even if they have been removed by the predecessor State. The widest possible implementation of such a principle of succession would greatly help newly independent States to acquire greater mastery of their internal and external problems; a better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned.

145. Although it seems that there should be no doubt concerning the principle of transfer of archives to the newly independent State, no satisfactory solution has yet been reached in State practice on this question. The principal reason is the former metropolitan country's reluctance to release the archives, but another reason is the diversity of situations: the variety of local conditions, of the preceding status and of the degree of administrative organization left by the colonial Power in the territory.

146. In general it is to be hoped that the formulation of an equitable rule of the transfer of archives to the successor State will lead to better relations between States and open the way for appropriate co-operation in the matter of archives. This would enable the newly independent State to recover *the items which express its history, its traditions, its heritage, and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also help the former colonial Power to ease its own difficulties, intangible and material, which accompany its withdrawal and that of its nationals from the territory which has become independent.* All this, however, gives rise to a number of problems which must now be discussed in relation to different kinds of archives; political archives of the colonial period, pre-colonial historical archives of the territory, administrative archives. All three kinds of archives directly concern the territory which has become independent—but some of these archives, established in the former metropolitan country, were never located in the dependent territory, while others, constituted within the territory, were removed from it on the eve of its independence. We shall therefore examine, succes-

[118] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 41–42.

[119] *Ibid.*, p. 42.

[120] *Ibid.*

[121] Laroche, *loc. cit.*, pp. 124–125.

sively, the treatment given to political archives of the colonial period, to pre-colonial historical and cultural archives proper to the territory which has become independent, and lastly, to the territory's current administrative archives, giving due attention, wherever necessary, to the sub-distinction between archives remaining in the territory and archives removed from or constituted outside the territory.

2. Political archives of the colonial period

147. For obvious reasons, the predecessor State cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations of policy or expediency prevent it from leaving to the new sovereign revealing documents about the colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is usually careful to remove before independence—is rarely applied in practice.

148. At this point, a distinction must be drawn between the various categories of archives which the former metropolitan country is tempted to remove before the termination of its sovereignty. A distinction should be made between (*a*) historical archives proper, which antedate the beginning of the colonization of the territory; (*b*) archives of the colonial period, relating to the *imperium* and *dominium* of the metropolitan country and to its colonial policy generally in the territory; and (*c*) purely administrative and technical archives relating to the current administration of the territory.

149. An international conference on archives has expressed the opinion that the principle of transfer may be difficult to apply to archives connected with the *imperium* and *dominium* of the former metropolitan country:

> ... here are apparently legal grounds for distinguishing in the matter of archives between *sovereignty collections and administrative collections**: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, *whose history they directly concern**.[122]

Another author expresses the same opinion:

> Emancipation raises a new problem. The right of new States to possess the archives essential to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the populations, remains unquestionable. But there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.[123]

[122] France, *Les archives dans la vie internationale* (*op. cit.*), p. 44.

[123] Laroche, *loc. cit.*, p. 130.

150. According to this view, archives connected with *imperium* would absolutely not belong to the territory. This is no doubt an exaggerated point of view, in that the exception made to the principle of transfer for archives connected with *imperium* relates less to the principle of belonging than to considerations of expediency and policy; what is involved, of course, is the importance of good relations between the predecessor State and the successor State, and also at times the *viability* of the newly independent State.

151. In the interest of such relations it may perhaps be advisable to avoid argument on the subject of "political" archives or archives "of sovereignty", since they refer to the policy followed by the colonial Power *within* its dependent territory. For example, archives concerning general policy with regard to the territory, or a repressive policy against its liberation movements, are not to be confused with administrative archives or archives concerning the day-to-day management of the territory, but form part of the political archives or archives connected with sovereignty. It is probably unrealistic to expect the predecessor State to hand them over. On the other hand, the part of the political archives or archives connected with sovereignty that is concerned with policy carried on *outside* the territory and on its behalf by the colonial Power (conclusion of treaties applied to the territory, diplomatic documents concerning the relations between the colonial Power and third States with respect to the territory, and in particular diplomatic documents relating to the delimitation of its frontiers), unquestionably concern *also* (and sometimes even *primarily*, in the event of a dispute or conflict with a third State) the newly independent State. The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily.

152. It can certainly be said that, no matter how sound and well-founded the principle of the transfer of archives may be, it would be unreasonable to expect the *immediate and complete return* of archives connected with *imperium* and *dominium*. Indeed, in the interest of good relations between the predecessor State and the successor State, it may even be unrealistic and undesirable for the new independent State to claim such archives and to start a dispute over them which is bound to be difficult.

153. *In this, as in other respects, the passage of time is the best remedy.* In almost all countries there exists domestic legislation under which *all political archives, including the most secret ones, become accessible to the public after a certain time.* Colonial political archives form no exception. That being so, if any person is lawfully entitled to consult archives of sovereignty after the lapse of a period of fifteen, twenty or thirty years, why should not the newly independent

State directly concerned by and interested in archives which relate to its territory have the right to obtain them in microfilm, if need be at its own expense? *Thus, even where the archives are connected with the exercise of the colonial Power's* imperium *over the territory, the successor State's right to obtain copies of such archives after the lapse of time provided for under the predecessor State's legislation for the passage into the public domain of archives connected with sovereignty should be recognized.* One can hardly deny to the successor State a right which is granted to any person or institution, public or private, national or foreign.

154. The Special Rapporteur has not found any case of decolonization where the former administering Power has voluntarily left or restored by agreement parts of collections of colonial political archives. France transferred to Viet Nam the archives established by the Imperial Vietnamese Government before the French conquest, together with part of the archives necessary for the administration of the country, but the Franco-Vietnamese agreement of 15 June 1950 concerning the apportionment of the archives of Indo-China under which these transfers took place enabled France to retain all the archives connected with its own diplomatic, military and political sovereignty and which concerned Indo-China, even where such archives had been constituted in Indo-China and were removed at independence. A similar policy appears to have been followed with regard to France's former dependencies in Africa.

155. The problem of colonial political archives was dealt with in the same manner in the case of the independence of Algeria. In the course of frontier disputes with its neighbours occurring after decolonization, Algeria was unable to obtain access to the diplomatic documents and political colonial archives held by France relating to the problem of delimitation of frontiers. A very large part of those colonial political documents had been constituted in Algiers and had remained there until just before the country's independence.[124] The case mentioned was even more prejudicial in that Algeria was also unable to recover its own historical archives concerning the pre-colonial period, which had been carefully catalogued and even added to by the colonial administration and kept at Algiers but which were removed by the French authorities, as will be seen further on, immediately before Algeria attained independence.[125]

156. *It is, however, a most welcome, positive and encouraging development that, in the course of official conversations held in Algiers in March and December 1974, the French Government did not refuse to consider handing over to Algeria originals, microfilms or photocopies, depending on the nature of the document, of historical archives connected with the colonial period.* The principle of microfilming archives of sovereignty dating from colonization was accepted in order that each party should have at its disposal all the documents relating to a period during which the histories of France and Algeria were intertwined. The conversations of 1974 were followed by an exchange of diplomatic correspondence on 22 April and 20 May 1975 giving evidence of a constructive approach to the problem by the French authorities, which regarded it as *"entirely in conformity with current practice of co-operation among historians to envisage the microfilming*" of France's archives of sovereignty concerning the colonization of Algeria.*[126]

157. The historical documents of the Netherlands relating to Indonesia formed the subject of negotiations between the former administering Power and the newly independent State within the framework of co-operation in the field of cultural and historical property. The relevant agreement concluded between the two countries in 1976 provides, *inter alia*:

> That it is desirable to make cultural objects such as ethnographical *and archival** material available for exhibitions and study in the other country in order to fill the gaps in the already existing collections of cultural objects in both countries, with a view to promoting mutual understanding and appreciation of each other's cultural heritage and history;

[124] A precise inventory of part of these documents, with the file numbers under which they were catalogued in Algiers, in itself fills a large number of volumes published by the Government-General of Algeria during the colonial period. Cf. G. Esquer and E. Dermenghem, *Archives du Gouvernement général de l'Algerie, série E and EE (Correspondance politique générale), Inventaire sommaire* (Algiers, Heinz, 1949). Series E and EE are known as the "Political boxes". According to Esquer and Dermenghem, the two authors of this "brief inventory", it is "fundamental for the history of the French conquest, the organization and the political and economic life of Algeria in the nineteenth century, especially since the accretion of the Bugeaud and Gueydon collections" (*ibid.*, p. 9). Cf. also Esquer and Dermenghem, *Archives du Gouvernement général de l'Algérie, serie H (Affaires musulmanes et sahariennes), Réportoire* (Algiers, Imbert, 1953). This series, according to the authors, is "one of the most important for the history of French penetration in Algeria". Cf. lastly, Esquer and Dermenghem. *Archives du Gouvernement général de l'Algérie, série X (Dons et acquisitions diverses). Répertoire* (Algiers, Imbert, 1954). This series includes papers relating to colonial personalities, manuscripts, registers later than 1832, collections of Arabic autographs, etc.

More generally, archives in Algeria were classified in three categories: (*a*) documents antedating 1830 (date of the French colonization), comprising series A to D; (*b*) documents subsequent to 1830, comprising series E to Y; and (*c*) Arabic and Turkish archives, combined in series Z.

[125] Cf. paras. 160–161 below.

[126] Letter dated 20 May 1975 addressed by Mr. Sauvagnargues, French Minister of Foreign Affairs, to Mr. Bedjaoui, Ambassador of Algeria in France, in reply to his letter of 22 April 1975. There is no doubt that the French Government, which thus liberally agreed to the microfilming of its political archives of the colonial period concerning Algeria, would be prepared to consent *a fortiori* to Algeria's microfilming French political archives *antedating* colonization, of which the two noteworthy features are that they concern Algeria and that they do not belong to it. The series in question is series A, known as "Archives of the Consulate of France in Algiers (1686–1831)", which is of importance to the history of Algeria's political and trade relations with France during the two centuries which preceded colonization.

*That it should be the general principle that archives ought to be kept by the administration that originated them.**

Both parties continue to work out programmes and to develop co-operation along the broad lines defined above. In the field of archives, *certain exchanges of microfilms have already been arranged.**[127]

158. The United Kingdom and Belgium appear to have followed a rather restrictive policy in the matter of colonial political archives, at least so far as the Special Rapporteur is informed at the present stage. Thus, specialists in the problem of "archives of sovereignty" relating to the colonial period summed up the situation at one of the meetings of the Round Table on archives in the following manner: "In all cases the local archives of the territories were handed over, with the exception of papers relating to the sovereignty of the metropolitan country alone."[128] This is true and acceptable, subject to the important double reservation that not all the so-called local archives (including the territory's historical archives) were handed over, and that the "papers of sovereignty"—at least some of them, which were useful to the successor State in defending its territorial rights against third parties—might be reproduced for the successor State's benefit, especially if these documents may lawfully enter the public domain after a certain lapse of time. That is the point of the French solution mentioned above in connection with archives relating to Algeria.

159. The newly independent successor State's access to the political archives of the colonial period must not, then, be definitively and hermetically blocked. Thus, Professor Charles Rousseau has said, very pertinently, in connection with colonial political archives concerning Cambodia: "The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. *The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863–1953)*".[129]

160. In the Special Rapporteur's opinion, the question of colonial political archives or of archives described as "sovereignty" is particularly important in this type of succession of States, given the frequency with which archives are repatriated by the former metropolitan country. It is most inappropriate and inequitable for the predecessor State to refuse categorically to accede to any justified request by the successor State. While *a century of colonization may form part of the history of the administering Power, it bulks even larger in the history of the newly independent State, which may need certain documents relating to it.* The "Symposium on African archives and history" held at Dakar from 1 to 8 October 1965 recognized the importance of such documents and therefore made the following recommendation:

Considering the successive disruptions of the political and administrative structures of African countries, the participants hope that wherever transfers have infringed the principles of the *territoriality of archives** and the *indivisibility of collections*,* the situation will be remedied by restitution or by other appropriate measures.[130]

161. To conclude, *succession to "political archives" or "archives of sovereignty" should not be ruled out altogether.* The diplomatic, military and political documents which were once the expression of the colonial Power's *dominium* and *imperium* over the dependent territory do not concern the former metropolitan country alone. They obviously "relate" to the dependent territory which formed their subject. On acceding to independence, the territory may feel the need to have at its disposal political or diplomatic archives from the colonial period, for example in the case of a dispute concerning the demarcation of its frontier when it has to take a position regarding the problem of its succession to treaties concluded by the colonial Power on behalf of the territory concerned. The reason why newly independent States are notably reluctant to notify their succession to certain treaties is, in some cases, uncertainty as to the reality of the earlier application of those treaties to their territory or as to the actual content of those treaties, of which they find no trace in the archives left behind in the territory by the colonial Power.[131] In the light of these considerations, the Special Rapporteur proposes that the non-restitution of "colonial archives connected with sovereignty" relating to the territory should be strongly qualified by the predecessor State's obligation to hand over to the successor State at least copies of such archives in case of need.[132]

3. Pre-colonial historical archives and cultural archives proper to the territory

162. The newly independent State's historical and cultural heritage may include two kinds of archives: archives which antedate colonization, and cultural archives constituted within the dependent territory throughout the duration of the colonial period. If documents of these two kinds have been removed by the former metropolitan country, they must be

[127] A/32/203, pp. 5–6.

[128] France, *Les archives dans la vie internationale* (*op. cit.*), p. 45.

[129] C. Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964–1965), p. 136.

[130] Laroche, *loc. cit.*, p. 139.

[131] Cf. the deliberations of the Commission on the problem of succession of States in respect of treaties, in connection with newly independent States.

[132] Carlo Laroche (who is Chief Curator of the Overseas Section of the French National Archives in Paris) writes:

"It cannot be denied . . . that new States have *a privilege as to the consultation, the communication, and the reproduction of these archives, which, to a large extent, are theirs as well as ours.**" (Laroche, *loc. cit.*, p. 135.)

returned to the successor State. *This principle should be firmly and immediately applied.* These archives are the product of the land and spring from its soil; they are bound up with the land where they came into existence, and they contain its history and form an integral part of its cultural heritage.

163. Historical archives of the pre-colonial period are not "the property of the predecessor State" but are the property of the territory itself, which has constituted them in the course of its history or has acquired them with its own funds or in some other manner. They must consequently revert to the newly independent State, quite apart from any question of succession of States, if they are still within its territory at the time of its accession to independence, or must be claimed by it if they have been removed from the territory by the colonial Power.

164. The reason that the Special Rapporteur has to raise this question is the overlapping which occurs with other categories of archives removed from the territory to which the succession of States relates. Here again, one encounters the difficulties inherent in the mobility of some kinds of property, such as archives, whose improper removal from the territory raises the whole problem of their restitution to the successor State.

165. Where a dispute arises in this field, it tends to continue for a long time without any settlement, and when such a dispute is terminated, it is often by reason of a power relationship. Yet we read in the Proceedings of the Sixth International Conference of the Round Table on Archives that:

> It appears undeniable that the metropolitan country should return to States that achieve independence in the first place, *the archives which antedate the colonial regime,** which are without question the property of the territory. ... It is ... regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered *indispensable.**[133]

166. At this point it is pertinent to cite paragraph 1 of draft article 13 as adopted by the Commission:

> When the successor State is a newly independent State;
>
> 1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became independent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

The provision exactly covers the case of historical archives which antedate colonization. An example is the case of the annexation of Ethiopia by Italy in 1935; Italy was obliged to return the archives which it had removed from Ethiopia when, after the Second World War, its colonization was terminated. Article 37 of the Treaty of Peace of 1947 with Italy provides as follows:

> ... Italy shall restore all ... archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.[134]

167. In the case of Viet Nam, a Franco-Vietnamese agreement in the matter of archives, signed on 15 June 1950, provided that *historical* archives constituted by the Imperial Vietnamese Government before the French occupation were to be restored as of right to the Vietnamese State. The relevant provision of the agreement states:

> *Article 7:* The following shall revert to the Government of Viet Nam:
>
> (1) The archives constituted by the Imperial Government and its Kinh Luoc [135], preserved at the Central Archives.

168. A Franco-Algerian dispute concerning pre-colonial historical archives has been only very partially settled to this day. The archives relating to Algeria's pre-colonial history had been carefully catalogued, added to and preserved in Algiers by the French administering authority until immediately before the independence, when they were taken to France (to Nantes, Paris, and particularly to a special archives depot at Aix-en-Provence). These archives consisted of what is commonly known as the "Arabic collection", the "Turkish collection" and the "Spanish collection". As a result of negotiations between the two Governments, some registers of the pay of Janissaries, forming part of the documents in the Turkish collection, and microfilms of part of the Spanish collection were returned in 1966.

169. By a Franco-Algerian exchange of letters of 23 December 1966, the Algerian Government obtained the restitution of "450 original registers in the Turkish and Arabic languages relating to the administration of Algeria before 1830", that is, before the French colonial occupation. Under the terms of this exchange of letters, by July 1967 the National Library of Algiers was to receive, free of charge, microfilms of documents in Spanish which had been moved from Algeria to Aix-en-Provence immediately before independence and which constituted the "Spanish collection" of Algeria relative to the Spanish occupation of Algerian coastal regions. However, the agreement has not been implemented on this point. The same exchange of letters provided that questions concerning archives not

[133] France, *Les archives dans la vie internationale.* (*op. cit.*), pp. 43–44. The administering Power is not the only party involved. Private persons have also played a part in the looting of archives and cultural property belonging to territories which have become independent. In an article on Madagascar, one author writes:

> "The authorities of Antananarivo believe that vast quantities of objects and documents were removed by French scholars or collectors taking advantage of the total absence of controls during the colonial era and the 'Franco-Malagasy' period that followed. In some cases, the drain of cultural property has actually given rise to an illicit trade in precious stones, rare wood and sculpture, *archives,** etc." (E. Ramaro, "Les lumières et les ombres", *Afrique-Asie*, No. 187 (14–27 May 1979).)

[134] See footnote 15 above.

[135] The "Kinh Luoc" were governors or prefects of the Emperor of Indo-China before the French occupation of the Indo-Chinese peninsula.

settled by that instrument would form the subject of subsequent consultations.

170. This limited restitution of Algerian historical archives removed by the French administration immediately before Algeria's independence was matched by a contribution by Algeria, for by the same exchange of letters of 23 December 1966 Algeria placed at the disposal of France, in a positive spirit of co-operation, a microfilm of "34 registers in the Turkish and Arabic languages relative to the administration of Algeria before 1830".[136]

171. On the basis of the Franco-Algerian exchange of letters of 23 December 1966, which provided for subsequent consultations between the two countries, Algeria in 1974 again raised the problem of its historical archives. In April 1975, on the occasion of the visit to Algeria of Mr. Valéry Giscard d'Estaing, President of the French Republic, 15 boxes of Algerian historical archives forming part of the "Arabic collection" were returned by the French Government.[137]

172. One last point remains to be examined before we discuss administrative archives: the question of historical archives established outside the territory which has become independent.

4. Archives established outside the territory which has become independent

173. The Special Rapporteur has not found any specific information covering this field and this type of succession. However, the problem of the ownership of the India Office library furnishes an example of an "unresolved" case. It will be recalled that in 1801 the British East India Company established a library which now contains some 280,000 volumes and 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition, in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955, the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.[138] The problem would assuredly be quite difficult to solve, because the Government of India Act (1935) had allocated the contents of the library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case was referred in June 1961 to arbitration by three Commonwealth jurists who were members of the Judicial Committee of the Privy Council.[139]

5. Administrative archives

174. The Sixth International Conference of the Round Table on Archives stated:

It seems undeniable that [the former Administering Powers] have *... the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local populations** .... Consequently, titles of ownership of the State and of semi-public institutions, documents concerning public buildings, railways, bridges and roads, etc., land survey documents, census records, records of births, marriages and deaths, etc., will normally be handed over with the territory itself. This assumes the regular transfer of local administrative archives to the new authorities. *It is sometimes regrettable that the conditions under which the transfer of powers from one authority to the other occurred have not always been such as to ensure the regularity of this transfer of archives, which may be regarded as indispensable.**[140]

[136] On the composition of the Algerian historical archives (Turkish and Arabic collections), cf. J. Deny, "A propos du fonds arabe-turc des archives du Gouvernement général de l'Algérie", *Revue africaine* (Algiers, 62nd year, No. 309 (1921), pp. 375–378; Deny, "Les registres de solde des janissaires conservés à la Bibliothèque nationale d'Alger", *ibid.*, 61st year, Nos. 302–303 (1920), p. 19; and *ibid.*, Nos. 304–305 (1920), p. 212; E. Dermenghen, "Les archives centrales du Gouvernement général de l'Algérie", *Documents algériens*, série culturelle, No. 69 (Algiers, 30 May 1953); G. Esquer, "Les sources de l'histoire de l'Algérie": chap. XV of *Histoire et historiens de l'Algérie* (Algiers, Gouvernement général de l'Algérie, Collection du centenaire de l'Algérie, 1931).

[137] When the Algerian side in 1975 again requested the return of the "Arabic collection" and of the remainder of the "Spanish collection", the French side replied that "there do not exist in France any further Algerian archives antedating 1830", the date of colonization, adding that the "Spanish collection" was a collection of copies made by French scholars from the sixteenth to the nineteenth century, on the basis of originals most of which are preserved in the Spanish Archives of Simancas. The French side accordingly referred the Algerian side to the Spanish authorities, with a view to possibly microfilming the originals, while expressing its readiness to authorize the microfilming of copies in its possession (exchange of diplomatic correspondence of 22 April and 20 May 1975). In fact, Algeria's so-called Spanish archives, collected from the sixteenth to the nineteenth century and constituting series C in the classification of Algerian archives (cf. footnote 124 above), are, according to Esquer and Dermenghem, librarian-archivists specializing in the colonial period, "a collection of original items, copies and manuscripts" (*Archives du gouvernement général de l'Algérie, série C* (Algiers, Heinz, n.d.)). The collection contains documents relating to the Arab conquest of Spain and to Spanish establishments on the African coast, to Spanish wars in the seventeenth and eighteenth centuries, and to the history and trade of the Barbary Coast States. It also contains the originals of treaties concluded by the Dey of Algiers with various foreign Powers, as well as manuscripts such as the "Chronicle of Diego Suárez Montañés" (see G. Jacqueton, *Les archives espagnoles du Gouvernement général de l'Algérie, Histoire du fonds et inventaire* (Algiers, 1894)).

[138] In the difficult process of partition between India and Pakistan in 1947, the central archives were left to India, but it was provided that Pakistan would receive a microfilm of the series of common interest.

[139] The Special Rapporteur has taken this information from the lectures of Rousseau, *Les transformations territoriales ...* (*op. cit.*), pp. 137–139. He has not been able to find out whether and how the case was finally settled.

[140] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 43–44.

175. Cases where the former Administering Power has removed all kinds of administrative documents can only be a source of considerable embarrassment, confusion and maladministration for the young independent State which in any case has to cope with often serious difficulties owing to its inexperience and its qualitative and quantitative deficiencies in trained personnel. We will forbear to mention the rare instances where independence was marked by the sudden and brutal rupture of relations between the former motherland and the ex-colony and where, with the accompanying misunderstandings and bitterness, all instruments of administration may have been maliciously destroyed or carried away. More commonly, the removal of the means of administration consisting of archives has mainly reflected the wish of the Administering Power not to be deprived of documents and titles of possible interest to its own nationals who previously formed a minority inhabiting the territory affected by the succession of States. However, reproduction techniques are now so advanced that it would be unreasonable and unjustified to continue to retain administrative or technical archives of this nature, depriving a majority to satisfy a minority's needs—which, in any case, could be satisfied otherwise.

176. In the case of the decolonization of Libya, General Assembly resolution 388A (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", expressed the wish of the United Nations that the newly independent State should possess at least the administrative archives most indispensable to current administration. Accordingly, article I, paragraph 2 (*a*) of the resolution provided for the immediate transfer to Libya of "*the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution.**" It will be noticed that, according to this provision, it is immaterial where the archives in question are physically situated (in Libya, Italy or elsewhere) for the purpose of the requirement of their immediate transfer to the new Libyan State, so long as those items "concern" Libya or "relate to" the property which Libya was to receive from the predecessor State. That the newly independent State should have at its disposal the administrative and technical archives for the everyday administration of the country appears to be a matter of common sense and reason, and an imperative condition for the *viability* of this newly independent State.

177. In the case of Eritrea, however, the General Assembly of the United Nations adopted certain provisions of which some are not wholly in accord with those the Organization had one year earlier adopted with regard to Libya. Article II, paragraph 2, of resolution 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", had permitted Italy to hand over at its convenience to the provisional Administering Power either the originals or copies of documents and archives. Under paragraph 3 of the same article, the provisional Administering Power was to restore to Italy not the copies, but possibly the originals of the documents of interest to that country, its nationals, its citizens or any person or persons who had transferred their residence to Italy. It is hard to see how, without the use of scissors, it was possible to hand over to Italy the originals of the records of births in which the names of Italians and Eritreans are juxtaposed through the chronology of birth on Eritrean soil.

178. The same problem arose in 1962 in the case of the independence of Algeria and after the repatriation to France of French nationals born in Algeria. The French Government had decided to remove to France for microfilming certain records of births, marriages and deaths from the town halls of districts in Algeria which had a large European population. This measure would have deprived of their records the Algerian nationals who formed the majority in the country and whose names appeared in the records removed to France just before Algeria's independence. Happily, these records were quickly microfilmed in France and were returned to Algeria several years after independence. The French Government had noted that the records were not all up-to-date because the war of national liberation had prevented the proper maintenance of the records.[141] It then requested the Algerian Government, in 1966, to microfilm the series of records kept in the record offices of the Algerian courts, which were better kept than those in the town halls. The Algerian Government agreed to this request and authorized French microfilm teams to come and do the work themselves.[142]

179. Before drawing his conclusions regarding the problem of archives in the case of the succession of States after decolonization, and before proposing to the Commission a draft article covering this case, the Special Rapporteur wishes to cite some passages from the resolution adopted in October 1977 by the Seventeenth International Round Table Conference on Archives. The resolution does not specifically concern cases of decolonization, but relates to all types of succession of States. It includes in particular the following passages, which should be a guide for the Commission in working out a draft article concerning newly independent States:

> ... The Round Table reaffirms *the right of each State to recover archives which are part of its heritage of archives** and which are currently kept outside its territory, as well as *the right of each national group to access,** under specified conditions, *to*

[141] During the last years of the war in Algeria, the "marginal notes" were not entered systematically in these records because the notifications of deaths, marriages and divorces were not made by the parties concerned.

[142] The Special Rapporteur, then Minister of Justice, had authorized this microfilming, giving the teams access to all the records of the Algerian courts and permission to work on the spot. The costs of microfilming were borne by the successor State, whose parliament voted special funds for this purpose.

*the sources** wheresoever preserved, concerning its history, and *to the copying** of these sources.

Considering the large number of archival disputes and, in particular, *those resulting from decolonization*;*

...

Considering that this settlement should be effected by means of bilateral or plurilateral *negotiations*;*

The Round Table recommends that:

(*a*) *The opening of negotiations** should be encouraged between all the parties concerned, first, regarding the problems relating to the ownership of the archives and, secondly, regarding the right of access and the right to copies;

...

The Round Table recognizes *the legitimate right of the public authorities** and of the citizens of the countries which formed part of larger political units or which were administered by foreign Powers *to be informed of their own history. The legitimate right to information exists per se** independently of the right of ownership in the archives.

...[143]

6. Proposals for a draft article

180. The Special Rapporteur believes that the foregoing discussion may be summed up as follows:

(*a*) The problem of archives is *vital* for any territory to which the succession of States relates, but it is assuredly more so for a newly independent State which has to contend, in any case, with difficulties of all kinds resulting from its underdevelopment.

(*b*) In a newly independent State, the problem of the archives is not to be considered in terms of the facility, which would mean allocating *the archives according to their physical location*, i.e. to the State holding them at the time when the succession of States occurs. This would put a *premium on the removal of the archives* on the eve of independence and would legalize *faits accomplis*.

(*c*) The *need for co-operation* and the resultant benefits for both the successor State and the predecessor State should be given full consideration in the search for possible solutions to the question of the allocation of archives.

(*d*) The same needs and the same benefits of co-operation would render incomplete any solution limited to the *allocation of any particular kind of archives to the one or the other of the two States*, if it were not accompanied, under certain hypothetical conditions envisaged as broadly as possible, by a complementary solution consisting of *reproduction* for the State to which the originals of the archives were not allocated.

(*e*) The same needs and the same benefits of co-operation should lead to a search for the most appropriate solutions by direct *agreement between the two States concerned*, on the basis of equity and with a view to establishing ever closer co-operation between the two countries.

(*f*) As regards *archives proper to the territory* to which the succession of States relates:

(i) Such archives should necessarily revert, in their entirety, and in their *original* form, to the newly independent State, in conformity with the principles of origin and connection applied by archival scholarship;

(ii) Archives proper to the territory affected by the succession of States include two classes of items:
   a. the *historical archives* antedating the colonization of the territory; and
   b. *archives of a purely administrative or technical nature* which were kept in the territory until its independence and which are sometimes referred to as "local archives".

(iii) The successor State, while not under any legal obligation to do so, might *authorize the predecessor State to undertake at its own expense the microfilming of the pre-colonial historical archives*, especially if it has added to them during its administration of the territory. As a counterpart to this facility, the successor State should be able to request the predecessor State to microfilm other historical archives of the same kind, which were established and maintained outside the territory that has become independent, which have at all times belonged to the Administering Power and which may usefully supplement the stock of pre-colonial historical archives. This category of archives consists of all items and documents having the triple characteristics of being located on the territory of the former Administering Power, belonging in fact to that Power, but concerning by virtue of their subject matter the history of the territory that has become independent. Thus, while obtaining the restitution of the historical archives belonging to it, the successor State could obtain at its own expense the microfilm of pre-colonial historical archives belonging to the predecessor State, but *concerning* or *relating to the territory* which is the object of the succession of States. This would be a source of fruitful co-operation for the two States.

(iv) On the other hand, the successor State should be legally obliged to *allow the predecessor State to reproduce, at its own expense, all or part of certain kinds of administrative or technical archives* which it may need, particularly for administrative procedures concerning the nationals of the predecessor State who used to live in the territory affected by the succession of States and who, on independence, chose to settle in the territory of the predecessor State. Clearly, however, the successor State would be legally obliged to supply only copies of the administrative and other documents used in everyday administration, and even then the delivery of such items should not compromise its security, interests or sovereignty. If, for instance, the predecessor State were to claim the purely technical dossier of a military base which it had constructed on the

[143] International Council on Archives, *Bulletin*, No. 9 (December 1977), p. 7.

territory that has become independent, or a dossier containing the criminal record of one of the nationals of the predecessor State who used to live in the administered territory, the newly independent State could refuse to supply copies of such items. In such cases, the successor State, like any other State, must have some latitude and discretion.

(*g*) (i) As regards the "sovereignty archives" connected with the *imperium* of the Administering Power in the territory that has become independent, the rule is that they should be allocated to the predecessor State. However, *considerations of co-operation may, and indeed should, cause that State to adopt an understanding attitude towards the problems that may arise for the successor State.* If the latter should find itself in dispute or litigation with a third State concerning the delimitation of its frontiers, the former Administering Power should supply to the successor State, at its expense if need be, microfilms of all documents which it may need to present its case, or which throw light on that of the third State, or which may enlighten an international organization or any judicial or arbitral body.

(ii) This possibility open to the newly independent State of gaining access to the colonial archives of sovereignty becomes even more imperative if, after a certain time and in accordance with the laws of the predecessor State, these archives of sovereignty are opened to the public.

(iii) Naturally, the predecessor State will legitimately refuse to surrender any document of which the communication to the newly independent State might compromise the security or the interests of the predecessor State.

(*h*) (i) All these points, which seem to the Special Rapporteur to be a fair summary of the complex situation created, as regards archives, by succession after decolonization, take account of the concerns of the newly independent States without ignoring the interests, or merely fears, of the former Administering Powers, while also conforming both to the objectives of co-operation and to the concerns of the international organizations and specialized conferences that deal with these matters.

(ii) Mention should be made at this point of the *Symposium on African archives and history*, held at Dakar from 1 to 8 October 1965, which recommended that in view of the "successive disruptions of the political and administrative structures of African countries, ... wherever transfers [of archives to the former metropolitan country] have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution or by other appropriate measures".[144]

[144] See para. 160 above.

(iii) *UNESCO* has also taken action in this field. Its resolutions have been referred to earlier. Its action seems extremely beneficial in that it constitutes a timely intervention by an international organization which is concerned more than any other with the preservation of historical and cultural heritage and is free of any preoccupation with national pride that would cloud judgement on these already complex issues.[145]

(iv) Lastly, the *Cartographic Seminar of African countries and France* has adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the *recognition of State sovereignty over all cartographic archives* and proposed that such archives should be transferred to States on request, while documents relating to frontiers would be handed over simultaneously to the States concerned.[146]

181. In the light of the foregoing, the Special Rapporteur proposes the following draft article:

Article C. Newly independent States

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

(*a*) archives of all kinds which belonged to the territory prior to its dependence and which became the archives of the administering State, and

(*b*) administrative and technical archives connected with the activity of the predecessor State in regard to the territory to which the State succession relates,

shall pass to the successor State.

2. The successor State shall undertake, for the purposes of the predecessor State, and at the latter's request and expense, any necessary reproduction of the archives that pass to it.

3. Succession to archives other than those referred to in paragraph 1 and concerning the territory to which the State succession relates shall be determined by agreement between the predecessor State and the successor State in such a manner that each of the two States benefits liberally and equitably from such archives.

4. Where a newly independent State is formed from two or more dependent territories, the passing of the archives of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.

5. Where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of

[145] See paras. 41 to 53 above, and also para. 54, on action by the United Nations.

[146] Cartographic Seminar of African countries and France, Paris, 21 May–3 June 1975, *General Report*, recommendation No. 2, "Basic cartography".

the archives of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.

6. Agreements concluded between the predecessor State and the successor State in regard to archives shall not infringe the right of every people to information about its history and cultural heritage.

C. Uniting of States

182. The Commission has provisionally adopted a draft article 14 on the passing of State property to the successor State in the event of a uniting of States. The text reads as follows:

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.]

183. The agreement of the parties has a decisive place in the matter of State succession, but nowhere is it more decisive than in the case of a uniting of States. Union consists essentially and basically of *a voluntary act*. In other words, *it is the agreement of the parties which settles the problems arising from the union.* Even where the States did not, before uniting, reach agreement on a solution in a given field—for example, archives—such omission or silence may be interpreted without any risk of mistake, as the common will to rely on the future provisions of internal law to be enacted instead by the successor State for the purpose after the uniting of States has become a reality. Thus, if the agreement fails to determine what is to become of the predecessor State's archives, internal law prevails.

184. It is the law in force in each component State at the time of the uniting of States that initially prevails. Obviously, however, pending the uniting, such law can only give expression to the component State's sovereignty over its own archives. Consequently, in the absence of an agreed term in the agreements concerning the union, the archives of each component State do not pass automatically to the successor State, because the internal law of the component State has not been repealed. *Only if the successor State adopts new legislation repealing the component parts' internal laws in the matter of archives are those archives transferred to the successor State.*

185. The solution depends on the *constitutional nature of the uniting of States*. If the union results in the creation of a federation of States, it is difficult to see why the archives of each component State which survives (although with reduced international competence) should pass to the successor State. If, on the other hand, the uniting of States results in the establishment of a unitary State, the constituent States cease to exist completely, and their State archives can only pass to the successor State, at least in international law.

186. The solution depends also on the *nature of the archives*. If they are historical in character, the archives of the predecessor State are of interest to it alone and of relatively little concern to the union, unless it is decided by treaty, for reasons of prestige or other reasons, to transfer them to the seat of the union or to declare them to be its property. Any change of status or application, particularly a transfer to the benefit of the successor State of other categories of archives needed for the direct administration of each constituent State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming the union.

187. Referring to the case of a uniting of States leading to a federation, Fauchille has said:

> The State which ceases to exist does so not as a State but only as a unitary State. It should therefore retain its own patrimony, for the existence of this patrimony is in no way incompatible with the new régime to which the State is subject. Although its original independence is lost, its legal personality remains, and there is no reason why its property should become the property of the federation or union.[147]

Professor Erik Castrén shares that opinion: "Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them."[148] Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State archives must be determined.

188. Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means necessary for its functioning and viability. Thus, State property, particularly archives, pass to the successor State only if they are found to be necessary for the exercise of the powers devolving upon that State under the constituent act of the union. The transfer of the archives of the constituent States does not, however, seem to be necessary to the union, which will in time establish its own archives. The archives of the constituent States will continue to be more useful to those States than to the union itself for the reasons already given.[149] In this connection, an old but significant example may be recalled, that of the *unification of Spain* during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs such as councils and viceroyalties. Consequently, there was no centralization of archives.

[147] Fauchille, *op. cit.*, p. 390, para. 233.

[148] E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours de l'Académie de droit international de la Haye, 1951–I* (Paris, Sirey, 1952), vol. 18, p. 454.

[149] See para. 186 above.

The present organization of Spanish archives is still profoundly influenced by that system.

189. The Special Rapporteur cannot do better than propose a draft article modelled on article 14 relating to succession to State property. The article might read:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall, subject to the provisions of paragraph 2, pass to the successor State.

2. The allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

D. Separation of part or parts of the territory of a State and dissolution of a State

190. The case of separation of a part or parts of the territory of a State and the case of dissolution of a State are dealt with in separate draft articles, with respect both to State property and State debts, but the commentaries on the two articles are combined. Separation and dissolution both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. The case of separation, however, is associated with that of secession, in which the predecessor State continues to exist, whereas in the case of dissolution the predecessor State ceases to exist altogether.

191. An important and multiple dispute concerning archives arose among Scandinavian countries, particularly at the time of the dissolution of the Union between Norway and Sweden in 1905 and of the Union between Denmark and Iceland in 1944. In the first case, it seems, first, that both countries, Norway and Sweden, retained their respective archives, which the Union had not merged, and, secondly, that it was eventually possible to apportion the central archives between the two countries, but not without great difficulty. In general, the principle of functional connection was combined with that of territorial origin in an attempt to reach a satisfactory result. The convention of 27 April 1906 concluded between Sweden and Norway one year after the dissolution of the Union settled the allocation of common archives held abroad. That convention, which settled the problem of the archives of consulates that were the common property of both States, provided that:

> ... Documents relating exclusively to Norwegian affairs; and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned.[150]

Later, pursuant to a protocol of agreement between the two countries dated 25 April 1952, Norway succeeded in having Sweden transfer certain central archives which had been common archives.

192. A general arbitration convention concluded on 15 October 1927 between Denmark and Iceland resulted in a reciprocal handing over of archives. When the Union between Denmark and Iceland was dissolved, the archives were apportioned haphazardly. There was however, one problem which was to hold the attention of both countries, to the extent that *public opinion in Iceland and Denmark was aroused, something rarely observed in disputes relating to archives.* What was at stake was an important collection of parchments and manuscripts of great historical and cultural value containing, *inter alia*, old Icelandic legends and the "Flatey Book", a two-volume manuscript written in the fourteenth century by two monks on the island of Flatey in Iceland, and tracing the history of the kingdoms of Norway. The parchments and manuscripts were not really State archives since they had been collected *in Denmark* by an *Icelander*, Arne Magnussens, who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen.

193. These parchments, whose value had been estimated at 600 million Swiss francs, had been duly bequeathed in perpetuity by their owner to a university foundation in Copenhagen. Of Arne Magnussens's 2,855 manuscripts and parchments, 500 had been restored to Iceland after the death of their owner and the rest were kept by the foundation which bears his name. Despite the fact that they were private property, duly bequeathed to an educational establishment, these archives were finally handed over in 1971 to the Icelandic Government, which had been claiming them since the end of the Union between Denmark and Iceland, as the local governments which preceded them had been doing since the beginning of the century. This definitive restitution occurred pursuant to Danish judicial decisions. The Arne Magnussens university foundation of Copenhagen, to which the archives had been bequeathed by their owner, had challenged the Danish Government's decision to hand over the documents to Iceland, instituting proceedings against the Danish Minister of National Education in the Court of Copenhagen. The Court ruled in favour of the restitution of the archives by an order of 17 November 1966.[151] The foundation having appealed against this ruling, the Danish Supreme Court upheld the ruling by its decision of 18 March 1971.[152] Both Governments

[150] Baron Descamps and L. Renault, *Recueil international des traités du XXe siècle, 1906* (Paris, Rousseau), p. 1050.

[151] *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 2 (April–June 1967), pp. 401–402.

[152] The Special Rapporteur obtained the text of this decision, in Danish, thanks to the kindness of our late colleague on the

(Continued on next page.)

had agreed on the restitution of the originals to Iceland,[153] which was to house them in a foundation similar to and having the same objects as those set forth in the statutes of the Copenhagen Arne Magnussens Foundation. They also agreed on the conditions governing the loan, reproduction and consultation of these archives in the interest of scholarly research and cultural development. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection, which is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute. At the time of the official handing-over ceremony, when the first documents left the Royal library at Copenhagen, the Library flew the flag at half-mast.[154]

194. In the event of dissolution of a State, each of the successor States receives the archives relating to its territory. The central archives of the dissolved State are apportioned between the successor States if they are divisible, or placed in the charge of the successor State they concern most directly if they are indivisible. Copies are generally made for any other successor State concerned.

195. The disappearance of the Austro-Hungarian monarchy after the First World War gave rise to a very vast and complicated dispute concerning archives which has not yet been completely settled. The territories which were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia after the First World War, arranged for the archives concerning them to be handed over to them.[155] The treaty concluded on 10 August 1920 between Czechoslovakia, Italy, Poland, Romania and the Serb–Croat–Slovene State at Sèvres provides as follows in article 1:

> Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, *or which were established as a result of the dismemberment of that monarchy**,
>
> undertake to restore to each other any of the following objects which may be in their respective territories:
>
> 1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories ....[156]

196. The earlier Treaty of Saint-Germain-en-Laye (10 September 1919) between the Allied Powers and Austria contained many provisions obliging Austria to hand over archives to various new (or pre-constituted) States.[157] A convention concluded between Austria and various States attempted to settle the difficulties which had arisen as a result of the implementation of the provisions of the Treaty of Saint-Germain-en-Laye in the matter of archives.[158] It provided, *inter alia*, for exchanges of copies of documents, for the allocation to successor States of various archives relating to industrial property, and for the establishment of a list of reciprocal claims. An agreement of 14 October 1922 concluded at Vienna between Czechoslovakia and Romania[159] provided for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy by each of the two States and concerning the other State. On 26 June 1923, a convention concluded between Austria and the Kingdom of the Serbs, Croats and Slovenes,[160] pursuant to the pertinent provisions of the Treaty of Saint-Germain-en-Laye, provided for the handing over by Austria to the Kingdom of archives concerning the Kingdom. A start was made with the implementation of this convention. On 24 November 1923, it was Romania's turn to conclude a convention with the Kingdom of the Serbs, Croats and Slovenes, which was signed at Belgrade, for the reciprocal handing-over of archives. Similarly, the convention concluded between Hungary and Romania at Bucharest on 16 April 1924 with a view to the reciprocal handing-over of archives[161] settled, so far as the two signatory countries were concerned, the terrible dispute concerning archives which had resulted from the dissolution of the Austro-Hungarian monarchy. That same year the same two countries, Hungary and Romania, signed another convention, also in Bucharest, providing for exchanges of administrative archives.[162] A treaty of

(*Footnote 152 continued.*)

Commission, Edvard Hambro. He also wishes to thank the Danish Embassy in Paris for having translated the text. Cf. Danish text Højesteretsdomme, 18 marts 1971, i sag 68/1970, *Arne Magnussens Legat* (*Den arnamagnaeanske Stiftelse*, mod *Undervisningsministeriet*) (Supreme Court decisions, 18 March 1971, Case No. 68/1970, Arne Magnussens Bequest ("Arna-Magnae" Foundation, *v.* Ministry of National Education)) in *Ugeskrift for Retsvaesen* (Copenhagen), No. 19 (8 May 1977), pp. 299–305.

[153] Cf. also J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1974), vol. VII, p. 153, which mentions the case of the Icelandic parchments.

[154] A.E. Pederson, "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

[155] Article 93 of the Treaty of Saint-Germain-en-Laye (G.F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, vol. XI, p. 715).

[156] *Ibid.* (1924), vol. XIX, pp. 810–811.

[157] Cf. arts. 93, 97, 192, 193, 194, 196, 249 and 250 of the Treaty of Saint-Germain-en-Laye (*ibid.* (1923), vol. XI, pp. 715 *et seq.*)

[158] Cf. arts. 1–6 of the Convention concluded 6 April 1922 between Austria, Czechoslovakia, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes (Italy, Ministero degli affari esteri, *Trattati e Convenzioni fra il Regno d'Italia e gli Altri Stati* (Rome, 1931), vol. 28, pp. 361–370).

[159] League of Nations, *Treaty Series*, vol. XXV, p. 163.

[160] Kingdom of the Serbs, Croats and Slovenes, *Sluzbene Novine* [Official Journal] (Belgrade), 6th year, No. 54–VII (7 March 1924), p. 1.

[161] League of Nations, *Treaty Series*, vol. XLV, p. 331.

[162] Cf. arts. 1 (para. 5) and 18 of the convention signed at Bucharest on 3 December 1924 for an exchange of papers relating to judicial proceedings, land, registers of births, marriages and deaths.

conciliation and arbitration, dated 23 April 1925, was concluded between Czechoslovakia and Poland[163] for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy.

197. Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 10 February 1947, *all historical archives which had been constituted by the Austro-Hungarian monarchy between 1848 and 1919 in those territories*. Under the same treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.[164] Article 11, paragraph 1, of the same treaty specifically states that the detached territories which had formed States (Yugoslavia, Czechoslovakia) were entitled to the objects "constituting [their] cultural heritage ... *which originated in those territories**"; thus, the article was based on the link existing between archives and territory. Paragraph 2 of the same article, moreover, rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy, and original works of Hungarians"; by *a contrario* reasoning it follows, presumably, that objects acquired by the Czechoslovak territory should revert to it. In fact, these objects have been returned to Czechoslovakia.[165]

198. The aforementioned article 11 of the Treaty of Peace with Hungary is one of the most specific with regard to time-limits for the handing over of archives; it establishes a veritable time-table within a maximum time-limit of 18 months.

199. This simple enumeration of only some of the many agreements reached on the subject of archives upon the dismemberment of the Austro-Hungarian Empire gives some idea of the complexity of the problem to be solved in the matter of the Austro-Hungarian imperial archives. Certain archival disputes that arose in this connection concern the succession of States by "transfer of part of the territory of a State to another State" which was discussed in the Special Rapporteur's earlier reports on this type of succession. Other disputes, also resulting from the dissolution of the Austro-Hungarian monarchy, concerned the "separation of one or more parts of the territory of a State" to form a new State and the dissolution of a State resulting in two or more new States. The archival dispute caused by the disappearance of the Hapsburg monarchy has given rise to intricate, even inextricable, situations and cross-claims in which each type of succession of States cannot always easily be separated.[166]

200. The convention concluded on 25 May 1926 at Baden between the two States, Austria and Hungary, which had given the Austro-Hungarian monarchy its name, had partly settled the Austro-Hungarian archival dispute. Austria handed over the "Registraturen", *documents of a historical nature concerning Hungary*. The archives of common interest, however, formed the subject of special provisions, pursuant to which a permanent mission of Hungarian archivists is working in Austrian State archives, has free access to the shelves and participates in the sorting of the common heritage. (The most difficult question concerning local archives related to the devolution of the archives of the two counties of Sopron (Ödenburg) and Vas (Eisenburg), which, having been transferred to Austria, formed the Burgenland, while their chief towns remained Hungarian. It was decided to leave their archives, which had remained in the chief towns, to Hungary, except for the archives of Eisenstadt and various villages, which were handed over to Austria. This solution was later supplemented by a convention permitting annual exchanges of microfilms in order not to disappoint any party.)[167]

201. The case of the break-up of the Ottoman Empire after the First World War is similar to that of a *separation* of several parts of a State's territory, although the Turkish Government upheld the theory of the *dissolution* of a State when, during negotiation of the treaty signed at Lausanne in 1923, it considered the new Turkish State as a successor State on the same footing as the other States which had succeeded to the Ottoman Empire. The Special Rapporteur will not enter into this controversy, which simply adds a justification for the joint commentaries on the cases of separation and dissolution. The following provision appears in the Treaty of Lausanne:

Article 139

Archives, registers, plans, title-deeds and other documents of every kind relating to the civil, judicial or financial administration, or the administration of Wakfs, which are at present in Turkey and are *only of interest** to the Government of a territory detached from the Ottoman Empire, and reciprocally those in a territory detached from the Ottoman Empire which are *only of interest** to the Turkish Government shall reciprocally be restored.

Archives, registers, plans, title-deeds and other documents mentioned above which are considered by the Government in whose possession they are as being *also of interest** to itself, may

[163] League of Nations, *Treaty Series*, vol. XLVIII, p. 383.

[164] Art. 11 of the Treaty of Peace with Hungary (United Nations, *Treaty Series*, vol. 41, p. 178).

[165] The provisions of the same art. 11 (para. 2) were reproduced for the case of Yugoslavia.

[166] See, in addition to the agreements mentioned in the preceding paragraphs, the Convention of Nettuno (20 July 1925) between Italy and the Kingdom of the Serbs, Croats and Slovenes (arts. 1–15); the convention of 26 October 1927 concluded between Czechoslovakia and Poland for the handing over of archives inherited from the Austro-Hungarian monarchy and concerning each of the two contracting States; the Convention of Rome (23 May 1931) concluded between Czechoslovakia and Italy for the apportionment and reproduction of archives of the former Austro-Hungarian army (arts. 1–9); the Agreement of Vienna (26 October 1932) which enabled Poland to obtain various archives from Austria; the Convention of Belgrade (30 January 1933) between Romania and Yugoslavia; etc.

[167] Cf. the statements by Mr. Szedö at the Sixth International Conference of the Archives Round Table (France, *Les archives dans la vie internationale* (*op. cit.*), p. 137).

be retained by that Government, subject to its furnishing on request photographs or certified copies to the Government concerned.

Archives, registers, plans, title-deeds and other documents which have been taken away either from Turkey or from detached territories shall reciprocally be restored in original, in so far as they *concern exclusively** the territories from which they have been taken.

The expense entailed by these operations shall be paid by the Government applying therefore.

...[168]

202. Without expressing an opinion on the exact juridical nature of the operation of the dissolution of the Third German Reich and the creation of the two Germanies, a brief reference will here be made to the controversies that arose concerning the Prussian Library. Difficulties having arisen with regard to the allocation of this large library, which contains 1,700,000 volumes and various Prussian archives, an Act of the Federal Republic of Germany dated 25 July 1957 placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

203. Pressed for time and somewhat awed by the length of this report, the Special Rapporteur does not intend to delve further into the question of the disposition of archives in cases of separation of a part or parts of the territory of a State and of the dissolution of a State.

204. As regards the case of separation of part or parts of the territory of a State, the Special Rapporteur draws attention to draft *article 15* adopted by the Commission, concerning succession to State property. It reads as follows:

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

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

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

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

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

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

The Special Rapporteur proposes, on this basis, a draft article E which would read:

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

1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of an agreement:

(*a*) the State archives of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates pass to the successor State;

(*b*) the State archives of the predecessor State other than those referred to in paragraph 2(*a*) above pass to the successor State in an equitable proportion.

3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained or which have passed to it, as the case may be.

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

5. The provisions of paragraphs 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State.

205. It will be noted that the Special Rapporteur has given special prominence to the agreement between the parties as a means of settling disputes concerning archives. Nothing can be done in this respect unless the two parties get together with a view to negotiating and settling such a dispute.

206. With regard to the case of the dissolution of a State, the Special Rapporteur cites below draft *article 16*, adopted by the Commission, in respect of succession to State property.

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

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

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

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

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

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

On this basis, the Special Rapporteur proposes the following draft article F:

[168] Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Rumania, the Serbo–Croat–Slovene State of the one part, and Turkey of the other part, signed at Lausanne on 24 July 1923 (League of Nations, *Treaty Series*, vol. XXVIII, p. 109).

Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

2. In the absence of an agreement:

(*a*) the State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense.

(*b*) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor State concerned and at their request.

(*c*) State archives of the type referred to in paragraph (*b*) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (*b*).

207. As in draft article E, the Special Rapporteur has given prominence to the settlement of disputes concerning archives by agreement between the parties. Wishing to propose an equitable solution for the case where there is no agreement, the Special Rapporteur has relied heavily on the principle of the functional connection by recommending that State archives should pass to the successor State if they concern exclusively or principally that State's territory. It is relatively immaterial whether these archives are situated in the territory of one of the successor States, or even outside the territorial boundaries of the dissolved State (for example, archives of the embassies of the predecessor State, its consulates, its trade missions, its military missions, and its representatives to intergovernmental organizations). This is the purpose of paragraph 2(*a*).

208. Paragraph (*b*) concerns the case of State archives which are indivisible or which relate to much the same extent to two or more successor States. The solution proposed involves transferring them to the successor State in whose territory they are physically present. The problem arises in the case of the *central archives* of the State which has disappeared. Its capital, in which such archives are generally kept, forms part of the territory of one of the successor States. It is this State which will inherit the central archives that are indivisible, or that are of equal interest to all the other successor States. The conditions laid down for such a transfer in paragraph (*b*) provide for equitable compensation, which may be financial, archivistic, movable or immovable, and which moreover do not preclude the right to any substitute copy.

209. Finally, in cases where such indivisible archives, or archives concerning two or more successor States, are not situated in the territory of any of the successor States (archives of official representatives of the dissolved State abroad), they are allocated to one of the successor States concerned under the conditions laid down in paragraph 2(*c*).

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QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 4]

DOCUMENT A/CN.4/319

Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

Draft articles, with commentaries* (continued)

[*Original: French*]
[*9 March 1979*]

CONTENTS

* For the preceding draft articles presented by the Special Rapporteur, see the third to seventh reports (*Yearbook... 1974*, vol. II (Part One) p. 135, document A/CN.4/279; *Yearbook... 1975*, vol. II, p. 25, document A/CN.4/285; *Yearbook... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook... 1977*, vol. II (Part One), p. 119, document A/CN.4/298; *Yearbook... 1978*, vol. II (Part One), p. 247, document A/CN.4/312, respectively).

ABBREVIATIONS

I.C.J.	International Court of Justice
I.C.J. Reports	*I.C.J. Reports of Judgments, Advisory Opinions and Orders*

Draft articles with commentaries (*continued*)

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

General considerations

1. Part V of the 1969 Vienna Convention on the Law of Treaties[1] is perhaps the most original and the most debated component of the Convention. There was no

[1] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

substantial body of practice relating to many of the questions covered in that part, which could be considered as having resulted in a quite perceptible degree of progressive development of international law. Both legal writers and the United Nations Conference on the Law of Treaties itself examined most of these provisions with great care, and sometimes with strong feelings.

2. Today, however, ten years after the signing of that Convention, the provisions of part V seem to be generally accepted and the International Court of Justice has confirmed the customary value of some of its most important articles.[2] There is thus *a priori* no reason to depart in principle from the general line adopted by the Commission and approved by the Sixth Committee according to which the present draft articles will follow the text of the Vienna Convention as far as possible.

3. No doubt various problems will arise in connection with part V which have already attracted the attention of the Commission and which result from the basic differences which distinguish international organizations from States. The most important of these (embodied in draft article 6)[3] concerns the capacity of international organizations to conclude treaties; in addition, there is the diversity of structures, which vary from one organization to another, thus preventing the development of uniform practices; and, in most cases, the weakness or uncertainty of the legal personality of the organization, which does not always make it possible to distinguish or separate the organization from its member States. During the consideration of this subject by the Commission, several of its members have frequently stressed the need to take those facts into account and to ensure strict application of the rules regarding the capacity of international organizations. The Special Rapporteur has sought to give due weight to this concern. But only a few of the 31 articles which make up part V of the Vienna Convention are likely to raise questions of principle. In order to give the members of the Commission a better opportunity to evaluate the range of choices available to them, variant versions have been submitted for some articles. In other cases, drafting changes constitute the only difference between the draft articles submitted and the corresponding articles of the Vienna Convention.

4. The last general comment concerns the position of the member States of an organization in relation to the treaties to which the latter is a party. The Vienna Convention specified with great care and subtlety which States are entitled to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. The solutions adopted (articles 46 and 47; articles 48 to 50; articles 50 to 53; article 60; article 62) embody a simple idea: the right to invoke these grounds depends on the interest that State are acknowledged to have in the matter, which varies according to the ground invoked. Thus any State may invoke unlawful violence as a ground for invalidating a treaty, whereas only the State which is the victim of an error may invoke that ground. But would not a State member of an international organization have a legitimate interest in invoking a ground relating to a treaty to which that organization is a party?

5. As will be explained below (commentary to draft article 46, paragraph (17)), and without prejudice to the treaties governed by the special rules of a given organization, this question must be answered in the negative. To acknowledge that a member State had that power would be to deny the separate legal personality of the organization and would confer on each member State, acting individually, the right to use, without considering the position of the organization and of the other member States, a power which the organization possesses in its own right. Moreover, it was only to a very limited extent, and without fully convincing all its members, that the Commission included in article 36 *bis* the idea that the members of an organization are in a special position with regard to treaties concluded by that organization. In fact, in the most serious cases (violence and breach of an absolute peremptory rule) the members of an international organization are well protected, as are all States and all international organizations, since invalidity is established *erga omnes*, and this protection must be considered as generally sufficient.

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties[4]

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present draft articles.

[2] For example, article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach): Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (*Advisory Opinion, I.C.J. Reports 1971*, p. 16). The same is true of article 62 (Fundamental change of circumstances): *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*) (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3).

[3] For the text of all the articles adopted so far by the Commission, see *Yearbook ... 1978*, vol. II (Part Two), pp. 124 *et seq.*, document A/33/10, chap. V, sect. B.1.

[4] Corresponding provision of the Vienna Convention:

"*Article 42: Validity and continuance in force of treaties*

"1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

"2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present draft articles. The same rule applies to suspension of the operation of a treaty.

3. The preceding provisions are without prejudice to the obligations that may derive from the Charter, and particularly from Article 103.

Commentary

(1) The purpose of the provisions of article 42 of the Vienna Convention is to provide "a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for";[5] "... the grounds of invalidity, termination, denunciation, withdrawal and suspension provided for ... are exhaustive";[6] and these grounds can be invoked only under the conditions provided for in the Convention and eventually in the treaty itself.

(2) The intention thus defined is perfectly valid for treaties between States and international organizations or between two or more international organizations. The provisions of article 42 of the Vienna Convention can thus be adopted, with one small drafting addition in paragraph 1—but some explanatory remarks are nevertheless called for.

(3) First of all, it is natural that, as was done in the Vienna Convention in the case of treaties between States, the possibility should be left open that the treaties which are the subject of this report may contain clauses concerning termination, denunciation, withdrawal or suspension of operation. Concern has been expressed in connection with other articles, such as article 39[7] that an organization might take advantage of that possibility to include in a treaty to which it is a party clauses that run counter to its statutory rules. But even if it is considered possible that such a case might occur, it would be covered by article 46; and in any event, it should be noted that such provisions, which are already very uncommon in the internal law of States, are virtually unknown in the relevant rules of each organization, and such a case may therefore be considered as purely theoretical.

(4) On the other hand, some doubts might arise as to the exhaustive nature of the enumeration in the Vienna Convention; even the explanation given at the time by the Commission in its 1966 report was not fully convincing.[8] Two cases must be examined: that of the disappearance of international organizations and the special case of the United Nations.

(5) Although international organizations are unusually long-lived, they may nevertheless disappear. It seems unlikely that the disappearance of an international organization could occur "purely and simply".[9] In some cases, at least the member States of which it had been composed would remain. Other cases, like that which occurred when the Organisation for European Economic Co-operation became the Organisation for Economic Co-operation and Development in 1960, involve the transformation of one organization into another by means of a process whose effects are fully defined in a treaty. It is also necessary to include the theoretical case in which a regional organization would be absorbed by the single State that its member States would constitute if they were to merge. These are, no doubt, special situations for which the precedents are neither numerous nor convincing, and in the view of the Special Rapporteur it would be inadvisable to begin considering them in this report. However, it would be advisable in due course to include a reservation on that subject in the draft articles. It would seem that this should be done in connection with draft article 73: while article 73 of the Vienna Convention reserves the case of State succession, it will be necessary to cover also those problems which are peculiar to international organizations.[10]

(6) Another special problem resulting from the Charter of the United Nations has led the Special Rapporteur to propose the inclusion in the present draft article of a new paragraph 3. As is well known, Article 103 of the Charter provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Commission and the Vienna Conference on the Law of Treaties reserved the effects of this Article with

[5] *Yearbook ... 1966*, vol. II, p. 236, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary to article 39.

[6] *Ibid.*, para. (5) of the commentary.

[7] *Yearbook ... 1978*, vol. II (Part One), p. 248, document A/CN.4/312.

[8] See *Yearbook ... 1966*, vol. II, p. 236, document A/6309/Rev.1, part II, chap. II, para. (5) of the commentary to article 39.

[9] Noting that "a bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party", the Commission, in paragraph (5) of the commentary to article 39 of its draft articles on the law of treaties, observed that "... this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles" (*ibid.*)—but this elusive attitude was covered by article 69 of the draft, which reserved questions relating to the succession of States (*ibid.*).

[10] The very term "succession" seems inappropriate in the cases mentioned. Neither the 1978 Vienna Convention on Succession of States in Respect of Treaties (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185) nor the 1974 draft articles of the Commission on the same subject (*Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D) deal with these questions. Only a few aspects of them were mentioned in the Commission's commentary to articles included in part IV (Uniting and Separation of States) of the draft articles on succession of States in respect of treaties (*ibid.*, pp. 252 *et seq.*).

regard to the provisions of article 30 (Application of successive treaties relating to the same subject-matter). As Article 103 does not deal explicitly with the obligations of international organizations, and since it could be argued either that it does not cover such organizations or that because of the general nature of its wording it should also be applied to international organizations, the Commission, in article 30 of the present draft, adopted a deliberately ambiguous formulation, which consists in placing the reservation concerning Article 103 of the Charter at the end of draft article 30 and wording it as follows:

> The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.[11]

(7) It might be wondered whether a reference to Article 103 of the Charter would not also be appropriate in article 42. The Special Rapporteur has proposed the insertion of paragraph 3 in order that the Commission may be led to consider the question. The elements of the discussion concern the significance of this reference, its utility and its form.

(8) The *significance* of a reference to Article 103 of the Charter is to recall the exceptional importance of a provision whose exact scope may be open to discussion but whose general sense is clear. Not only do the legal rules incorporated in the Charter prevail over obligations under other international agreements, but obligations under the Charter, such as those deriving from binding resolutions of the Security Council or judgments of the International Court of Justice, lead at least to the suspension of the operation of agreements which run counter to them. But this very consequence makes it possible to strengthen a solution already adopted by the Commission in connection with article 27 of the present draft.

(9) The Commission has, in fact, adopted article 27, paragraph 2, which provides:

> An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.[12]

The purpose of this provision is to prevent a treaty concluded *only* to implement a resolution of an organ of the organization from immobilizing the position of that organ contrary to the intention of the parties to the treaty. In the case of the United Nations, Article 103 of the Charter reinforces this principle still further. In fact, the resolutions of the Security Council which give rise to obligations are made superior in principle to all agreements that may have been or may be concluded by Member States, even agreements concluded by those States with the United Nations itself, when it seems that the sole purpose and effect of those agreements is to facilitate the implementation of Security Council resolutions.

(10) The significance of the reference to Article 103 of the Charter in draft article 42 having thus been clarified, we may now turn to a discussion of its *utility*. It could be argued that the reference to Article 103 in draft article 30 is sufficient; indeed, the first two paragraphs of article 42 refer to "the application of the present draft articles"; article 30 already incorporates the reservation relating to Article 103, and one formulation of the reservation suffices. In reply it could be observed that article 30 concerns successive treaties only, and that Article 103 is more general in scope, since it entails consideration of the relationship between acts of United Nations organs and treaties. It is thus for the Commission to decide whether the reference to Article 103 in article 30, paragraph 6, is sufficient.

(11) If we now turn to the *form* of a reference to Article 103, there is no doubt that the best solution would be to refer to Article 103 only once in the whole set of draft articles. In the second reading of the draft articles it may perhaps seem desirable to replace the various references to Article 103 by a single provision, but this question cannot be settled at the current stage of the Commission's work on the draft. For the time being, it is necessary only to take a position regarding the question of whether it is or is not useful to refer to Article 103 in so general a provision as draft article 42.

(12) If the Commission answers this question in the affirmative, there is one last question relating to form to be decided. In its desire to use as general a formulation as possible, the Commission adopted the aforementioned wording for draft article 30, paragraph 6.[13] The same course could be followed for article 42. It would also be possible—and this is the intention behind paragraph 3 as submitted by the Special Rapporteur—to adopt a somewhat more extensive formulation, so as to affirm even more emphatically the superiority of obligations under the Charter over all treaties whatsoever, even those concluded only between international organizations. In that case, reference would be made not only to Article 103 but to the Charter as a whole. A general examination of the Charter certainly leads to an acknowledgement that obligations under that instrument are superior to all other obligations, whatever their technical characteristics.

[11] For the text of article 30 of the present draft and the commentary thereto, see *Yearbook ... 1977*, vol. II (Part Two), pp. 121–122. See also the debate on this subject at the same session: *ibid.*, vol. I, pp. 119–120 (1437th meeting, paras. 43 *et seq.*, and 1438th meeting paras. 1–12), and pp. 236–238 (1458th meeting, paras. 20–32, and 1459th meeting, paras. 1–5).

[12] For the text of article 27 of the draft and the commentary thereto: *ibid.*, vol. II (Part Two), pp. 118–120; for the debate on this subject at the same session: *ibid.*, vol. I, pp. 107–114 (1435th meeting, paras. 37 *et seq.*, and 1436th meeting, paras. 1–40), pp. 199–201 (1451st meeting, paras. 47 *et seq.*), and pp. 238–240 (1459th meeting, paras. 6 *et seq.*).

[13] See para. (6) of this commentary.

Article 43. Obligations imposed by international law independently of a treaty[14]

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Commentary

Except for drafting changes, the text of draft article 43 is the same as that of the corresponding article of the Vienna Convention.

Article 44. Separability of treaty provisions[15]

1. A right of a party, provided for in a treaty or arising under [article 56], to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in [article 60].

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under [articles 49 and 50] the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under [articles 51, 52 and 53], no separation of the provisions of the treaty is permitted.

Commentary

Except for drafting changes, the text of draft article 44 is the same as that of the corresponding article of the Vienna Convention.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty[16]

VARIANT A

A State or an international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

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[14] Corresponding provision of the Vienna Convention:

"*Article 43: Obligations imposed by international law independently of a treaty*

"The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

[15] Corresponding provision of the Vienna Convention:

"*Article 44: Separability of treaty provisions*

"1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

"2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

"3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

"(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

"(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

"(*c*) Continued performance of the remainder of the treaty would not be unjust.

"4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

"5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted."

[16] Corresponding provision of the Vienna Convention:

"*Article 45: Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

"(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

"(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

VARIANT B

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] may no longer be invoked by:

(*a*) a State if, after becoming aware of the facts:

(i) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(ii) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

(*b*) an international organization if, after becoming aware of the facts, it has, in accordance with the relevant rules of the organization, agreed that the treaty is valid or remains in force or continues in operation, as the case may be.

Commentary

(1) At the United Nations Conference on the Law of Treaties, there was a fairly serious difference of views concerning article 45, paragraph (*b*); on the other hand, there was inevitably unanimous agreement on paragraph (*a*), which merely sanctions the right of the State to act according to its interests, except in cases involving a breach of an absolute peremptory rule or unlawful recourse to coercion, when renunciation by the State in question would run counter to the interests of the international community. Paragraph (*b*) refers to a concept whereby a State may be bound by its conduct as well as by express consent when that conduct implies acquiescence. The Commission did not adopt any of the technical constructions of internal law based on the same concept (*actos proprios*, *estoppel*), but related the solution to the principle of good faith and referred to numerous international judicial decisions.[17]

(2) The Special Rapporteur is submitting two solutions to the Commission. In the first (*variant A*), no distinction is drawn between the case of a State and that of an international organization. The proposed text for draft article 45 thus differs from article 45 of the Vienna Convention only with respect to minor drafting changes. In the second solution (*variant B*), the case of a State is submitted to exactly the same rules as in the Vienna Convention but the case of an international organization is quite different. In the latter case, no distinction is drawn between "express agreement" and "conduct equivalent to acquiescence"; reference is made only to "agreement", but the latter is qualified by a reference to the "relevant rules of the organization". In variant B there is a marked difference between the case of a State and that of an organization with regard both to *principles* and to *practice*. With regard to principles, the State loses the right to invoke certain facts that could modify its situation with regard to the treaty by reason of its *conduct* and consequently for reasons alien to any treaty commitment: acquiescence is not consent to a treaty. The organization, on the other hand, loses the same right by reason of *agreement*, which must be given according to the rules of the organization as defined in draft article 2, paragraph 1 (*j*). The competence to give such agreement and the form which it must take will therefore vary from one organization to another; what is involved is no longer conduct but an act related to the treaty-making process itself. With regard to practice, the determination of a State's acquiescence will not be easy, but will depend only on the factual circumstances of each case. The determination of the agreement of an organization will likewise depend on the same circumstances of each case, but in addition should be subordinated to a special demonstration concerning the regularity of the acts giving rise to the agreement vis-à-vis the rules of the organization. Thus, all things being equal, it will be more difficult for an organization than for a State to lose the right to invoke certain facts.

(3) In other words, an organization is better protected than a State against the abandonment of certain rights; in the case of an organization, the sanction of rights is ensured by its own rules, and is therefore better ensured than in the case of a State. It is thus clear what is involved in a choice between variant A and variant B. If it is felt that international organizations are, like States, subject to the rules of international relations which render the subjects of international law responsible for their conduct, it will be seen that solution B has, as it were, the effect, if not the purpose, of protecting the organization against its own conduct, that is, it treats the organization in the same way that private law treats all those who by reason of their youth or weakness are treated as "incapacitated". Solution A, on the other hand, which is designed to protect the co-contractants of the organization, draws all the inferences of the participation of an international organization in international relations. It is true that in practice there is often some uncertainty regarding the capacity of an organization to conclude a treaty and the role of its different organs in that connection, but the choice lies between the security of the other parties to a treaty and that of the organization. Although the Special Rapporteur is more responsive to the considerations militating in favour of variant A, he felt it would be advisable to offer the Commission a choice between both possible options.[18]

[17] See *Yearbook ... 1966*, vol. II, p. 239, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, para. (2) of the commentary to art. 42.

[18] It might also be possible to accept solution A in the case of articles 60 and 62, but solution B in the case of articles 46 to 50, for the validity of the organization's consent is called in question only in the latter articles.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties[19]

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

VARIANT A

2. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of the organization of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State and any organization conducting itself in the matter in accordance with normal practice and in good faith.

VARIANT B

2. In the case referred to in the preceding paragraph, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of the organization of fundamental importance.

4. In the case referred to in paragraph 3, a violation is manifest if it would be objectively evident to any State not a member of the organization concerned and any international organization conducting itself in the matter in accordance with the normal practice relating to that organization and in good faith.

Commentary

(1) The solution adopted by the Conference on the Law of Treaties by 94 votes to none, with 3 abstentions,[20] is the outcome of a compromise between divergent theoretical positions, formulated to take account of practical considerations. It is based on the idea that the verification of the constitutionality of treaties between States is not the affair of other States, and that it is for each State to take the necessary steps to ensure there is no violation of its internal law regarding competence to conclude treaties. Once a State has expressed its consent, it is in principle bound vis-à-vis its co-contractors. The only exception to this rule is when the violation is so manifest that the co-contractors should be put on notice of it, but even in this case the violation must be of fundamental importance. In other words, article 46 of the Vienna Convention adopts a solution oriented towards the security of legal relations; it departs from that solution only if the legitimate trust of the partners of a State could not be betrayed because the violation was so manifest they would necessarily have detected it for themselves. The implementation of the invalidity of consent given in violation of the internal law regarding competence to conclude treaties is also limited by the fact that only the State whose consent had been vitiated is entitled to invoke the invalidity; it is clear from article 46, as from the solution incorporated in article 45, that no other State can invoke invalidity.

(2) The problem which was solved in that way in the case of treaties between States must also be solved in the case of the treaties which are the subject of the present articles. In so far as it is necessary to that end to establish a rule for the consent of States, there would certainly be no question of proposing any rule other than that embodied in the delicate balance adopted in 1969. The present draft article therefore adopts unchanged the rule of the Vienna Convention relating to the consent of States. However, the solution is not obvious in the case of the consent of organizations; can the rule establish for States be extended to them without change, or should another rule be proposed?

(3) The question has already been raised in the Commission on several occasions. When the Commission adopted in 1977 draft article 27 (which, like the corresponding provision of the Vienna Convention, reserved article 46), several members of the Commission took up the question of article 46 directly or indirectly and it was even noted that "the real problem to be solved" would arise in connection with that article and that "a number of problems" would be encountered at that time.[21] As early as his second report, the Special Rapporteur posed the problem in these terms: "It may ... be wondered whether the rule patiently drawn up and established by article 46 is

[19] Corresponding provision of the Vienna Convention:

"*Article 46: Provisions of internal law regarding competence to conclude treaties*

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

[20] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nation publication, Sales No. E.70.V.6), p. 88, 18th meeting.

[21] *Yearbook ... 1977*, vol. I, pp. 109 and 112, 1436th meeting, paras. 1 and 29.

valid in all cases for international organizations", and he considered the special case—to which we shall have occasion to revert—of an agreement concluded between an international organization and one of its members.[22]

(4) In the same report, the substance of which was based largely on the replies of a number of international organizations to a questionnaire addressed to them by the Special Rapporteur, the latter raised the question of defining and proving capacity to represent an international organization in any of the phases of the conclusion of a treaty and stressed that, unlike States, international organizations differed from each other and did not possess that common structure (Head of State or Government, Minister for Foreign Affairs) empowered by international law itself to represent a State, to express and to certify its will in international relations. He concluded in these terms:

> 60. The most direct consequence of this situation might be that the entity concluding an agreement with an international organization should, in theory, ask for a much more extensive proof of the involvement of all the organs competent to assume a commitment on behalf of the organization, and should then require the natural person finally expressing the will of the organization to furnish proof that he is duly authorized to perform the acts he is proposing to perform. In other words, the distinction between the "internal" and the "international" phases of the conclusion of agreements could not, in the present state of international relations, be as clear-cut as it is in the case of States.
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> 61. However, it appears from the information given by international organizations that in practice the difficulties are not as serious as might be feared. In the first place, by force of circumstances, the most senior official of international secretariats enjoys a privileged situation ....
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> 62. Secondly, all the organizations stressed the practical importance of the correspondence exchanged prior to the conclusion of an agreement. In fact, all the stages—constitutional stages, internal stages, authorizations, delegations of authority, and approvals—are mentioned and described in this correspondence; and in addition copies of the documents and records of the discussions concerning them are generally included in this exchange of correspondence. The partner of an organization is thus informed regularly, and often from day to day, of the development of a situation affecting any stage in the conclusion of an agreement. ...
>
> 63. Thus, the situation as it seems to emerge from the information received may be summed up, rather surprisingly perhaps but nevertheless accurately, by saying that it is not radically different from that of relations between States. As in the case of States, the internal procedure of each organization remains the affair of each organization, but the partner to the agreements of the organization is generally informed of it by administrative correspondence. ...[23]

(5) The passage quoted above deals mainly with the question of powers, and the Commission in fact adopted draft article 7, which, by means of certain changes, adapts the solution adopted for States to international organizations.[24] But that article also deals with the question raised by draft article 46. Indeed, it shows clearly, as a result of the replies of the organizations to the questions addressed to them at the time by the Special Rapporteur, that the two questions are linked. The Commission decided (article 7, paragraph 4) that:

> A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:
>
> (*a*) he produces appropriate powers; or
>
> (*b*) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

It was made clear that the verb "communicate" was used instead of the verb "express" in order to emphasize that the representative did not participate in the establishment of the consent of the organization, but merely transmitted that consent.[25] However, by this transmission he likewise certifies that the consent is legally perfect. The partner of the organization in question has generally been kept informed of the progress of the internal procedures involved in the formation of that consent. It is thus familiar with what might be called the "practice" of the organization, but is not usually called upon to compare that "practice" with the "rules of the organization", with regard to which it is a third party. That is the conclusion which emerges both from the information provided in 1973 by the international organizations consulted and from the way in which the Commission settled in 1975 the question of the authority of representatives of organizations to communicate their consent to be bound by a treaty.

(6) It follows from the foregoing that a partner of an international organization is certainly never called upon to invoke for its own benefit the failure of a treaty concluded by an international organization to conform to the general rules of that organization. However, it is not this point which is being called in question but rather that of determining whether the organization, after having "communicated" its will to its partner, has *itself* lost the right to deprive that communication of all effect by invoking a violation of the rules of the organization regarding competence to conclude treaties. On this point the foregoing considerations do, however, seem to lead to one certain conclusion: the right of an international organization to invoke the violation of the rules of the organization regarding competence to conclude treaties cannot be admitted without restriction. Of course, such a possibility would theoretically provide the organization with complete protection against its own legal errors or any temporary abuse of the organization by one of its own organs, but it would leave the partners of the organization with no

[22] *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[23] *Ibid.*, p. 85.

[24] *Yearbook ... 1975*, vol. II, pp. 28–30, document A/CN.4/285, draft articles and commentaries, art. 7; and *ibid.*, pp. 174–176, document A/10010/Rev.1, chap. V, sect. B.2, art. 7. For the Commission's consideration of the question of powers: *ibid.*, vol. I, pp. 207 *et seq.* (1344th meeting, paras. 3 *et seq.*), 218–219 (1345th meeting, paras. 62–68), and pp. 265–266 (1353rd meeting, paras. 23–28).

[25] *Ibid.*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B2, para (11) of the commentary to art. 7. Cf. footnote 38 below.

protection and no guarantee of stability with regard to the treaties concluded. Despite the communication of the consent of the organization to be bound by a treaty received from organs duly empowered to that effect, they would be obliged to accept without limit communications in the opposite sense from the same organization without being able to raise any objection, for since they would be third parties with regard to the organization, they would have no right to contest the latter's interpretation of its own rules. The result in practice would be a system whereby the treaty commitments of international organizations would always be assumed on a purely potestative condition. There is no need to demonstrate that such a concept would be counterproductive as far as the organizations themselves are concerned; their limited capacity to conclude international treaties would be nothing more than the capacity to assume commitments without value.

(7) The other solution, however, under which international organizations could never invoke the violation of the rules of the organization regarding competence to conclude treaties, is equally unacceptable. It was rejected in the case of States by article 46 of the Vienna Convention, and there seems to be no reason why international organizations should not need the same protection as States; rather, their need is even greater. In fact, from an informal standpoint, it is finally States, or certain States, which are protected by the invalidity of a treaty concluded by an international organization. In certain cases the invalidity would stem from the fact that the organization concluded a treaty concerning a subject-matter for which it had not received the requisite competence: that subject-matter remains within the competence of the member States without diminution or limits. In other cases, it is the respective powers of the organs of the organization regarding the conclusion of treaties which have not been respected, but since States are unequally represented in these organs, it is still the interest of member States, or at least of some member States, which is at stake. It could also be argued, as has already been stated, that international organizations have a greater need than States for the protection of their fundamental rules regarding competence to conclude treaties. These rules are not always explicit or clear, and the structures of the organization are fragile; they are not based on solid sociological realities. An international organization, more than any other institution, is obliged to derive its force from law, and consequently to respect the law.

(8) If the foregoing contradictory considerations are regarded as valid and if the two extreme antinomic solutions are rejected, the only available solution is a compromise solution, like that which the Conference on the Law of Treaties, following the Commission, established in the case of States. The problem is then posed in the following terms: should the compromise adopted in 1969 in the case of States likewise be adopted in the case of international organizations?

(9) The solution which consists in simply extending to international organizations the rule formulated for States can be defended. In that connection, it may be observed that all the reasons militating in favour of the compromise solution adopted for States are valid for international organizations, and it is difficult to conceive of a compromise solution having more advantages and fewer drawbacks than the one embodied in article 46 of the Vienna Convention. It was in that spirit that the Special Rapporteur drafted variant A proposed above. Article 46, paragraph 1, of the Vienna Convention has been divided into two separate paragraphs, solely for drafting reasons. The first of these paragraphs concerns the case of States and simply reproduces article 46, paragraph 1, of the Vienna Convention; the second adapts the first paragraph to the case of international organizations by replacing the term "internal law" with the term "rules of the organization", in accordance with article 2, paragraph 1 (*j*). Article 46, paragraph 2, of the Vienna Convention has become paragraph 3 of draft article 46, the only difference being the addition of the words "and any organization".

(10) If it is desired to pursue the research further with a view to proposing for the case of organizations a compromise different from that which was adopted in the case of States, it becomes necessary to ponder the two conditions posed by article 46 of the Vienna Convention for the implementation of a violation of the rules regarding competence to conclude treaties. It does not seem advisable to suggest any change regarding the "fundamental" character of the rule violated; that is a reasonable criterion which provides a degree of flexibility and which has been the subject of no criticism or reservations. On the other hand, it might be wondered whether the definition of the "manifest" character of the violation does not call for clarification in the case of international organizations.

(11) It was to cover this hypothesis that the Special Rapporteur chose the wording of variant B, which differs from variant A in that it contains a new paragraph 4, concerning the definition of the "manifest" character of a violation in the case of an international organization, the three other paragraphs of variant B being the same as those of variant A, although arranged in a different order.

(12) To begin with, it is perhaps advisable to recall that article 46, when proposed by the Commission (as draft article 43), did not contain paragraph 2, which was drafted by the Conference on the Law of Treaties. An amendment submitted by the United Kingdom led to the adoption of a definition which the Commission had provided, but only in the commentary, explaining that the exception in question would come into play when the violation of internal law was objectively evident to any State dealing with the matter normally and in good faith.[26] The Drafting Committee put the

[26] See *Yearbook ... 1966*, vol. II, p. 242, document A/6309/Rev.1, part II, chap. II, para. (11) of the commentary to

text into the form[27] adopted by the plenary meeting in 1969.[28]

(13) Although no other elements are available that would make it possible to determine the meaning of article 46, paragraph 2, of the Vienna Convention, the text of the article itself shows that in order to determine the level of evidence reference is made to "any State" conducting itself in a certain way. No account is taken of geographical proximity or of the existence or absence of any legal or political community that may exist between the State whose law has been violated and the State which serves as reference; similarly, no account is taken of the frequency and scope of the treaty relations between those two States. It is quite obvious that two States which are closely linked by geography, history, culture and the density of their treaty relations are generally fairly familiar with each other's constitutional law; it is conceivable that each of these States would be in a fairly good position to perceive any violation of the constitution of the other which might be committed. But it is not this privileged basis of reference which is envisaged in article 46: in order that the error be manifest, it must be evident to the State which has the fewest reasons to be familiar with the internal law of the State in question. This implies—and all the observations of Governments confirm it—a "flagrant", "enormous" violation.

(14) There is no reason to amend the principle of this solution for international organizations. However, the Special Rapporteur felt that two changes should be made in the text to cover the case of international organizations.

(15) First of all, the level of evidence should be verified for any State, whether it is a party to the treaty, could have been a party to the treaty or is completely unconnected with the treaty. But in the case of the treaties which are the subject of the present articles it would seem to be more correct, although not essential, to take into consideration not only States but all the international organizations belonging to the broad community to which the articles will apply. Furthermore, this provision is intended to apply only to treaties concluded between international organizations, and it is therefore natural to refer to international organizations.

(16) However, there are some States which must be set aside as regards the establishment of this level of evidence, namely those which are members of the organization in question. Such States, by reason of their intimate and permanent participation in the internal life of the organization, must be perfectly familiar with its rules; they are not ordinary States and should not be taken into account in establishing the level of evidence which violations of the rules of the organization must attain in order to be invoked by the organization. Paragraph 4 of variant B contains a provision along these lines. But this solution nevertheless requires more detailed discussion.

(17) In the case of treaties concluded between an international organization and States (or international organizations) which are not members of that organization, it seems quite easy to accept the idea that in establishing the level of evidence which should be apparent to "any State", no account should be taken of the special knowledge of the law of the organization which is the prerogative of its members. But let us now take the case of a treaty concluded between an international organization and a State which is a member of that organization: does not this treaty fall within the scope of the present articles? Must it be acknowledged that the organization may not invoke certain violations as a ground for invalidation because they would not have been evident to a State completely unconnected with the organization? Or is it necessary to adopt the opposite solution, and include in article 46 a new paragraph dealing with this special case?

(18) The Special Rapporteur does not favour any of these solutions,[29] for a very simple reason. The relations between an international organization and its members are governed by a special system of law, whatever name it may be known by; it is the rules of this system which apply to treaties concluded by an organization with its members, and it is the rules of each organization which will determine the fate of treaties concluded between the organization and one of its members if they are concluded in violation of the rules of the organization regarding competence to conclude treaties.[30] Draft article 46 as submitted does not take this particular case into account; it will suffice that the commentary states this point clearly.

(19) Draft article 46, paragraph 4, raises another problem. Article 46, paragraph 2, of the Vienna Convention refers to a State conducting itself "... in the matter in accordance with normal practice and in

article 43. See also *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 239, 43rd meeting, para. 17.

[27] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), p. 464, 78th meeting, para. 8

[28] *Ibid., Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), pp. 85–88, 18th meeting, paras. 5 *et seq.*

[29] See *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[30] The replies of the organizations consulted on this question in 1973 showed that they had never faced these problems in practice, but even in the case of treaties between States the value of article 46 is primarily theoretical. It should, however, be noted that the position defended here has very far-reaching consequences for universal organizations and particularly for the United Nations, which has concluded almost all its treaties with Member States; the definition of evidence proposed in art. 46, para. 4, would not apply to such treaties; in practice that would mean that it would be easier for the United Nations to invoke any violation of a fundamental rule in connection with treaties concluded with Member States, which seems quite fair.

good faith". What is *normal practice*? It is clearly a general practice, common to all States, since it is evident "... to any State conducting itself in the matter in accordance with normal practice". This is not surprising, since there is a *general* practice relating to treaties between States, even with regard to the sanctioning of the violation by States of their internal law: the practice is precisely to disregard the violation by a third State of its own internal law unless the violation is "flagrant". But can it be said today that there is in this sphere a *general* practice for international organizations? This practice might tend to emerge from the progressive standardization of conduct. However, this may also be doubted.

(20) It is for this reason that when the Special Rapporteur proposed draft article 7 he acknowledged that a person could be considered as representing an organization if "it appears from the practice of the States and international organizations concerned ... that their intention was to consider that person as representing the organization ...",[31] and during the discussion he explained that in his opinion the wording referred to the practice of *each* organization concerned.[32] But the Drafting Committee decided "to refer only to practice in general, rather than to specify the source of the practice, in order to avoid difficulties in achieving a balance between States and international organizations"[33] and draft article 7 as adopted by the Commission refers to "practice" without qualifying or identifying it.

(21) The Special Rapporteur nevertheless felt that in the case of article 46 it was necessary to revert to this question. The purpose is not to oppose the practice of States to that of international organizations, but simply to observe that *in relation to each* international organization a body of practice is built up consisting of the initiatives and reactions of that organization and the initiatives and reactions of the States and international organizations with which it has treaty relations. It would be dangerous to jump to the conclusion that this practice in relation to one international organization constitutes a set of legal rules, but it certainly constitutes a yardstick for conduct, and the rule to be embodied in the draft article corresponds to a requirement of security and common sense. The partners of an organization which conform to this yardstick of conduct must be protected from a change of position on the part of the organization which might, without warning, produce a different interpretation of its own law and suddenly invoke grounds for invalidation of which its partners had no conception.

(22) This is at least the basic idea which led the Special Rapporteur to specify that what was involved was the normal practice "relating to that organization".

(23) The differences between variant B and variant A are perhaps minor and might lead to the conclusion that it would be preferable to adopt variant A; the Special Rapporteur has not submitted more far-reaching changes because no fact or consideration has changed the view which he expressed in 1973, namely that "article 46 of the 1969 Convention should be modified slightly, if at all".[34] The title of draft article 46, which differs slightly from the Vienna Convention, remains the same for both versions.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty[35]

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating international organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the negotiating States and other negotiating organizations prior to his expressing such consent.

Commentary

(1) The significance of article 47 of the Vienna Convention is quite clear in the light of the explanations given when it was introduced by Sir Humphrey Waldock, the Special Rapporteur in 1963.[36] It concerns the case where a representative has received all ostensible formal authority to express the consent of a State to be bound by a treaty; his full powers, if he has them, are in agreement with that ostensible authority.[37] But in addition he has received

[31] *Yearbook ... 1975*, vol. II, p. 28, document A/CN.4/285, draft articles and commentaries, art. 7, para. 3 (*b*).

[32] *Ibid.*, vol. I, p. 218, 1345th meeting, para. 65.

[33] *Ibid.*, p. 266, 1353rd meeting, para. 25.

[34] *Yearbook ... 1973*, vol. II, p. 89, document A/CN.4/271, para. 88.

[35] Corresponding provision of the Vienna Convention:

"*Article 47: Specific restrictions on authority to express the consent of a State*

"If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."

[36] See *Yearbook ... 1963*, vol. II, p. 47, document A/CN.4/156 and Add.1–3, para. (5) of the commentary to article 6.

[37] The French and Spanish texts may for a moment give rise to some doubt, for they refer to a restriction on "*pouvoirs*", "*poderes*", but as the term used in the English text ("authority") and the obvious meaning of the text show, those terms here signify the real authority, the real substance of the competence

instructions which limit his authority in that they instruct him not to use it except on certain conditions, with certain reservations or in certain hypothetical cases which are still uncertain at the time when both the full powers and the instructions are given. Clearly, these instructions, which are in principle secret, limit the authority of the representative. If, however, the representative does not respect those instructions and expressed the consent of the State to be bound although the conditions specified by his instructions have not been fulfilled, this violation cannot be enforced vis-à-vis the other States and the State is nevertheless bound. In order for the situation to be otherwise, the other States must have received notification of the restrictions *before* the representative has expressed the consent of the State.

(2) So indisputable a rule is as valid for organizations as for States. It is expressed once again in the case of States in draft article 47, paragraph 1, with a slight drafting change. It is formulated for organizations in paragraph 2 of the same draft article, with some drafting changes, only one of which calls for comment. In draft article 7, the Commission retained the term "expressing" (used by the Vienna Convention), in the case of representatives of a State in the expression "expressing the consent of a State to be bound by a treaty"; the term is used in the sense of "making public", "manifesting". But in the case of the consent of an international organization to be bound by a treaty, it used another term: "communicating". In other provisions of the present articles relating to the consent of the organization the term "expressing" has been avoided and has been replaced by "communicating" (article 2, paragraph 1 (*c*) (*bis*)) or "establishing" (articles 11, 12 and 15). This solution has likewise been adopted in paragraph 2 of the present article.[38] A slight change has therefore been made in the title of the article.

Article 48. Error[39]

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Commentary

Except for drafting changes, the text of the foregoing draft article is the same as that of article 48 of the Vienna Convention.

Article 49. Fraud[40]

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating international organization, the State or the international organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

Except for drafting changes, the text of the foregoing article is the same as that of article 49 of the Vienna Convention.

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received, and not the formal official instruments establishing the competence of the agent in the eyes of the world (*pleins pouvoirs*, *pouvoirs*); otherwise, the text would be incomprehensible.

[38] The reasons for this substitution of terms were given in the commentary on art. 7 of the present draft:

"The Commission believes that to apply the verb 'express' to the representative of an international organization might give rise to some doubt; particularly in view of the rather frequent gaps and ambiguities in constituent instruments, the term might be understood as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. A means of avoiding that doubt seemed the use of the verb 'communicate' instead of the verb 'express', since the former indicates more clearly that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representative should be to transmit that consent; he should not, at least in the present draft article, be empowered to determine by himself the organization's consent to be bound by a treaty." (*Yearbook ... 1975*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B.2, para. (11) of the commentary to art. 7.)

However, see the commentary to art. 50, footnote 41.

[39] Corresponding provision of the Vienna Convention:

"*Article 48: Error*

"1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

"3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."

[40] Corresponding provision of the Vienna Convention:

"*Article 49: Fraud*

"If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

Article 50. Corruption of a representative of a State or of an international organization[41]

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

This draft article differs from the corresponding text of the Vienna Convention only in respect of minor changes in the title and the body of the article, the reasons for which are so clear as to require no explanation. However, if the Vienna formulation, "the expression of a State's consent to be bound by a treaty", had been used, it would have been necessary to balance it by using the formula "the communication of an international organization's consent to be bound by a treaty" in order to take account of earlier decisions of the Commission.[42] That solution would not have been incorrect, but it has the double disadvantage of making it necessary to divide article 50 into two separate paragraphs and of emphasizing the sometimes rather unsatisfactory character of the term "communicate". When the representative of an organization is called upon to sign a treaty which will become definitive as a result of signature alone and he possesses a measure of freedom in the negotiating process, it is not very appropriate to say that by the act of signing he "communicates" the will of the organization to be bound, and it is primarily in cases of this nature that corruption is conceivable. Of course, when the representative deposits an instrument of ratification it can properly be said that he "communicates" the consent of the organization, but it seems difficult even to conceive of the purpose of corruption in such a case. In order to avoid all these difficulties the wording has been changed so that the *expression* of consent is attributed to the State or the organization and not to their representative: "the expression by a State or an international organization of consent to be bound". This formulation is even more correct than that used in the Vienna Convention and permits the elimination of several difficulties.

[41] Corresponding provision of the Vienna Convention:

"Article 50: Corruption of a representative of a State

"If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

[42] See above, para. (2) of the commentary on art. 47 and footnote 38.

Article 51. Coercion of a representative of a State or of an international organization[43]

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Commentary

The commentary on draft article 50 applies to this draft article also.

Article 52. Coercion of a State or of an international organization by a threat or use of force[44]

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Commentary

The title alone has been changed, in order to bring it into line with the purpose of the present articles.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)[45]

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

The title and body of this draft article contain only drafting changes. "The international community of

[43] Corresponding provision of the Vienna Convention:

"Article 51: Coercion of a representative of a State

"The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."

[44] Corresponding provision of the Vienna Convention:

"Article 52: Coercion of a State by the threat or use of force

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

[45] Corresponding provision of the Vienna Convention:

"Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens)

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

States as a whole" is a unitary concept which does not call for a reference to international organizations in addition to the reference to States.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties[46]

The termination of a treaty or the withdrawal of a party may take place:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

Commentary

The last part of paragraph (*b*) of article 54 has been changed for drafting reasons: it is not any clearer as a result. It has been retained only out of respect for the Vienna Convention. The consultation of contracting States which are not parties to a treaty in force is not a concept which is easy to understand. It was added at the Conference on the Law of Treaties as a result of an initiative by the Drafting Committee, the Chairman of which provided the following explanation:

... that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.[47]

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force[48]

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Commentary

No change has been proposed with respect to the corresponding provision of the Vienna Convention.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal[49]

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Commentary

No change is proposed with respect to the corresponding provision of the Vienna Convention.

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[46] Corresponding provision of the Vienna Convention:

"*Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

"The termination of a treaty of the withdrawal of a party may take place:

"(*a*) in conformity with the provisions of the treaty; or

"(*b*) at any time by consent of all the parties after consultation with the other contracting States."

[47] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (*op. cit.*), p. 476, 81st meeting, para. 6.

[48] Corresponding provision of the Vienna Convention:

"*Article 55: Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

"Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force."

[49] Corresponding provision of the Vienna Convention:

"*Article 56: Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*

"1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

"(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

"(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

"2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties[50]

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

Commentary

The commentary on draft article 54 applies to draft article 57.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only[51]

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Commentary

No change is proposed with respect to the corresponding provision of the Vienna Convention.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty[52]

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Commentary

This draft article contains no change with respect to the corresponding provision of the Vienna Convention.

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[50] Corresponding provision of the Vienna Convention:

"*Article 57: Suspension of the operation of a treaty under its provisions or by consent of the parties*

"The operation of a treaty in regard to all the parties or to a particular party may be suspended:

"(*a*) in conformity with the provisions of the treaty; or

"(*b*) at any time by consent of all the parties after consultation with the other contracting States."

[51] Corresponding provision of the Vienna Convention:

"*Article 58: Suspension of the operation of a multilateral treaty by agreement between certain of the parties only*

"1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

"(*a*) the possibility of such a suspension is provided for by the treaty; or

"(*b*) the suspension in question is not prohibited by the treaty and:

"(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

"(ii) is not incompatible with the object and purpose of the treaty.

"2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

[52] Corresponding provision of the Vienna Convention:

"*Article 59: Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*

"1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

"(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

"(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

"2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

[53] Corresponding provision of the Vienna Convention:

"*Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach*

"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

"2. A material breach of a multilateral treaty by one of the parties entitles:

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach[53]

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(*b*) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(*c*) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present articles; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

"(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

"(i) in the relations between themselves and the defaulting State, or

"(ii) as between all the parties;

"(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

"(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

"3. A material breach of a treaty, for the purposes of this article, consists in:

"(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

"(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

"4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

"5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Commentary

Compared with the corresponding text of the Vienna Convention, the text of draft article 60 contains only drafting changes designed to bring it into line with the purpose of these draft articles.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

(Agenda item 5)

DOCUMENT A/CN.4/320*

First report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur

[*Original: English*]
[*21 May 1979*]

CONTENTS

* Incorporating document A/CN.4/320/Corr.1.

ABBREVIATIONS

ECE	Economic Commission for Europe	UNEP	United Nations Environment Programme
ILA	International Law Association	UNITAR	United Nations Institute for Training and Research

Introduction

1. This report contains four chapters. Chapter I is introductory and deals with the nature of the subject, suggesting distinguishing factors that call for its singular treatment. Chapter II summarizes salient aspects of the history of the treatment of the subject to date, particularly by the Commission, and addresses the scope of the draft articles. Chapter III discusses the utility of user agreements as a means of affording States immediately concerned with a particular international watercourse the possibility of undertaking detailed obligations that are calibrated to the particular characteristics of that watercourse, but within the framework of the draft articles. Chapter IV addresses one fundamental area of obligations which both the draft articles and user agreements entered into pursuant to them should contain, that of collection and exchange of data. It also considers cost sharing in respect of data collection and exchange. Subsequent reports will be required which will take up other elements of what may come to be a set of draft articles on the subject of non-navigational uses of international watercourses. Those elements might well include articles on:

Categories of uses (such as domestic or "consumptive" uses, irrigation, power, industrial uses other than power, fish and other aquatic food production, recreation, and timber floating);

Specialized problems (such as flood control, erosion, sedimentation, salt water intrusion and perhaps drought);

The interrelationship among categories of uses and among specialized problems;

Institutional arrangements for the co-operative use of international watercourses; and

Settlement of disputes.

Problems of pollution would be addressed in connection with particular uses.

2. It may be useful at the outset to set forth the draft articles which the Special Rapporteur invites the Commission to consider initially.

Draft articles on the non-navigational uses of international watercourses

Article 1. Scope of the present articles

1. The present articles apply to the uses of the water of international watercourses, and to associated problems such as flood control, erosion, sedimentation and salt water intrusion.

2. The use of the water of international watercourses for navigation is embraced by these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation.

Article 2. User States

For the purposes of these articles, a State which contributes to and makes use of water of an international watercourse shall be termed a user State.

Article 3. User agreements

The present articles may be supplemented by user agreements among user States.

Article 4. Definitions

For the purposes of the present articles:

1. "Contracting State" means a user State party to these articles which may or may not be party to a user agreement.

2. "Co-operating State" means a user State party to a user agreement which is not party to these articles.

3. "Non-contracting State" means a user State which is not party either to these articles or to a user agreement.

Article 5. Parties to user agreements

A user State not party to these articles may be party to a user agreement provided that one or more user States parties to the user agreement are parties to these articles.

Article 6. Relation of these articles to user agreements

1. A user agreement shall be entered into within the framework of these articles.

2. These articles shall apply to States parties to a user agreement with respect to matters not regulated by the user agreement.

Article 7. Entry into force for an international watercourse

These articles shall enter into force for an international watercourse on the thirtieth day following the deposit of the second instrument of ratification or accession by a user State.

Article 8. Data collection

1. A contracting State shall collect and record data with respect to precipitation and evaporation of water and with respect to the stage of flow, mean velocity and abstraction of the water of an international watercourse in its territory as follows

(*a*) ... (*to be completed*)

(*b*) ... (*to be completed*)

(*c*) ... (*to be completed*)

(*d*) ... (*to be completed*)

...

2. Each contracting State shall employ its best efforts to collect and record data in a manner which facilitates co-operative utilization of the data by contracting and co-operating States.

3. User agreements may provide for the collection of such additional data, notably in respect of water quality and water-related disease, as may be significant for development, use and

environmental protection of the international watercourse. They may specify the method of data collection and the nature of the records to be employed.

Article 9. Exchange of data

1. Data collected under the terms of paragraphs 1 and 2 of article 8 of these articles shall be made available to contracting and co-operating States at regular intervals of....

2. Contracting and co-operating States shall use their best efforts to comply with requests from contracting and co-operating States for special data (data not included in the provisions of article 8, paragraph 1) and with requests from contracting and co-operating States for data collected prior to the entry into force of these articles for the contracting State requested or to the entry into force of the user agreement for the co-operating State requested.

3. User agreements may regulate additional aspects of data exchange.

Article 10. Costs of data collection and exchange

1. Costs of the collection and exchange of data pursuant to article 8, paragraph 1, and article 9, paragraph 1, shall by borne by the State providing the data.

2. The requesting State shall bear the costs incurred by the requested State in fulfilling a request for special data, as defined in article 9, paragraph 2, and in making available data collected prior to:

(*a*) the entry into force of these articles for the contracting State requested, or

(*b*) the entry into force of the user agreement for the co-operating State requested.

3. User agreements may provide for different or additional cost provisions relating to the collection and exchange of data.

3. Any successor special rapporteur is necessarily indebted to predecessor special rapporteurs. In this case, however, the debt owed by the current Special Rapporteur is exceptional. For this report in large measure derives from work that Mr. Richard D. Kearney, the first Special Rapporteur of the Commission on this subject, performed under the auspices of the American Society of International Law. The Special Rapporteur is most grateful to him and to his research assistant, Miss Janice Callison.[1]

[1] He also wishes to express his appreciation to the American Society of International Law and to the members of a working group on environmental aspects of international watershed management convened by it.

CHAPTER I

Nature of the topic

4. The preparation of draft articles on the law of the non-navigational uses of international watercourses is a subject of a different nature from that of those currently under consideration by the Commission. The simplest explanation of the difference is that the subject-matter of international watercourses deals with a physical phenomenon that is unique. If water did not possess special qualities, it would not require a special legal régime. These qualities are actual, not abstract.

5. The subject-matter of the law of State responsibility, by way of contrast, is an abstraction; the State is a legal conception of such complexity that the Commission has not attempted to define it. The object of the study is equally abstract: to determine what principles should apply in the allocation of responsibility to a State for wrongful acts that have produced effects with respect to other States.[2] Similarly, the recently adopted Vienna Convention on Succession of States in Respect of Treaties[3] is almost completely conceptual in character. It provides rules to govern the effects upon treaties between States of the replacement of one State by another in responsibility for a territory's international relations. The physical existence of a document embodying a treaty is of course a reality. So is the physical existence of the territory to which it applies. However, the physical features of the territory do not play a part in defining the content of the treaty's rules. These examples could be multiplied.

6. It is necessary in the work of the Commission to go back to the Conventions on the Law of the Sea[4] to find a topic in which the legal content was as directly affected by the physical character of the subject-matter as it will be in the draft articles on uses of the water of international watercourses. The parallelism is obvious. The basic subject—water—is the same, although there are real differences between sea water and sweet water. The basic objective is identical: to lay down rules that govern uses of water by States. And, in both cases there must be a certain similarity of approach, that is

[2] For the text of the draft articles on State responsibility adopted by the Commission up to 1978, see *Yearbook... 1978*, vol. II (Part Two), pp. 78 *et seq.*, document A/33/10, chap. III, sect. B, 1.

[3] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

[4] Convention on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 11); Convention on the Territorial Sea and the Contiguous Zone (*ibid.*, vol. 516, p. 205); Convention on Fishing and Conservation of the Living Resources of the High Seas (*ibid.*, vol. 559, p. 285); Convention on the Continental Shelf (*ibid.*, vol. 499, p. 311).

to say, in the law of the sea there has been, and in the law of international watercourses there must be, conceptualization and formulation of legal principles that respond to the nature of water and to physical facts respecting it.

7. It may indeed be that there is much in the experience of the Commission and in the First, Second and Third United Nations Conferences on the Law of the Sea that will be instructive to an effort at codifying the law of non-navigational uses of international watercourses. The Commission is fortunate to embrace in its currect membership a number of the world's leading experts in the law of the sea, distinguished lawyers who have contributed greatly to the conception, negotiation and formulation of what at this writing is the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea.[5] From their rich experience, they may well be able to bring to bear lessons on questions such as the responsiveness of the codification process to physical realities, the generality and specificity of such responses, and the degree to which use by many States of inevitably interacting resources requires that the product of the codification process embody co-operative principles and procedures.

Some salient characteristics of water

8. In view of the ineluctable impact that the nature of water must exert on any codification of the law of international watercourses, it may be desirable, by way of introduction, to summarize the fundamental distinguishing physical characteristics of water. Water flowing in rivers has for present purposes three salient aspects: (*a*) the hydrologic cycle, (*b*) self-purification, and (*c*) variations in quantity and flow. These will be touched upon in turn.

A. The hydrologic cycle

9. The movement of water through a watercourse is one phase of the operation of what is known as the hydrologic cycle. Discovery of the nature of the operation of this cycle is a relatively recent event in human history when viewed in the light of the very long record of man's effort to control river systems. The earliest appearances of civilization centred upon rivers, among them the Nile of Egypt, the Tigris and Euphrates of Mesopotamia, the Indus of India, the Yellow River of China and the river valleys of Persia and Peru. Yet, during the some 6,000 years when elaborate river control methods were developed by these and other societies, explanations of the nature of the phenomenon being controlled remained relatively unsophisticated and rested largely upon conjecture, mythology and religious conviction.

> The idea of a complete cycle—that water evaporated from the sea and land, was drawn into the atmosphere, fell as rain and snow, sank into the earth to reappear in watercourses, and then drained back into the sea—had attracted brilliant men over the years, but it could not be proved at that time and therefore was not generally accepted. With the development of modern science in the 16th and 17th centuries, however, attention was directed again and again to what seemed to be the cyclical pattern of all nature: Newton's law that for every action there must be a reaction, the recirculating blood system demonstrated by Harvey, the planetary orbits postulated by Copernicus. These rules of balance and repetition had been established by close observation and careful measurement. It was only natural, then, to seek a similar balance in the world's water supply and to seek it with similar techniques.
>
> In the mid-17th century, two French scientists individually attacked the puzzle of the rivers. Each—Pierre Perrault first and Edme Mariotte a little later—measured the precipitation in the watershed of the Seine and then measured the river's rate of discharge, i.e. the amount of water it poured into the ocean in a given time. Their measurements, although crude, proved that, contrary to ancient belief, precipitation alone could account for the river's flow. Moreover, enough water would remain to supply the springs and wells. Mariotte went a step further; he showed that rain deeply infiltrated the ground wherever it fell, seeping downward through porous soil until it reached impermeable material.
>
> Another essential factor in the distribution cycle—the origin of rain and snow—remained to be proved. Shortly after Perrault and Mariotte completed their investigations, the English astronomer Edmond Halley showed that the earth's precipitation was of such magnitude that it could be balanced by evaporation: the evaporation from a large body of water was of an order of size equal to the amount it regained from the rivers that flowed into it. The key to Halley's discovery was the determination of the rate of evaporation.
>
> . . .
>
> The concept of a hydrologic cycle unravelled the ancient riddle of water. Man could now understand that the water going out from the surface of the earth must come back in equal amount—a perpetual cycle with no beginning, middle or end.[6]

10. The nature of the hydrologic cycle is simplicity itself once it becomes apparent that, on a world basis, water leaving the land mass of the earth returns in an equal amount. This process goes on in an unbroken pattern. Variations in the patterns of departure and return occur continuously and universally, but as far as water is concerned whatever goes up comes down. Moreover, the cycle operates at a fairly rapid pace: once every 12 days practically all the water in the air falls and is replaced.[7]

11. There is substantial expert opinion that about 500 Tm^3 of water are taken up and returned to earth each year (one Tm^3 (tera cubic metre) equals 1,000,000,000,000,000 litres). The quantity taken up from the sea is about 420 Tm^3, while the amount taken up from the land is about 80 Tm^3. However, of the

[5] See *Official Records of the Third United Nations Conference on the Law of the Sea, Sixth Session*, vol. VIII, *Informal composite negotiating text* (United Nations publication, Sales No. E.78.V.4), document A/CONF.62/WP.10.

[6] L.B. Leopold and K.S. Davis, *Water* (New York, Time, 1966), pp. 38–39.

[7] *Ibid.*, p. 39.

amount precipitated back to the earth as rain, hail or snow, 380 Tm^3 fall over the seas and 120 Tm^3 over the land. This means that some 40 Tm^3 which fall upon land do not evaporate but instead make their way to the sea to replace the 40 Tm^3 of sea water which is precipitated upon land in the course of the year.[8] It is these 40,000,000,000,000,000 litres of water that form international watercourses and are the subject of this report.

12. Water falls to the earth in various forms of precipitation, with four results:

(1) some water will be intercepted by vegetation and will never reach the ground;

(2) some will remain on the earth's surface, dampening the soil or forming pools;

(3) a proportion will seep directly into the soil;

(4) the balance will form streams and begin to flow to lower ground. When precipitation stops, the water lying on vegetation and any remaining as mist in the lower atmosphere or lying in pools on the ground will begin to evaporate again. Where streams have been formed, these will flow into rivers, the water discharging eventually into lakes or the sea. And all the time a certain amount of water lying in pools or lakes, or flowing in rivers, will seep into the earth and percolate slowly down until it reaches the water table, the natural level of free groundwater. This water, prevented from percolating still lower by a watertight geological layer, will now tend to flow horizontally through the subsoil until it reaches land at a lower altitude, where it may reappear as a spring or artesian well, or flow from below the surface into a lake or even into the sea. Where groundwater appears above the surface, new streams are formed and the water resumes its journey overland to the sea.

But gravity is not the only force at work here. Some groundwater is drawn above the water table through the interstices (fine interconnecting spaces) in the soil by capillary action. Together with moisture percolating from above or held in the soil by molecular attraction, it may then be absorbed into the roots of vegetable matter and conveyed up into the leaves. The transpiration by the leaves returns the water, as vapour, to the atmosphere. Water that precipitates as ice or snow may remain temporarily immobile where it falls on the earth's surface. But most of this, too, will eventually reach the sea in the form of glaciers, or via rivers when it melts. Some of the melted ice and snow will seep into the ground, some will evaporate.[9]

13. The following summary of the activities of water that constitute the hydrologic cycle evidences water's unending mobility:

It is never still. The apparently inert tumblerful that stands beside a dinner plate may simultaneously convert ice cubes into liquid, release tiny amounts of vapour into the air above it, and condense vapour into droplets on its smooth glass sides. This is the fidgety world of water in microcosm. Projected into a grand global scale, all 326 million cubic miles of this active substance are constantly responding to a complex of mighty natural forces—the rotation of the earth, the radiant heat of the sun, and the gravitational effects of the earth and its companions in the solar system. Added to these forces are the effects of surface irregularities—the mountains, valleys and plains on the continents and oceans' basins—the shifting, changing, fickle nature of gaseous, solid and liquid water.

In one vitally important respect, however, water's behaviour is steadfast: the total supply neither grows nor diminishes. It is believed to be almost precisely the same now as it was 3 billion years ago. Endlessly recycled water is used, disposed of, purified and used again. Last night's potatoes may have boiled in what was, ages ago, the bath water of Archimedes. And while the idea of using "used" water may at first repel a hygienic civilization, the knowledge that the world supply of this vital substance cannot be depleted should offer comfort.[10]

14. The role of the watercourse in the cycle is the channelling of surface water and some groundwater to the sea. Considered together, surface water and groundwater are called "runoff". Surface flow, however, consists of three parts: channel precipitation, overland flow and interflow.

15. Channel precipitation is the fall of rain, etc., directly upon watercourses. Normally, it is a very small proportion of total runoff because of the limited catchment area, except in such unusual cases as the Great Lakes, and because of the effects of "evapotranspiration" which refers to the processes of both evaporation (absorption of water into the atmosphere from inorganic surfaces) and transpiration (absorption of water into the atmosphere from the leaves of plants). Overland flow is water that does not infiltrate the ground surface but travels overground to reach a stream channel. It results when saturation or freezing prevent water from penetrating the earth.

16. Interflow is

water which infiltrates the soil surface and then moves laterally through the upper soil horizons towards the stream channels, either as unsaturated flow or, more usually, as shallow perched saturated flow above the main groundwater level ... It is also called storm flow, storm seepage, and secondary base flow.[11]

Available evidence indicates that interflow may account for up to 85 per cent of total surface runoff.

17. While surface runoff is the most visible source of moisture for watercourses, it is less important than groundwater, which is believed to constitute 97 per cent of the water on earth, excluding oceans, ice-caps and glaciers. As the following quotation reveals, however, the significance of groundwater lies also in the steady nature of its flow:

Most of the rainfall which percolates through the soil layer to the underlying groundwater will eventually reach the main stream channels as groundwater flow through the zone of saturation. Since water can move only very slowly through the ground, the outflow of groundwater into the stream channels may lag behind the occurrence of precipitation by several days, weeks, or often years. Groundwater flow also tends to be very regular, representing as it does the overflow from the slowly changing reservoir of moisture in the soil and rock layers. It must not be inferred from this that groundwater may not show a rapid response to precipitation. Indeed, the push-through mechanism of translatory flow frequently results in a rapid response of groundwater flow to precipitation during individual storm periods, and especially on a seasonal basis. Since translatory flow can only operate in moist soil and subsoil conditions, however, the

[8] M. Overman, *Water: solutions to a problem of supply and demand* (Garden City, N.Y., Doubleday, 1969), p. 36.

[9] *Ibid.*, pp. 33–34.

[10] Leopold and Davis, *op. cit.*, p. 33.

[11] R.C. Ward, *Principles of Hydrology*, 2nd ed. (London, McGraw-Hill, 1975), p. 240.

replenishment of large moisture deficits created, particularly during summer conditions, may result in a considerable lag of groundwater outflow after precipitation during and immediately following prolonged dry periods. In general, groundwater flow represents the main long-term component of total runoff and is particularly important during dry spells where surface runoff is absent.[12]

18. Because groundwater is usually not visible, there are understandable misconceptions about it. In nature and movement, it is subject to the same physical laws and has the same properties as water on the surface or in the air. Like fresh water elsewhere, a major characteristic is that it remains in motion, as the following exposition makes clear:

The outermost surface of the earth is composed largely of porous, fairly loose material, principally sand, gravel, silt and decayed vegetation. Most of this surface is underlain by porous rock such as sandstone and limestone. Beneath this everywhere is bedrock, so compact, as a result of molten origin or of subsequent heat and pressure, that it is totally impermeable. All layers above this impermeable base rock hold groundwater. The layers are classified by water content into two regions: the zone of aeration and the zone of saturation.

Seeping below the surface, water first enters the zone of aeration, a transition level where the earth contains both water and air. Its depth varies widely, from an inch or less near the edge of a swamp to hundreds or thousands of feet elsewhere. In this zone, water shows its powers of adhesion by clinging to particles of soil and rock. The amount held in the pore spaces by this molecular attraction fluctuates widely and rapidly. Immediately after a rainstorm, the zone of aeration may be surfeited with water; shortly after, it may contain little; during a prolonged drought, it may contain almost none at all. Some water that enters this region sinks through to the layers beneath; some is absorbed by plants or evaporates into the air. The zone of aeration ends in a moist region called the capillary fringe. It contains water lifted from the still lower zone of saturation by capillary action. Its depth depends upon the diameter of the soil's pores: if the pores are relatively large, little water will be drawn up and the belt will be narrow; but if they are fine-pored and continuous, water may climb as high as eight feet. Sometimes, though not often, this fringe reaches all the way to the surface.

The lower moist layer, comprising the zone of saturated earth, forms a principal water resource. Wells dip into it; springs, rivers and lakes are its natural outcroppings on the surface of the globe. Water seeping downward can go no further; every pore, crack and interstice is filled. The top of the saturation zone—the boundary between it and the capillary fringe—is called the groundwater-table, or simply the water-table. The water glinting at the bottom of a shallow well is an exposed part of the water-table. Around it and continuous with it, the same water-table extends—whether exposed or not—above the ground or in it. The surfaces of lakes and rivers are also exposures of the water-table and, to a hydrologist's eye, blend with the water-table into the landscape.

The changing elevations in the earth's water-table are revealed by its surface waters. Some lakes are higher than others. Streams run downhill. The water-table, which must connect them all, also slopes. Its contours reflect in part the landscape above it; it is high under mountains and dips toward river valleys. Occasionally, the surface contour drops more sharply than the water-table beneath it. It cuts into the water-table and exposes saturated earth so that water issues forth: a spring. If a wide swath of the land's surface dips beneath the water-table, a lake or swamp occurs. Across the lowest dip of a valley the water-table supplies a river. In fact, a river's channel is often a continuous spring that sustains the river's flow under sunny skies when no rain falls.

One of the factors influencing the contour of the water-table is the contour of the land above it. This connection is best seen in an idealized landscape: a low and gently sloping hill with a river valley on either side, all underlain by homogeneous porous material. As rain falls and seeps downward, water accumulates underground at the base of the porous material. The water-table rises uniformly ... It remains essentially flat until, as more rain falls, it rises so far above the base that it reaches the lowest portions of the two valleys. It will now seep out into the valleys and fill those channels.

Thereafter, groundwater feeds into the two rivers. As rain continues to fall on the hills, it soaks the earth, seeps down to the aquifer and—since the aquifer is now higher than the valley—seeps out the sides of the hill.[13]

19. Under certain geologic conditions, groundwater may be confined between impervious layers of rock. Such aquifers, like the one stretching across the Sahara desert from Libya to the Atlas mountains, can be very large. Confined aquifers are rare, however:

Water does not usually remain stationary in the aquifers but flows from the charging areas either to areas of natural discharge, such as springs, swamps, ponds, and lakes, or to wells .... Water has been known to move 300 miles or more in these underground strata, although the usual distances range from 5 to 100 miles. The lowering of the water level in an aquifer through well pumping does not necessarily mean that the water supply is being permanently reduced, in the sense that less remains available for future generations. On the contrary, a local lowering of the water level often causes increased flow through the strata and decreased waste in the charging and discharging areas. However, if the local lowering reduces the hydraulic level much below sea level in coastal areas, there may be danger of contaminating fresh water with saline water. This is especially true if impenetrable strata covering the aquifer have been pierced near the sea by artificial harbours or abandoned wells. Even without such penetration, contamination may occur because in coastal areas there may be hydraulic continuity of fresh water bodies ....[14]

20. The replacement of groundwater is a complicated process. An illustration of some aspects of the problem may be worthwhile:

In the final analysis, virtually all groundwater owes its existence, directly or indirectly, to precipitation. In detail, however, the main components of groundwater recharge are: (*a*) infiltration of part of the total precipitation at the ground surface; (*b*) influent seepage through the banks and bed of surface water bodies such as ditches, rivers, lakes, and even oceans; (*c*) groundwater leakage and inflow from adjacent aquicludes [a geologic formation or stratum that confines water within an adjacent aquifer] and aquifers; and finally (*d*) artificial recharge from irrigation, reservoirs, spreading operations, and injection wells.

(*a*) In general terms, the proportion of precipitation infiltrating the water-table depends largely on charcateristics of the precipitation itself, topography, vegetation characteristics, and on the type and structure of the soil and the underlying rocks ....

(*b*) Where groundwater occurs in direct contact with surface water bodies such as lakes, ponds, and streams, there will normally be a movement of water between the two water bodies. Either flow will take place from the stream to the groundwater

[12] *Ibid.*, p. 241.

[13] Leopold and Davis, *op. cit.*, pp. 56–57.

[14] J.H. Hirshleifer, J.C. DeHaven and J.W. Milliman, *Water Supply* (Chicago, Ill., Univ. of Chicago Press, 1960), p. 10.

body, in which case it is known as *influent seepage*, or the reverse movement, *effluent seepage*, will occur, in which case groundwater seeps into and adds to the volume and flow of the surface water body. The seepage relationship between surface and underground water is seldom static, but changes with the changing levels of, say, a stream and the adjacent water-table so that, in a matter of a few hours, influent seepage may supersede effluent and then, in turn, be replaced once more by the latter.[15]

21. Despite problems in collecting data regarding groundwater under varying hydrologic and geologic conditions, there can be no doubt that groundwater is an integral and vital part of the unbroken cycle of movement through which the supply of fresh water is continually replenished. If, in some manner, the movement of groundwater were to come to a halt, the quantity of water in watercourses would be reduced drastically. Many perennial surface streams would become intermittent, or even dry up altogether. Accordingly, the contribution of groundwater to watercourses must be taken into account in framing principles to govern the uses made of watercourses. At an elementary level, the amount of groundwater moving into an international watercourse has to be included in calculating the total volume of flow of the watercourse. At the level of water resources management, it is necessary, in framing principles regarding the use of water, to give consideration to the effects of a contribution of groundwater to a watercourse. It is necessary to consider as well the effects of the existence of available reserves of groundwater, and of the contribution of water flowing in watercourses to the quantity of groundwater.

B. Self-purification

22. A second, paramount quality of water, in the hydrologic cycle, is its ability to cleanse itself. The water flowing in rivers and streams is capable of self-purification in two ways. First, it is able to disperse wastes either through its flowing motion, which dissolves waste particles or causes them to break up and settle at the river bottom, or through the supply of fresh water that continually enters the watercourse. Secondly, oxygen reacts chemically with wastes to convert them into harmless substances or acts as host to bacteria which consumes sewage and other organic wastes. However, the supply of oxygen absorbed by a river from the air or from plants can be exhausted; when an overload of waste enters the stream, the river may become unable to purify itself.

23. Groundwater is able to perform these two functions to a lesser degree. Its more sluggish movement, for example, limits its ability to dissolve wastes or break up particles of waste matter. Similarly, its stock of oxygen is less renewable. Moreover, water that has been trapped deep within the earth for millenia is unusable for most purposes. The effects of its existence under the pressure and heat typical of the inner layers of the earth and of its contact with mineral substances have combined to saturate it with dissolved salts.

C. Quantity and flow of water

24. As a resource, one of water's most extraordinary characteristics is its limited but forever renewable quantity. Like almost all resources, the fixed amount of fresh water in watercourse systems is unevenly distributed throughout the world. Therefore, even though the total supply of fresh water may well be sufficient for current human needs, there have always been large deficiencies of water in many regions and large excesses in others. The factors having an impact upon the quantity of water flowing in a watercourse system lend themselves to categorization into three divisions: meteorological, catchment and human.[16]

25. Meteorological factors determine the maximum amount of runoff for any given catchment area at any given time. The rate of evapotranspiration is a function of "solar radiation, temperature, humidity, windspeed and barometric pressure".[17] The release of precipitation, on the other hand, varies according to the type of moisture: snow is able to store water for later release, while hail and sleet are similar to rain and release moisture rapidly.[18]

26. A broad range of variables are considered catchment factors. The slope of the catchment area has an impact upon the speed with which water travels and hence upon its percolation through the soil. A catchment area's shape generally corresponds to a precise drainage pattern, with recognizable consequences for the flow of runoff; the tributaries of a square drainage basin tend to join at the basin's centre, and runoff results in a rapid increase in the quantity of water in the main stream; the tributaries of an elongated basin are normally relatively short, join the main stream at different intervals, and lead to the discharge of runoff from lower streams before that from the upper reaches. A final feature is the orientation of the catchment area. An orientation towards the sun, for example, increases evaporation or speeds melting.[19]

27. Rock and soil type, as well as vegetative cover and the drainage network, are additional catchment features. The former is determinative of the porosity of the earth and has a major impact upon its absorptive capacity, while the presence of vegetation impedes water's ability to flow over the land and aids the process of infiltration. Vegetation also has an impact

[15] Ward, *op. cit.*, pp. 193–194.

[16] *Ibid.*, pp. 324–346.

[17] *Ibid.*, p. 330.

[18] *Ibid.*, pp. 326–329.

[19] *Ibid.*, pp. 330–333.

through evapotranspiration, even though generalizations about its effect are difficult due to the role played by other factors, such as temperature, wind and humidity, in determining the amount of evapotranspiration that will take place. The distribution of streams in regional drainage networks contributes to the efficiency of runoff removal. Efficient—i.e. rapid—runoff removal intimates short surface flow. When surface runoff must travel a long distance to reach a stream, as it must in a poorly drained basin, greater opportunity for penetration of the soil arises and groundwater runoff is potentially increased.[20]

28. The quantity of water in a watercourse reflects seasonal variations in flow. A pattern of seasonal changes is called the régime of a river; comparison of river régimes has produced three classifications,[21] which need not be pursued at this juncture

29. Although fresh water is a renewable resource, it is within man's capability so to upset the order of nature that the hydrologic cycle can no longer produce "sweet water". The report of the United Nations Water Conference (1977) lists some of the activities that may affect water in the cycle:

> Large-scale water-development projects have important environmental repercussions of a physical, chemical, biological, social and economic nature, which should be evaluated and taken into consideration in the formulation and implementation of water projects. Furthermore, water-development projects may have unforeseen adverse consequences affecting human health in addition to those associated with the use of water for domestic purposes. Water pollution from sewage and industrial effluents and the use of chemical fertilizers and pesticides in agriculture is on the increase in many countries. It is also recognized that control measures regarding the discharge of urban, industrial and mining effluents are inadequate. Increased emphasis must be given to the question of water pollution, within the over-all context of waste management.[22]

30. The list of human activities that have a substantially adverse effect upon the hydrologic cycle also includes deforestation, acid rain, the transformation or removal of vegetative cover and the reduction of the number of absorptive surfaces through urbanization. The following opinion has been offered as an analysis of modern flooding and is indicative of the extent of man's potential role:

> Any increase in the severity of floods is therefore likely to be caused by increased rainfall intensities, reduced infiltration capacities, or the changed efficiency of the drainage network. There is no evidence to suggest that storms are increasing in intensity; but the effects of urbanization in reducing infiltration capacities have already been noted and, in addition, such factors as forest clearance and the burning, accidentally or otherwise, of large areas of peat moorland must also be taken into account. Finally, the efficiency of drainage channels is likely to be impeded by bridges, levees, flood walls, and similar structures, and although the individual effect of each may be small, their combined effect in large built-up areas may be surprisingly significant.[23]

31. It merits repeating that water is a unique substance. The characteristics described—constant in quantity, self-purifying, but varying in flow—contribute to water's singular nature in many ways. Because of its atomic structure, it is a solvent of great efficacy, able to dissolve about half of all chemical elements. It has enormous capacity to absorb heat, and is consequently an immense source of energy when it releases heat. Such qualities play an integral part in the various uses to which water can be put, and must necessarily be considered in connection with its various uses. For the purposes of this introduction, it is sufficient to reiterate that physical facts have to be recognized in deciding what rules should be established among nations respecting the use of fresh water.

[20] *Ibid.*, pp. 333–343.

[21] *Ibid.*, pp. 348–352.

[22] *Report of the United Nations Water Conference* (United Nations publication, Sales No. E.77.II.A.12), recommendation C, para. 34.

[23] Ward, *op. cit.*, p. 346.

CHAPTER II

Uses of international watercourses

32. By its resolution 2669 (XXV) of 8 December 1970, the United Nations General Assembly recommended that the Commission take up the study of the law of the non-navigational uses of international watercourses. The Commission placed the subject on its work programme at its twenty-third session, in 1971. By the same resolution, the General Assembly also requested the Secretary-General to bring up to date his report of 1963 entitled "Legal problems relating to the utilization and use of international rivers".[24] The supplementary report by the Secretary-General entitled, "Legal problems relating to the non-navigational uses of international watercourses"[25] was made available to the Commission for consideration at its twenty-sixth session, in 1974.

[24] *Yearbook ... 1974*, vol. II (Part Two), p. 33, document A/5409.

[25] *Ibid.*, p. 265, document A/CN.4/274.

33. At its twenty-sixth session, the Commission appointed a Sub-Committee on the law of the non-navigational uses of international watercourses, composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi,[26] to prepare proposals regarding the action to be taken respecting the request of the General Assembly. The Sub-Committee submitted a report[27] that proposed the submission of a questionnaire, to States regarding the scope of the proposed study; the uses of water to be considered, and whether the problem of pollution should be given priority; the need to deal with flood control and erosion problems; and the interrelationships between navigational uses and other uses.

34. The questionnaire contained, among other questions, three regarding the definition of "international watercourses" for the purpose of the study;

(*a*) What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses, on the one hand and of fresh water pollution on the other hand?

(*b*) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?

(*c*) Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?[28]

The Sub-Committee report, in proposing those questions, noted that the International Law Association, at its Helsinki Conference of 1966, had prepared a set of articles on the Uses of the Waters of International Rivers (Helsinki Rules)[29] based on the concept of the "international drainage basin". The term is defined in article II of the Helsinki Rules as follows:

> An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

35. The questionnaire was submitted to States, and the Commission reviewed the answers made by States to the questions it contained at its twenty-eighth session in 1976 on the basis of a report submitted by Mr. Kearney the Commission's first Special Rapporteur for the subject.[30] This report stated that considerable differences had been expressed by States regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, both with respect to uses and with respect to the special problems of pollution. Such differences were found as well in the views expressed by members of the Commission in the debate upon the Special Rapporteur's report.[31] A consensus emerged that the question of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work. The pertinent paragraphs of the report of the Commission to the General Assembly state:

> This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance between those which were too detailed to be generally applicable and those which were so general that they would not be effective. Further, the rules should be designed to promote the adoption of régimes for individual international rivers and for that reason should have a residual character. Efforts should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.
>
> It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.[32]

36. The other issues raised by the questionnaire did not result in any substantial differences among States or among the members of the Commission. The suggested outline of uses of water was approved, subject to appropriate revision in the light of State comments. Questions of flood control, erosion problems, sedimentation and the interaction between the use of international watercourses for navigation and for other uses should be addressed by the Commission. From the standpoint of methodology, specific pollution problems should be taken up in the context of the uses that occasioned pollution.[33] The General Assembly, in its resolution 31/97 of 15 December 1976, on the 1976 report of the Commission, noted with appreciation the work done on the law of the non-navigational uses of international watercourses and recommended that the Commission should continue its work on the subject. The recommendation was subsequently reiterated by the General Assembly in resolutions 32/151 of 19 December 1977 and 33/139 of 19 December 1978.

37. The replies of States to the questionnaire and the debate in the Commission are revealing of the positions that must be taken into account in framing principles regarding the uses of international watercourses. As noted, the questions that gave rise to substantial—even

[26] *Ibid.*, vol. II (Part One), p. 301, document A/9610/Rev.1, para. 156.

[27] *Ibid.*, pp. 301 *et seq.*, document A/9610/Rev.1, chap. V, annex.

[28] *Ibid.*, p. 302, para. 17.

[29] See *Yearbook ... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, part four, sect. C, 1.

[30] *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

[31] *Ibid.*, vol. I, pp. 268–283, 1406th to 1409th meetings.

[32] *Ibid.*, vol. II (Part Two), p. 162, document A/31/10, paras. 164–165.

[33] *Ibid.*, para. 166.

striking—differences were the first three, which concerned the meaning and scope of the term "international watercourse". The 1974 report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses explained the purpose of those questions. Section II of the report, entitled "The nature of international watercourses", pointed out that a variety of terms had been used in various treaties and in the reports of international organizations and conferences to delimit the geographic area within which rules relating to uses of a specific international watercourse should be applicable. Those terms included "successive international rivers" and "contiguous international rivers", "river basin", "international drainage basin", and "hydrographic basin". The Sub-Committee concluded that it would be desirable to determine whether agreement on one descriptive term was possible, and accordingly proposed that the questionnaire ask what should be the appropriate scope of the term "international watercourse" in a study that included both the uses and the pollution of fresh water.[34]

38. The explanation in the Sub-Committee report did not go into the effects that the selection of a particular formula for describing an international watercourse would have upon the development of the draft articles to be considered by the Commission in the course of its work on the subject. Broadly stated, the consequence of choosing a term such as "drainage basin" emphasizes the unitary nature of an international watercourse as a shared common resource, while the use of terms such as "boundary rivers" or "successive rivers" emphasizes the fragmentation of the natural unity of a fresh water system as a consequence of the existence of political boundaries.

39. The unity of a watercourse is based upon the hydrologic cycle—the process, described in chapter I of this report, by which water circulates in a never-ending flow from the land and water surface of the earth to the atmosphere to the earth and back. The basin is an essential part of this process:

> The river basin, bounded by its drainage divide and subject to surface and sub-surface drainage under gravity to the ocean or to interior lakes, forms the logical areal unit for hydrological studies. ... Within this framework one can conveniently, for example, draw up a water balance and assess water resources; estimate the probability of the occurrence of extreme events, such as floods and droughts, particularly as they affect reservoir storage and water use by man; and mobilize hydrological information to enable man to manage his water resources more efficiently by knowing when and in what ways it is to his advantage to intervene locally in the hydrological cycle.[35]

The river basin or, more precisely, the drainage or hydrologic basin, is nature's catchment unit in the complicated process of returning water that falls upon the land to the sea. In so doing, the basin functions physically as a self-contained unit.

40. This unity has consequences that are of fundamental importance for the development of legal principles regarding international watercourses, as Teclaff points out:

> The interaction of drainage, geology, soils, climate, and vegetation within a particular river basin produces an individual relationship between these physical elements different from that in another river basin or another natural unit, but topography, geology, soils, climate, and vegetation do not per se, either separately or together, distinguish the river basin in general as a *type of land area*. The distinguishing feature remains that the waters which the river basin receives tend to drain toward a single outlet and form an interconnected system which is capable of transmitting within itself any disturbance caused by changes affecting water in any part of the basin. The distribution of drainage through a single outlet constitutes an areal unity, the behaviour of the water itself a functional unity. Because it is constituted by the distribution and behaviour of water, the physical unity of the river basin can thus best be described as hydrologic.[36]

41. The areal and functional unity of a drainage basin suggests that this indivisibility is the proper starting point for the development of principles to govern the uses of fresh water moving through international watercourses. A use in an upstream State, either alone or in combination with other uses, characteristically will have some effect upon the volume, the rate of flow or the quality of the water moving to a downstream State. Sometimes such effects will be large, other times small. In any event, from a scientific and economic—one might even say, from an objective—perspective, use of the "basin" concept for the development of legal rules regarding international watercourses would seem to be the appropriate method of taking into account the interrelationships that apply throughout the entire area that is drained by a river system.

42. There was decided opposition to use of the drainage basin concept as a basis for the Commission's work in the replies of about half of the 25 States that responded to the question.[37] An exact determination of States' views on the matter cannot be made, however, owing to the propensity of States to qualify their answers. For example, Canada, in replying to question A, stated that the definition of an international watercourse should be "a body of fresh water which crosses or forms an international boundary".[38] However, it recognized that the work of the Commission might require expansion of the definition and, in its answers to questions B and C, stated that "use of a geographically narrow definition as a starting point

[34] *Yearbook ... 1974*, vol. II (Part One), pp. 301–302, document A/9610/Rev.1, chap. V, annex, paras. 7–16.

[35] R.J. More, "The basin hydrological cycle", *Water, Earth and Man*, R.J. Chorley, ed. (London, Methuen, 1969), p. 67.

[36] L.A. Teclaff, *The River Basin in History and Law* (The Hague, Nijhoff, 1967), p. 14.

[37] See *Yearbook ... 1976*, vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1, and *Yearbook ... 1978*, vol. II (Part One), pp. 253 *et seq.*, document A/CN.4/314.

[38] *Yearbook ... 1976*, vol. II (Part One), p. 153, document A/CN.4/294 and Add.1, section II.

would not preclude consideration of a natural drainage basin ... where the circumstances of the case so require."[39]

43. Most of the States that rejected adoption of the drainage basin concept expressed the belief that the study of the non-navigational uses of an international watercourse should be based on the definition of an international river found in the Final Act of the Congress of Vienna (1815),[40] i.e. "a river that separates or traverses the territory of two or more States". Those States included Austria, Brazil, Canada, Colombia, Ecuador, the Federal Republic of Germany, Nicaragua, Poland, Spain and the Sudan. Some of those replies put forward the definition as a traditional, accepted or "classical" one, without reference to the 1815 instrument. For the States that support the 1815 definition, the existence of international boundaries appears to be the paramount factor. For the most part, these States are in an upstream or predominantly upstream position.

44. Correspondingly, most of the States supporting the drainage basin concept are predominantly downstream States. The States that supported adoption of the drainage basin concept included Argentina, Barbados, Finland, Hungary, Pakistan, the Philippines, Sweden, the United States of America and Venezuela, as well, apparently, as the Netherlands. Two of these are island States, which may qualify them for the role of disinterested commentator. While the impartial views of States that do not have an international river problem may, in a sense, be best suited to addressing the problems that arise from the use of international watercourses, a supervening practical deficiency is that no treaty dealing with uses of international watercourses can be put into practical effect solely by island States. Substantial riparian State support is an essential ingredient of any universal treaty on laws on fresh water resources. That fact must give pause to advocates of a drainage basin approach.

45. The comments of States thus suggest that the positions of a State with respect to draft articles on the uses of international watercourses will indeed, and understandably, be influenced by the geographical position of that State on one or more river basins. A State that considers that its major water uses are based upon an upstream position, will, if it is prepared to accept any kind of treaty on the uses of fresh water, be inclined towards one that is limited in scope and effect. A State that considers that its major water uses are based upon a downstream position will be inclined to support a treaty that is broad in scope and that provides protection against overreaching by its upstream neighbours.

46. It is of interest to note that there is a difference in the traditional treatment of successive and contiguous rivers. It was especially marked during earlier stages of watercourse development, when uses were few and did not tax the resource, and before the full implications of the hydrologic cycle were known or its complex interdependencies appreciated, but it has modern illustrations. For example, the Declaration of Asunción on the Use of International Rivers, issued as resolution No. 25 annexed to the Act of Asunción,[41] which was adopted at the Fourth Meeting of the Foreign Ministers of the River Plate Basin States, provides:

> 1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.
>
> 2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.[42]

The fact that there are a much greater number of international agreements in effect on uses of boundary waters than on uses of successive international watercourses also reflects this difference in treatment. For present purposes, the consequence to be taken into account is that, regarding the proper scope of treaty provisions, the position a State will take on the uses of boundary watercourses may differ from the position it will take on the uses of successive watercourses.

47. In his first report on the law of the non-navigational uses of international watercourses, the former Special Rapporteur proposed that, for the purpose of drafting articles, the Commission accept "international river basin" as the appropriate meaning of the term "international watercourses".[43] The reasons given in support of his proposal were that current practice as expressed in multilateral treaties dealing with specific rivers was to use the term "river basin", that the concept of river basin encompassed the interrelationships that existed between the use of water in one part of a river system and the effects that such use might produce in a far distant part of the basin across several intervening national frontiers, and that the consequences of the use of tributaries must be taken into account in framing international law for watercourses.[44]

48. The discussion of that report at the twenty-eighth session of the Commission disclosed a division of opinion in the Commission comparable to that which had appeared in the comments of States. Conspicuous support for the drainage basin concept was not expressed. A number of members expressed strong

[39] *Ibid.*, p. 162.

[40] For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* [1918] (repr. Oxford, Clarendon Press, 1970), p. 37.

[41] See *Yearbook ... 1974*, vol. II (Part Two), p. 322, document A/CN.4/274, para. 326.

[42] *Ibid.*, p. 324.

[43] *Yearbook ... 1976*, vol. II (Part One), p. 191, document A/CN.4/295, para. 49.

[44] *Ibid.*, pp. 190–191, para. 44.

support for adoption of the definition of the Final Act of the Vienna Congress of 1815. There was no particular support for the concept of river basin as equivalent to that of international watercourse, although one or two members indicated a willingness to accept that definition if the Commission were so inclined. Their views were balanced by those upholding the 1815 Vienna definition, who found the concept of river basin almost as unappealing as that of drainage basin.[45]

49. The view of a substantial majority of the Commission was that work on the subject should begin without an effort being made at the outset to draw the limits of that work with any great exactitude. The statements of a few members on that approach give some indication of what the possible parameters might be. Sir Francis Vallat said that:

> The question of the definition of the term "international watercourse" had been raised, but he thought the Commission should concentrate on the basically different question of the uses of international watercourses. He shared the view of other members of the Commission, who had stated that it was not the time to try to formulate a definition of an international watercourse, because that endeavour would only hamper the Commission's work unnecessarily. Perhaps after hearing the Commission's discussion, the Special Rapporteur would also be able to agree that the problem of definitions should be left aside for the time being, while the Commission considered the main principles to be applied internationally.[46]

Mr. El-Erian said that:

> With regard to the scope of the Commission's work on the topic, the Special Rapporteur appeared to favour the drainage-basin concept, whereas Mr. Sette Câmara had proposed that the Commission should proceed on the basis of existing practice and of the time-honoured and traditional definition of an international watercourse adopted in the Final Act of the Congress of Vienna of 1815. As was pointed out in paragraph 8 of the Special Rapporteur's report, a useful point had been made by the Government of Hungary, which had argued that there was no general geographic term that could be applied to all the legal relations relating to waters that were on the territory of more than one State, and that consequently the need was not to study the meaning of terms, but to consider whether a term was suitable for the regulation of certain legal relations. An equally interesting point had been made by the Special Rapporteur in paragraph 21 of his report when, commenting on the definition adopted by the Congress of Vienna in 1815, he had observed that, "a definition devised for purposes of navigation is not necessarily the best choice for the requirements of the wide range of uses other than navigation". Mr. Ustor had suggested that the Commission should follow the inductive method and should take stock of existing law and practice before proceeding to formulate general rules. In his view, the Commission would be well advised to leave the question open for the time being and content itself with its thorough discussion of the topic, which would provide a basis for eliciting the views of Governments.[47]

Mr. Quentin-Baxter said that, in his view:

> ... the Commission should not be unduly concerned with the definitional element, that was to say, the question whether the basic unit for its work should be the international watercourse or the river basin. In their replies to the questionnaire sent to Member States, Governments had shown no inclination to adopt an unduly restrictive approach. For instance, no State had maintained that pollution originating in a tributary which subsequently flowed into an international watercourse was not a source of State responsibility. There were many cases in which two or more States sharing a particular river basin had combined to uphold their common interests, and that process should, and undoubtedly would, continue.
>
> It was clear that, where water lay upon or crossed an international boundary, there was a set of rights and obligations which needed to be developed in particular contexts, according to physical and economic interests. The degree of responsibility did not depend on proximity to the boundary. In the modern world, States would clearly be unwilling to create a condominium over every river basin that crossed an international boundary. They would increasingly be able to provide, however, that the responsibility of the riparian States extended to all that happened in such river basins and that damage or, conversely, increased advantages through development, were matters requiring equitable adjustment.[48]

50. The issue of the scope of the Commission's work on the non-navigational uses of international watercourses came up in the General Assembly's review of the report of the Commission on its twenty-eighth session. A number of States that had not submitted comments to the Commission expressed their views on the subject. That of the representative of Mali was summarized as follows:

> It was essential that the Commission should take account of the experience of States in that sphere. He recalled the existence of several State organizations concerned with the non-navigational uses of international watercourses, such as the Organization for the Utilization of the Senegal River and the Mekong Commission. With regard to the Senegal River, he noted the emergence of a new concept: beyond the joint exploitation of the river, the foundations had been laid for co-operation aimed at the integrated development of riparian States under the authority of an institution. At the legal level, the integration of the river went beyond the limits of the river basin and extended to the national territories in their entirety.[49]

The representative of Turkey, however, took a strong contrary position, namely, that the study of international watercourses:

> ... should be based on certain principles already existing in State practice and on the traditional definition of an international river contained in the Final Act of the Congress of Vienna of 9 June 1815 and reproduced in numerous treaties and conventions. Hydrographic or drainage basins were part of the territory of the State and could not be treated differently from the rest of that territory. Moreover, there could not be two different definitions of the same subject. It was also necessary to specify the interrelation between navigational and other uses.
>
> As watercourses were one of the natural resources of the State, the State exercised full and complete sovereignty over the watercourses within its territory. The physical nature of water could not affect its legal régime; otherwise, the same argument could be used for other liquid natural resources.[50]

[45] For discussion of the report, see *Yearbook ... 1976*, vol. I, pp. 268–283, 1406th–1409th meetings.

[46] *Ibid.*, p. 275, 1407th meeting, para. 19.

[47] *Ibid.*, p. 281, 1408th meeting, para. 13.

[48] *Ibid.*, p. 280, paras. 6–7.

[49] *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 30th meeting, para. 72; and *ibid., Sessional fascicle*, corrigendum.

[50] *Ibid.*, 24th meeting, paras. 13–14; and *ibid., Sessional fascicle*, corrigendum.

The representative of Paraguay discussed the topic at some length, noting difficulties that affected decisions regarding the scope of a study of the uses of international watercourses:

With regard to the law of the non-navigational uses of international watercourses, it was his understanding that the term "watercourses" meant fresh water watercourses over which temporary or permanent sovereignty was exercised by two or more States. The notion of temporary sovereignty applied to watercourses which were apt to appear or disappear as the result of natural causes such as thawing or drought. That concept as well as the water-table concept would have to be defined because of their international implications. Such notions as contiguous or successive watercourses and international lakes would also have to be dealt with. Definition problems should, however, be put off until later because they were apt to delay the progress of work.

In view of the rights of States to permanent sovereignty over their natural resources, watercourses which originated and terminated within the territory of a single State must not be regulated by the norms of international law even if they formed part of the regional *divortium acquarum* or of an international hydrographic basin.

In his delegation's opinion, the question of the pollution of international watercourses, which would have to be the subject of a precise hydrographic delimitation, could be dealt with at a later stage of the work on the topic . . .

. . .

Referring to the replies of Governments to the ILC questionnaire on international watercourses, he noted that the replies to some questions had been less contradictory than the replies to others. The most contradictory had been the replies to the questions involving notions which had a bearing on the political and the social and economic interests of States. Often, the replies of Governments had been influenced by geographical situation and degree of economic and technolgical development. Furthermore, as some questions demanded detailed replies, the possibility of different approaches became more pronounced. It was difficult to see how States could arrive at a consensus, at least at the present time, on a definition of the term "international watercourses".[51]

The representative of France offered the same advice in more abbreviated form:

Referring to the non-navigational uses of international watercourses, he noted that divergent views had been expressed with regard to the question of geographical scope. Consequently, the Commission should exercise considerable caution in that regard.[52]

51. In the light of the foregoing differences, caution dictates that article 1 of the draft should be couched in agreed language, substantially identical with the language of General Assembly resolution 2669 (XXV) of 8 December 1970, which requested the Commission to take up the subject. Paragraph 1 of the resolution provides that the General Assembly:

Recommends that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

It should not of course be assumed that there was any substantial agreement on the meaning of "international watercourses" in the Sixth Committee at the time the resolution was adopted. Finland had proposed General Assembly item 91, "Progressive development and codification of the rules of international law relating to international watercourses". The explanatory memorandum attached to the Finnish proposal[53] for an agenda item suggested that the Commission should be requested to take up the codification of international law relating to international rivers on the basis of the Helsinki Rules. Introducing the item, the Finnish delegation urged that the Helsinki Rules serve as the basis for the study and codification of the law of international watercourses by either the Commission or an *ad hoc* committee. The Helsinki Rules could be regarded as the most up-to-date code now available on the law of international watercourses. The Finnish delegation specifically pointed out that:

. . . the provisions relating to the equitable use of waters of international drainage basins rested on the coherence principle, formulated by the Austrian lawyer, Mr. Hartig, under which an international drainage basin, whether it belonged to two or several States, was considered to be an integrated whole, the use of which should be shared equitably by the riparian States.[54]

52. A draft resolution was prepared which served as a basis for discussions in the Sixth Committee. The debate centred largely upon whether there should be reference to the Helsinki Rules in the draft resolution. Opposition to a reference to the Helsinki Rules was said to be based upon the undesirability of adopting the product of a single non-governmental organization without reference to work done by other organizations, and lack of agreement with various provisions of the Rules. The drainage basin concept was not specifically opposed, although the statements of a number of States implied opposition. Supporters of the reference to the Helsinki Rules, however, did not deal with the issue directly, although favourable statements stressing the advantages of the Rules clearly included the drainage basin concept.[55] The difference was settled, by a vote on which the reference to the Helsinki Rules was rejected by 41 votes to 25, with 32 abstensions.[56]

53. In its reply to the Commission's questionnaire, Finland interpreted the term "international watercourse", as used by the General Assembly, in a way that sums up the case for the proponents of a broadly based study:

The concept of "international watercourse" was used by the Government of Finland in its motion of 1970 to the General Assembly and later on included in General Assembly resolution

[51] *Ibid.*, paras. 95–97 and 99; and *ibid.*, *Sessional fascicle*, corrigendum.

[52] *Ibid.*, 26th meeting, para. 10; and *ibid.*, *Sessional fascicle*, corrigendum.

[53] *Ibid.*, *Twenty-fifth Session*, *Annexes*, agenda item 91, document A/7991.

[54] *Ibid.*, *Sixth Committee*, 1225th meeting, para. 5.

[55] For example India (*ibid.*, 1232nd meeting, paras. 9–12).

[56] *Ibid.*, 1236th meeting, para. 32.

2669 (XXV) concerning the development of the rules of international law relating to international watercourses. The term "international watercourse" has generally been regarded to be broad enough to cover all the problems which have relevance in this connection, and it did not look too technical. When compared with other terms which have been used instead of "international watercourse", the scope of the latter is wider than that of "international river", because watercourse also means lakes. On the other hand "international watercourse" might be practically regarded as equivalent to "international drainage basin", provided that underground waters which are contained in the latter concept are not taken into account. Particularly for the purposes of the codification of international law of waters the term "international watercourse" seems to be as usable as the concept of "international drainage basin", which concept has been adopted by the International Law Association after a careful study of various alternatives (Helsinki Rules of 1966). A similar terminological problem was studied also in 1952 by ECE and the results of this study, which led to the acceptance of the concept "rivers and lakes of common interest", have been published in an ECE document. Those studies have indicated that synonymous terms can be used for describing the same notion, provided that the terms chosen cover the main factors which with regard to watercourses have an international legal relevance. Firstly, the term should indicate that a watercourse or a system of rivers and lakes (a hydrographic basin) is divided between the territories of two or more States. The second factor of importance in this connection is based upon the hydrographic coherence of the basin. Due to this coherence there exists, irrespective of the political borders, a legally relevant interdependence between the various parts of the watercourse belonging to different States. This interdependence, which in each individual case should decide to what extent the drainage area will be subjected to an international legal regulation, does not concern the different uses of the watercourse and its water only; it has also bearing upon problems of pollution. For that reason there is no need to make distinctions concerning the scope of the definition of an "international watercourse" or an "international drainage basin" with regard to the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand.[57]

54. Yet it is clear from the record as a whole that the term "international watercourse" was not adopted by the General Assembly or interpreted by the Commission as the practical equivalent of "international drainage basin". It is also clear that a substantial number of States would doubt that the term takes into account "the hydrographic coherence of the basin" that results, irrespective of political borders, in "a legally relevant interdependence between the various parts of the watercourse belonging to different States."[58] The States that support the 1815 Vienna definition would say that it is the existence of boundaries that is legally relevant, so that the problem would be one of considering the effects on a State's authority over water subject to its sovereignty of the fact that the water forms part of or crosses a boundary.

55. These conflicting theories cannot at this juncture be reconciled, at any rate on a theoretical basis. It is necessary to accept the ambiguity of the term "international watercourse" and determine to what extent the Commission, and States, are prepared to resolve the problems that arise from the physical aspects of the hydrographic process in dealing with the specific uses of fresh water. Accordingly, the use of the term "international watercourse" in these draft articles does not represent a choice among the principal definitions of that term. It will be left for subsequent determination whether "international watercourse" means: (*a*) contiguous and successive international rivers, lakes, canals and other surface waters, or (*b*) the foregoing, plus the tributaries of such rivers, whether or not these tributaries are found wholly within national territory (a totality termed "an international river system"), or (*c*) contiguous and successive rivers, etc., plus their tributaries, plus underground waters that drain into these surface waters to a common terminus, whether or not these underground waters are found wholly within national territory ("an international drainage basin"). This being the case, what scope is left for an article on scope of application as article 1 of this draft?

[57] *Yearbook ... 1976*, vol. II (Part One), pp. 154–155, document A/CN.4/294 and Add.1, sect. II, question A.

It should be noted that, in its resolution on the utilization of non-maritime international waters (except for navigation) of 1961, the Institute of International Law makes a similar equation between a watercourse and a hydrographic basin:

"*Considering* that the economic importance of the use of waters is transformed by modern technology and that the application of modern technology to the waters of a hydrographic basin which includes the territory of several States affects in general all these States, and renders necessary its restatement in juridical terms,

"...

"*Article 1.* The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

"*Article 2.* Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

"*Article 3.* If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

"*Article 4.* No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

"*Article 5.* Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

"*Article 6.* In case objection is made, the States will enter into negotiations with a view to reaching an agreement within a reasonable time.

"For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned."

(*Annuaire de l'Institut de droit international* (Basel, 1961), vol. 49, II, pp. 381–383; text reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.)

[58] See para. 53 above.

56. The question of the scope of the draft does not necessarily arise from the practice of the Commission. In fact, the practice of the Commission for many years was not to have an article on scope but to introduce the articles with an initial one on use of terms and then begin laying down the law, or in some cases not even to have an article on use of terms. The Conventions of the Law of the Sea,[59] the Vienna Conventions on Diplomatic Relations[60] and on Consular Relations,[61] the Convention on Special Missions[62] and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[63] may be cited as illustrations of treaties not containing articles on scope of application. Others, including the Vienna Conventions on the Law of Treaties,[64] on Succession of States in Respect of Treaties,[65] and on the Representation of States in Their Relations with International Organizations of a Universal Character,[66] have an initial article that sets out the proposed area of application of the law. Thus article 1 of the Vienna Convention on the Law of Treaties provides:

> The present convention applies to treaties between States.

57. There are a number of reasons why an article of limited substance on scope of application is desirable, despite the large measure of ambiguity it will carry. A first and fundamental reason is that the preparatory work demonstrated the existence of substantial differences among States regarding the scope of the draft; accordingly, failure to establish any common point of departure, while having some immediate advantages, would impede the development of a coherent body of rules. Secondly, as has been emphasized in chapter I of this report, the water with which the Commission will inescapably be dealing is water in the hydrologic cycle, that is, water in motion, water in the process of change. However, the draft articles will deal with only one aspect of that cycle. A statement indicating that the draft articles deal with international watercourses as such will make it clear that rain, sea water, cloud, fog, snowfall and hail are not included.

58. The term "use" also requires some development. In the report of the Sub-Committee on the law of the non-navigational uses of international watercourses, included in the Commission's 1974 report to the General Assembly,[67] specific attention was called to certain special problems related to fresh water uses in various relations of cause and effect but that could not be described as uses. The Sub-Committee recommended that States should be asked whether two of those problems, flood control and erosion, should be included in its work.[68] The subsequent responses of States supported such inclusion, and it was further suggested by States that sedimentation problems should be dealt with as well.[69] The Commission decided to consider those matters in developing the proposed articles and so reported to the General Assembly.[70] Therefore the article on scope of application should refer specifically to these special problems, as well as to the problems of salt water intrusion, to which attention was drawn in the reply of the Netherlands.[71] Another special problem is the need to clarify the effects of limiting the work to the "non-navigational uses" of international watercourses. Question G of the Commission's questionnaire inquired whether the Commission should take account in its study of interaction between use for navigation and other uses. All the responses of States were in the affirmative. A number of States considered that the study could not be successfully carried out without dealing with such interaction.[72]

59. Finally, an article on scope of application is necessary to establish that it is the fact of water use that will bring the draft articles into play. Who uses the water does not have any bearing upon the applicability of the articles. In practice, fresh water is used by less individuals, various private organizations and businesses, municipal or regional governmental entities, constituent entities of a State and all kinds of State agencies. In theory and practice, the habitual view has been to treat the use of the waters of an international watercourse by anyone within the borders of a particular State as a use by the State for the purpose of considering the international effects of that use. Thus the 1911 Madrid Declaration of the Institute of International Law, "International Regulations Regarding the Use of International Watercourses", provides:

> When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as

[59] For references, see footnote 4 above.

[60] United Nations, *Treaty Series*, vol. 500, p. 95.

[61] *Ibid.*, vol. 596, p. 261.

[62] General Assembly resolution 2530 (XXIV), annex.

[63] General Assembly resolution 3166 (XXVIII), annex.

[64] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 287.

[65] For reference, see footnote 3 above.

[66] *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

[67] *Yearbook ... 1974*, vol. II (Part One), p. 301, document A/9160/Rev.1, chap. V, annex.

[68] *Ibid.*, p. 303, para. 30, question C.

[69] See *Yearbook ... 1976*, vol. II (Part One), p. 191, document A/CN.4/295, para. 45.

[70] *Ibid.*, vol. II (Part Two), p. 162, document A/31/10, para. 166.

[71] *Ibid.*, vol. II (Part One), pp. 157–158, document A/CN.4/294 and Add. 1, section II, question A.

[72] *Ibid.*, pp. 176–178, question G.

seriously to interfere with its utilization by the other State or by individuals, corporations, etc. thereof.[73]

In some bilateral treaties there are provisions with respect to the use of water by individuals. The 1971 Agreement concerning frontier rivers between Finland and Sweden,[74] for example, requires any person carrying out hydraulic construction works that may have a harmful effect upon fishing to take measures needed to protect the fish stock or to maintain fishing at the existing level.[75] However, the treaty as a whole makes it clear that at the international level the State is responsible for the use of water of an international watercourse. This is an accepted doctrine, and there is no need for a special provision on the point. However, an article on scope will serve to reconfirm the point.

60. In light of the considerations discussed, the following article is proposed:

Article 1. Scope of the present articles

1. The present articles apply to the uses of the water of international watercourses, and to associated problems such as flood control, erosion, sedimentation and salt-water intrusion.

2. The use of the water of international watercourses for navigation is embraced by these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation.

61. It should be noted that minor modifications have been made in the formula contained in General Assembly resolution 2669 (XXV).[76] Non-navigational uses are dealt with in a separate paragraph, and "uses of the water of international watercourses" is suggested rather than "uses of international watercourses". These changes are matters of emphasis and are not essential. Starting out with "uses" rather than "non-navigational uses" makes it clearer that navigation, for the purposes of these articles, does not have a sacrosanct position. The exclusion of navigation apparently resulted from some dissatisfaction with the provisions of article XIII of the Helsinki Rules,[77] which limited the right of free navigation to riparian States. When introducing the proposal for a study of the law of international watercourses, the representative of Finland in the Sixth Committee of the General Assembly stated that:

> The Helsinki Rules should be regarded as the definitive result of the codification of the law relating to international watercourses undertaken by the International Law Association. Apart from the provisions relating to the equitable use of the waters of international drainage basins, those which dealt with the abatement of pollution, navigation and timber floating, as well as the recommendations concerning the settlement of disputes, should be treated as the basis of all codification work on the law relating to international watercourses. His delegation believed, however, that the provisions relating to navigation, which were not considered satisfactory by all the States concerned, might be excluded. On the other hand, the work done by the various private organizations which had taken up the question might well be taken into account.[78]

In the debate in the Sixth Committee, the representative of the United Kingdom urged exclusion of navigation, stating that:

> The question of navigation differed in many ways from other watercourse uses. Navigational regulation could directly affect the interests of non-riparian States seeking to exercise their right of navigation. That problem was of particular concern to the Government of the United Kingdom, which attached great importance to the notion of freedom to navigate on international rivers. The importance of that concept was recognized in several multilateral conventions, such as the Revised Convention on the Navigation of the Rhine signed at Mannheim in 1868, as amended in 1963, and the Convention on the Régime of Navigable Waterways of International Concern, signed at Barcelona in 1921. The Government of the United Kingdom could not agree that further work on that question should be based on a more restrictive approach, such as that embodied in the Helsinki Rules. On the other hand, it welcomed the course proposed by the Finnish delegation which would exclude navigation from present consideration of the question and was consistent with the position taken by the General Assembly in 1959 in its resolution 1401 (XIV).[79]

The only additional elements were a statement by Canada that it supported the exclusion and one by Paraguay that it favoured the inclusion of navigation.[80] In so far as the debate in the General Assembly indicates, the exclusion of navigation was the result of opposition to the provisions on that topic laid down in the Helsinki Rules. As any reference to those rules was eliminated from the authorizing resolution, the exclusion was perhaps unnecessary. A more substantial reason for the exclusion may have been the existence of a substantial number of existing treaty régimes for the navigation of rivers. However, the exclusion should not be broadly interpreted. As the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the Commission's draft articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses, and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships

[73] See *Yearbook ... 1974*, vol. II (Part Two), p. 200, document A/5409, para. 1072.

[74] United Nations, *Treaty Series*, vol. 825, p. 191. See also *Yearbook ... 1974*, vol. II (Part Two), pp. 319–322, document A/CN.4/274, paras. 307–321.

[75] *Ibid.*, pp. 320–321, para. 315.

[76] See para. 51 above.

[77] For the full text of the Helsinki rules, with commentaries, see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 484.

[78] *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1225th meeting, para. 6.

[79] *Ibid.*, 1231st meeting, para. 38.

[80] *Ibid.*, 1234th meeting, para. 15, and *ibid.*, 1233rd meeting, para. 29.

between navigational and non-navigational uses of watercourses are so many that, on any watercourse where navigation is practised or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators entrusted with development of the watercourse. This fact suggests that the Commission cannot wholly exclude navigational uses from the scope of its draft. Article 1 has been drafted accordingly.

62. The reference to uses of the water of international watercourses places the accent on the fact that it is water that plays the central and decisive role in the development of these draft articles, for the reasons outlined in chapter I of this report.

CHAPTER III

User agreements

A. Diversity of watercourses

63. One of the problems that must be faced in drafting articles on the law of the use of international watercourses is the immense diversity of international river systems. In size, they range from such enormous systems as the Congo, the Amazon, the Mississippi and the Ganges, all of which drain more than 1 million square kilometres, to the smallest of streams. Many are located in arid parts of the earth, so that they flow on the surface only intermittently, and disappear in the dry season. Many others are in water surplus areas, so that a major concern is not too little water but too much, in the form of floods. Many, such as the Rhine, have been integrated in domestic uses and productive processes for their entire lengths. Many others remain almost in a state of nature. Some pass through a succession of developed and relatively wealthy nations. Others water States in which industrial development is just beginning and in which some important resources are scanty. In short, there are international watercourses in almost every part of the world, and this means that their physical characteristics and the human needs they serve are subject to the same extreme variations as are found in other respects throughout the world.

64. Each watercourse is unique. Each has a special congeries of uses which differs from that of any other system. One may be used principally for drinking and household purposes, another for irrigation, a third for industrial production and a fourth for hydroelectric production. Normally, of course, a river serves—or has the potential for serving—a variety of uses. Yet there are rivers in which one or two uses predominate at a given time, and these uses may differ from one watercourse to the next.

65. In view of this diversity, the question arises whether it is possible to draft rules to deal with the uses of watercourses that will not be either so general as to be uncertain guides or so specific that they will be applicable to some but not to the full range of issues that may arise in an individual watercourse or, in so far as they are applicable, may deal inappropriately with the particular facts. Brierly, for example, in discussing the relationships between the "vital interests" of States and the development of international law, wrote in 1944:

> There are many rivers, especially so-called "international" rivers, which flow through or between the territories of more than one State, which it is desirable in the general interest that the law should regulate so that the maximum of advantage may be extracted from them. But this cannot be done by rules applying generally to all rivers. The political factors which have to be taken into account differ, and so do the uses to which rivers may be put; navigation, electric power generation, irrigation, water supply to cities, are some instances. Some rivers are more important for one purpose and some for another, so that they cannot all be dealt with in the same way; each requires a régime adapted to its own special circumstances. Experience has shown that special river commissions, each with its powers and duties laid down in an appropriate convention, are a more suitable method of regulating the use of rivers than a general law of rivers could ever be.[81]

Sauser-Hall expressed similar views in his Hague lectures on the industrial uses of international rivers:

> The rules of law should reflect the social reality in which they are to operate.
>
> More than in any other field of international law, it is difficult to formulate *a priori* principles governing the industrial use of international rivers and watercourses.
>
> This is so for several reasons:
>
> In the first place rivers and watercourses have many uses....
>
> It is not very advisable to adopt abstract and *a priori* rules, because the political, economic and topographical situation of these watercourses is extremely diverse. The conflicts of interests that may arise in the use of watercourses as between States members of a confederation of States or of a federal State resemble very closely those arising at the international level between sovereign States; ... but it is obvious that disputes between those States can, at least in principle, be settled more easily, on account of the political solidarity between them, than disputes between sovereign States.
>
> The peculiarities of the physical geography of States are so pronounced that principles applied in one case would be found to be quite futile or even harmful in respect of other watercourses. It should be noted that the influence of the various uses of rivers and streams on their flow, their volume, the drinking quality of the

[81] J.L. Brierly, *The Outlook for International Law* (Oxford, Clarendon Press, 1944), pp. 42–43.

water of the chemical composition of the water is by no means uniform.[82]

While some other scholars have argued along similar lines, still others support the formulation of a law of international watercourses.[83]

66. Another approach is represented by the Helsinki Rules on the uses of the waters of international rivers,[84] and the pertinent resolution of the Institute of International Law.[85] While the Helsinki Rules and the resolution of the institute are the product of non-governmental bodies, the distinguished lawyers who worked on their formulation included many jurists who had represented their Governments at international conferences concerned with water, had served as counsel in various disputes relating to the uses of water and had served the United Nations and its agencies in important capacities dealing with the uses of water and the protection of the environment. In view of such auspices and authorship, and the scholarship, knowledgeability and judgement that went into their preparation, the Helsinki Rules and the Institute's resolution merit the consideration of the Commission in any study of the law of the uses of international watercourses. The Helsinki Rules are the most developed formulation of a set of legal rules for general application to the uses of sweet water. In view of that fact and of their particular pertinence to the subject of this report, they should be reviewed for the light they shed on the question whether useful rules can be drafted for international watercourses in general or whether, if rules are to be genuinely useful, they must be formulated as a separate set of articles to meet the requirements of each individual international watercourse. Examination of the resolution of the Institute will be undertaken at a later stage.

67. The Helsinki Rules are expressed in terms of the rights and obligations of the States which have territory within the geographic limits of a drainage basin. Article II defines the basin and article III the basin State:

Article II

An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

Article III

A "basin State" is a State the territory of which includes a portion of an international drainage basin.

The commentary to article III[86] makes it clear that States which contribute only groundwater to the basin State share in the rights and duties laid down in the articles:

Recognition of the fact that underground waters may flow from a State without reaching the surface in its territory into the territory of other States in an international drainage basin where they contribute substantially to the surface flow, demonstrates that the terms based upon the word "riparian" are inadequate to describe all States included within the international drainage basin.

These chapters therefore adopt the term "basin State" as a comprehensive one to include all States whose territories contribute waters to the international drainage basin, whether or not "riparian".

Illustration:

The International River Meander flows on the surface through States A, B, and C. An underground spring in State D contributes water to an underground stream that flows into the Meander in the territory of B. All of these States are basin States although only A, B, and C are riparian States.

As the scientific considerations summarized in chapter I of this report indicate, there is reason to include groundwater States in formulating general rules relating to the uses of sweet water, as the Helsinki Rules decisively do.

68. Article IV of the Helsinki Rules lays down a general rule to govern the use of the waters of a drainage basin:

Article IV

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

This is a rule couched in the most general terms. It is difficult to see, however, how a principle of this nature could be expressed in other than the most general terms. If the same or a similar principle were to be applied to any individual drainage basin, it would have to be stated in substantially identical language.

69. Article IV, in and of itself, is not intended to provide a formula for allocating water resources in widely varying circumstances. That task is reserved for article V, which specifies many of the considerations to be taken into account in determining what is a fair and equitable share of the drainage basin water for use by a particular drainage basin State:

Article V

1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

2. Relevant factors which are to be considered include, but are not limited to:

[82] *Recueil des cours de l'Académie de droit international de la Haye, 1953-II* (Leyden, Sijthoff, 1955), vol. 83, pp. 471–472.

[83] See H.A. Smith, "The waters of the Jordan", *International Affairs* (London), vol. 25 (1949), p. 415, and F. Berber, *Rivers in International Law* (London, Stevens, 1959). *Contra*, see *Management of International Water Resources: Institutional and Legal Aspects, Report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development* (United Nations publication, Sales No. E.75.II.A.2); A.H. Garretson, R.D. Hayton, C.J. Olmstead, eds. *The Law of International Drainage Basins* (Dobbs Ferry, N.Y., Oceana, 1967); and Teclaff, *op. cit.*, p. 19.

[84] For reference, see footnote 29 above.

[85] For reference, see footnote 57 above.

[86] See footnote 77 above. It should be noted that the commentaries were not submitted for the approval of the ILA Conference and may not be assumed necessarily to carry the same measure of support as the Helsinki Rules themselves.

(*a*) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(*b*) The hydrology of the basin, including in particular the contribution of water by each basin State;

(*c*) The climate affecting the basin;

(*d*) The past utilization of the waters of the basin, including in particular existing utilization;

(*e*) The economic and social needs of each basin State;

(*f*) The population dependent on the waters of the basin in each basin State;

(*g*) The comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(*h*) The availability of other resources;

(*i*) The avoidance of unnecessary waste in the utilization of waters of the basin;

(*j*) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(*k*) The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State;

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

70. The commentary to article V emphasizes that paragraph 2 does not set forth all the possible relevant factors, and that only factors that are relevant require consideration. Thus if other resources are not available, paragraph 2 (*h*) would not be applied. The application of the article is summed up as follows:

> In short, no factor has a fixed weight nor will all factors be relevant in all cases. Each factor is given such weight as it merits relative to all the other factors. And no factor occupies a position of pre-eminence *per se* with respect to any other factor. Further, to be relevant, a factor must aid in the determination or satisfaction of the social and economic needs of the co-basin states.

In determining what is a reasonable and equitable share in the uses of basin water, it is necessary to take into account the factors not only as they apply in determining the share of one basin State but also as they apply in the other basin States. A watercourse has only a limited amount of water, and devoting some portion of the water to a use or uses in one locality could have some effect upon its availability for use in other localities. To ensure that one State's use is reasonable and equitable, it is necessary to give consideration to what uses are affected in other basin States. If this were not done, what appeared to be a reasonable and equitable share for one State might be established to be unreasonable and inequitable with respect to the other basin States. The list of relevant factors in article V makes it clear that broader considerations than a single State's need for use of water must be taken into account. The factors require consideration of the extent of the drainage area in each basin State, the contribution of water by each basin State, the economic and social needs of each basin State and the population dependent on use of the waters in each basin State, as well as more general considerations such as the climate affecting the basin and the past utilization of the waters of the basin.

71. Article VI affords an excellent example of a general rule that allows great freedom in its specific application:

Article VI

> A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

The commentary to article VI develops the reasons that led to the decision to abandon the historical priority of navigation and not to replace it by any other preferred use:

> *Preferential use.* Historically, navigation was preferred over other uses of water, irrespective of the later needs of the particular drainage basin involved. In the past twenty-five years, however, the technological revolution and population explosion, which have led to the rapid growth of non-navigational uses, have resulted in the loss of the former pre-eminence accorded navigational uses. Today, neither navigation nor any other use enjoys such a preference. A drainage basin must be examined on an individual basis and a determination made as to which uses are most important in that basin or, in appropriate cases, in portions of the basin.

The commentary then discusses whether domestic uses, because they are the basis of all life, should be accepted as succeeding to the preferential position of navigation. The preference is rejected on the ground that no substantial authority to support it exists and that such a preference could be inappropriate in individual basins. The commentary concludes with the statement:

> On the other hand, if a domestic use is indispensable—since it is, in fact, the basis of life—it would not have difficulty in prevailing on the merits against other uses in an evaluation of the drainage basin.

This last conclusion may be open to question. Domestic uses in one State that interfere with an important economic use in a co-basin State may not be considered as of overriding importance in the latter State.

72. The Helsinki Rules do not contemplate a procedure in which, on the basis of the relevant factors, whatever they may be, the entitlement of each basin State to its reasonable and equitable share in the use of the waters is fixed. This becomes clear from article VII, which provides:

Article VII

> A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters.

The commentary to article VII clarifies the objective of the article as well as the issue that is left obscure by article V. It states:

> This article [art. VII] postulates the flexibility and future readjustment implicit in the principle of equitable utilization.
>
> Here, it is necessary to make a choice between two conflicting principles with respect to the equitable sharing of water. The first is that every State whose territory lies within an international drainage basin ought to be assured the use of certain of the waters by reservation, even where such waters cannot presently be utilized. The second is that no water should be reserved for a

future use since to do so might interfere with current uses of the water or uses which come into being from time to time.

The former principle may have a visceral appeal because of what appears to be its fairness; also there is a danger that the State which commences its economic development later than its co-basin States may find such development inhibited by the existing uses of these co-basin States. (See article VIII.) On balance, however, the limitation of protection to present uses is the more reasonable approach.

73. The relevant factors are intended to be applied to the existing pattern of the uses in the basin whenever a new or possibly broadened use of water is contemplated by one or more basin States. If the requirements of the relevant factors are met, then the new or broadened use is permissible. If not, then the new or broadened use would not be acceptable. This leaves open the question of conflict between an existing use and a proposed new use that is incompatible with the existing use. The next article provides a solution for this conflict:

Article VIII

1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.

2. (*a*) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.

(*b*) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.

3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use.

The commentary is here important enough to quote at length:

(*a*) *Protection of existing uses.* Some authorities take the position that, upon the initiation of a use, the user gains a vested right in the use and cannot be deprived of it except in rare cases and with full compensation. Other authorities take the contrary position that the fact that a use is an existing use is of no weight whatsoever in determining what is an equitable utilization. Neither approach seems persuasive because neither comes to grips with realities, including the dynamic character of water development by States and changing technology. The former freezes river development according to the requirements of the earlier user. Indeed, it is conceivable that, if a State moves quickly enough, it could appropriate all of the waters of a basin to the complete exclusion of its co-basin States. Such a result is hardly consistent with their equal status as co-basin States. (See comment to article I.)

On the other hand, failure to give any weight to existing uses can only serve to inhibit river development. A State is unlikely to invest large sums of money in the construction of a dam if it has no assurances of being afforded some legal protection for the use over an extended period of time. This is especially true since no State could possibly guess what is likely to constitute an equitable utilization at some future time when its prior appropriation is placed in issue.

The rule stated in this article reflects the current international attitude in this matter—a middle ground between two extremes.

74. The factors referred to in paragraph 1 of article VIII of the Helsinki Rules would include the relevant factors listed in article V as well as any others that might be relevant in an individual drainage basin. We are therefore dealing with the same basic set of factors under the Helsinki Rules with respect to practically all aspects of determining whether a basin State is entitled to make a particular use of water as part of its reasonable and equitable share in the use of basin water. Possible lacunae may include the problem of incremental growth of a use and the situation of sub-basins. The issue under consideration, however, is the utility of the Helsinki Rules in their application to the problems of use of water in individual watercourse systems. At this stage, the exact scope of their application is not an aspect that requires consideration.

75. There is no doubt that the relevant factors are expressed in article V in terms of substantial generality. The geography, hydrology and climate of the basin—the initial three factors—include every possible physical feature that has some relationship to basin water. There are 19 international basins with over 1 million square kilometres within each watershed,[87] including some, such as the Congo and the Amazon, that cover half a continent. There are 78 international river basins that have between 100,000 and 1 million square kilometres within each watershed.[88] The amount of data needed to determine what is a reasonable and equitable share in the water in any drainage area in the second category, much less in the first, could be enormous, although this is not necessarily so, particularly in early stages of development. Moreover, the size or other physical characteristics of a basin may be less significant than the variety of uses and conflicts among them. Relevant factor (*d*) of article V, paragraph 2, requires a review of all past and current utilization of basin water at the time the new or broadened use is under consideration. As has been pointed out, the analysis of whether a new or broadened use is a reasonable and equitable sharing must be considered in light of its effects upon basin use as a whole.

76. The economic and social needs of each basin State (factor (*e*) in para. 2 of article V) is an open-ended criterion. The needs of States are unconfined, not least because the expectations of people may tend to increase with satisfaction rather than to diminish. Population and population growth, as dependent on basin water in each basin State (factor (*f*)), are reasonably determinable. Factors (*g*) through (*k*) deal with such issues as the comparative costs of alternative methods of satisfying needs (factor (*g*)), availability of other resources (factor (*h*)), avoidance of unnecessary waste (factor (*i*)), practicability of compensation as a means of adjusting conflicts (factor (*j*)), and satisfaction of one State's needs without substantial injury to a co-basin State (factor (*k*)). They

[87] *Integrated River Basin Development: Report of a Panel of Experts* (United Nations publication, Sales No. E.70.II.A.4), p. 6.

[88] *Ibid.*

are subject to resource and cost-benefit analysis and are more manageable in their application to individual watercourses than the initial factors.

77. None the less, geography, hydrology, climate, existing utilization of water and economic and social needs are factors that have to be taken into account in any attempt to provide guidelines under which States in a watercourse system can work out how they will share the use of a resource in which they all have an interest. While the formulation of the factors in the Helsinki Rules could perhaps be modified to reduce the substantial generality and open-ended nature that characterize a number of them, and while additional and more precise tests could perhaps be drafted, there is no real likelihood of being able to draft principles that can be applied precisely and without ambiguity to every international watercourse. Of course, principles characteristically cannot be applied precisely and unambiguously to particular cases, yet may be of very great utility.

78. Applying the 11 relevant factors contained in article V of the Helsinki Rules to the case of a two-State basin, it is apparent that the number of combinations of the factors is very large. It increases geometrically as the number of basin States increases. In practice, the relevant factors that dominate consideration of the acceptability of a new or broadened use may be much fewer than eleven. Nevertheless, the multiplicity of factors that have to be taken into account may be a formidable barrier to agreed solutions. Still more significant may be the weight given to one or more factors relative to others.

79. It is in the event of a difference among basin States as to whether a use of water is within the ambit of reasonable and equitable sharing that the factors become of concrete importance. The number of factors and their broad scope decreases their utility as standards for either co-operative river development of settlement of disputes. It would be possible to make a substantial case either for or against any proposal for a new or broadened use by judicious selection of criteria from this wide range of relevant factors.

80. Similar but more pronounced problems would arise if some other general principle, such as a requirement of co-operation or the principle of not using what is one's own in such a way as to injure others, were to be applied. An injunction to co-operate is inadequate unless coupled with norms that establish the nature and scope of the requirement. A principle that injury to others be avoided in using what is one's own requires tests to determine what is one's own, what constitutes injury and where the dividing line between a permissible measure of injury and an impermissible measure of injury lies. Because of the nature of the subject-matter, the physical differences between watercourse systems, and the diversity in watercourse uses, the norms or—at least the relevant factors that make clear the scope and content of such rules—would have to be expressed as general concepts rather than as specific requirements. This would give rise to the same problems in application as could arise in the use of the relevant factors under article V of the Helsinki Rules.

81. The difficulties that arise in applying principles of such generality as the Helsinki Rules to individual cases is illustrated by the positions taken by Bangladesh and India with respect to the diversion of water from the Ganges to the Hooghly. The diversion is through a feeder canal which runs from the Farakka Barrage on the Ganges 11 miles upstream from the point at which the river becomes the boundary between the two States. This boundary runs south-east for 50-odd miles and then continues due south, while the river continues south-east to the Bay of Bengal, entirely through Bangladesh territory.

82. Both Bangladesh and India relied upon the Helsinki Rules in public pronouncements of their positions. India described the background in these terms:

> The Ganga looms very large in the Indian economy and in the socio-economic and cultural life of the people inhabiting the Ganga basin. For 90 per cent of its length—1,925 km—the main channel of the Ganga flows through India. With its principal tributaries it flows through 8,000 km of Indian territory with a catchment area in India of 777,000 sq km. The geographical area in India dependent on the Ganga is 211 million acres (84 million ha) with a population of 250 million—more than 40 per cent of the country's total population. The cultivable area in the Ganga basin in India is more than 150 million acres (60 million ha).
>
> The Ganga and its tributaries pass through vast arid, semi-arid and drought-prone areas in the States of Rajasthan, Madhya Pradesh, Haryana, Uttar Pradesh and Bihar, which depend entirely on the waters of this river network in the summer months. Irrigation is the prime need of the Ganga basin in India where the annual average rainfall is a mere 76 cm. It is not possible to raise even one crop a year on an average in this basin, and only about one-fourth of the area is presently irrigated from all the sources.
>
> The inhabitants of the Ganga basin are among the poorest in India and they have one of the lowest per capita incomes in the world. The limitations on creating storages in the basin are severe owing to unfavourable topographical, hydrological and other features.
>
> On the other hand, the length of the main channel of the Ganga (Padma) in Bangladesh is only 141 km, excluding the common boundary of 112 km. The Ganga and its tributaries, covering a 173 km course in Bangladesh, flows through a catchment area of 5,600 sq km, hardly 0.7 per cent of the catchment area in India. The Ganga basin in Bangladesh contains only 6.1 million acres (2.4 million ha) and 12 million people. More than one crop is grown yearly on an acre of cultivated land without any irrigation.
>
> The average rainfall is between 144 and 254 cm a year. Moreover, Bangladesh is served not only by the Padma but also by the mighty Brahmaputra, the Meghna and their tributaries. These river systems which drain into the Bay of Bengal, discharge more than 1,000 million acre-feet of water every year—enough to inundate the entire territory of Bangladesh to a depth of about 30 feet.
>
> A large part of the area said to be suffering from water shortage in the Padma actually depends upon, or can very well be served by, the Brahmaputra or Meghna.
>
> Thus as between India and Bangladesh, India is by far the major riparian country for the Ganga waters in terms of

catchment area (99 per cent), ultimate irrigation potential (94.5 per cent) and population of the Ganga basin (94 per cent).[89]

India then invoked the Helsinki Rules, as follows:

International Law on the rights of riparians has not been codified. But the Helsinki Rules of 1966 have received broad acceptance by countries as a model on water law and are based on the concept of a "drainage basin". These Rules state: "Each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin".

The Rules provide that in computing the equitable share of a basin state relevant factors such as the geography and hydrology of the basin, economic needs, population, availability of other resources, avoidance of waste, past use, current needs and the comparative cost of alternative means and other factors should be taken into account.

In withdrawing part of the Ganga waters at Farakka India's sole obligation is to the extent possible not to affect adversely Bangladesh's "existing use" of the flow. There is absolutely no obligation, according to the Helsinki Rules, for an upper riparian to leave intact the "existing quantum" of flow. In fact, insistence on the continuance of "historical" or "natural" flow is a total denial of the principle of equitable sharing enshrined in these Rules.

Assertion of a right to "natural flow" amounts to exercising a veto on the rights of upper riparians to reasonable and equitable shares of the waters of common rivers. Its acceptance would obstruct the right of other riparians to implement development plans designed to use the water resources of the basin, thus perpetuating economic stagnation, accentuating human suffering, and impeding the progress of important regions and sectors of their economies.

It is also important to remember that India has no alternative source of water to flush the Hooghly and preserve Calcutta port. On the other hand Bangladesh is served by alternative river systems and actually has a problem of surplus water, most of which flows unused down to the sea.[90]

83. The Bangladesh White Paper on the Ganges water dispute of September 1976 also quotes article IV of the Helsinki Rules, and refers to the relevant factors of article V as a means for determining what is "a reasonable and equitable share". In the introduction and in a section regarding "The impact of India's unilateral withdrawal of Ganges water", the White Paper takes up the effect of the diversion of water at the Farakka Barrage upon various aspects of the uses of the Ganges, such as agriculture, intrusion into the basin area of saline water from the Bay of Bengal, irrigation, fisheries, forestry, navigation, industry, and the wealth and ecology of the region.[91] While not organized on the same basis as the relevant factors in article V of the Helsinki Rules, the content of the discussion is clearly directed towards them. Thus, it is stated that the Ganges system waters about 37 per cent of the area of Bangladesh, inhabited by 25 million people, or one third of the total population:

The Ganges is an international river, with its basin spread over China, Nepal, India and Bangladesh. The life and prosperity of the people of Bangladesh which is a riverine country are dependent on the waters of its rivers. The Ganges system serves about 37 per cent of the total area of Bangladesh, in which about 25 million people or one third of the total population live. The river provides drinking water to the people, sustains agriculture, forestry and fishery, serves as the main means of transport, keeps back the saline water from the Bay of Bengal and plays a dominant part in the ecology of the region.[92]

The detailed analysis by Bangladesh in respect of each use of the Ganges presents a quite different view of the effects of the barrage from that set forth in India's paper. Nevertheless, as a result of goodwill, co-operative effort and statesmanship on both sides, an agreement on sharing the waters of the Ganges at Farakka and on augmenting its flows was concluded at Dacca on 5 November 1977.[93]

84. The Commission is not concerned with the substance of any specific difference between States in use of fresh water, and it is not empowered to express any view with regard to any such difference. It is, however, appropriate for it to consider the utility of the Helsinki Rules in a matter in which they have been relied upon by both parties. In the first place, it can be said that the reliance upon the Rules of the two States demonstrates the need for the adoption of a set of articles to help in resolving international differences regarding conflicting uses of water. The fact that both States turned to principles that had been developed by what is a learned and broadly based—but non-governmental—organization supports the view that development of such principles through international agreement on a global basis is necessary. Secondly, however, the fact that each State was able to rely upon the same relevant factors in developing its position supports the conclusion that principles sufficiently general to apply to all watercourses would be more useful if they could be organized so as to apply as well to the highly individual problems of each individual watercourse. What is needed is a set of articles that lays down principles regarding the use of international watercourses in terms sufficiently broad that it can be applied to all international watercourses, while at the same time providing the means by which the articles it contains can be more sharply defined or modified to take into account the singular nature of an individual watercourse and the varying needs of the States whose territory it drains.

85. Once a difference between States has arisen because of conflicting uses, once each State has become convinced that its vital or even just important interests are involved, the solution of water problems (and other international problems) on the basis of scientific analysis and co-operative action becomes extremely difficult. The situation is well summed up in

[89] India, Ministry of External Affairs, *The Farakka Barrage* (New Delhi, The Statesman Press [n.d.]), "Relative dependence on the Ganga waters".

[90] *Ibid.*, "Position in International Law".

[91] Bangladesh, *White Paper on the Ganges Water Dispute*, (September 1976), pp. 5–10.

[92] *Ibid.*, p. 5.

[93] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 1 (January 1978), p. 103.

the conclusions of the United Nations report on integrated river basin development:

> The vital character of current and impending disputes on international streams has been shown in chapter IV, where it is pointed out that lack of accepted international law on the uses of these streams presents a major obstacle in the settlement of differences, with the result that progress in development is often held up for years, to the detriment not only of the countries concerned but of the economy of the world in general.[94]

In such a situation, it would be most helpful to have general principles, accepted by the international community as a whole, to apply. But it would be better still, if certain uses are of outstanding importance in a watercourse, to have an agreement in force among the States concerned regarding the legal basis for determining priority uses (as well as for settling disputes arising under the agreement). Is it possible to devise a set of articles that will provide both the general principles needed to codify the law of international watercourses on a global basis and a means of ensuring the development of more detailed rules, based on those principles, for application to individual watercourse systems?

B. The multilateral convention as a framework treaty

86. The 1923 Geneva Convention relating to the development of hydraulic power affecting more than one State[95] introduces a means of achieving a marriage of general principles and specific rules. Article 1 lays down, with a certain indirection, the principle that the development of hydraulic power by a State within its own territory must be carried out subject to the limits of international law:

Article 1

> The present Convention in no way affects the right belonging to each State, within the limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable.

The Convention does not prescribe what the applicable limits of international law are with regard to the development of hydraulic power. However, articles 2, 3 and 4 each deals with a situation which must have been considered as coming within those limits. They read:

Article 2

> Should reasonable development of hydraulic power involve international investigation, the Contracting States concerned shall agree to such investigation, which shall be carried out conjointly at the request of any one of them, with a view to arriving at the solution most favourable to their interests as a whole, and to drawing up, if possible, a scheme of development, with due regard for any works already existing, under construction, or projected.
>
> Any Contracting State desirous of modifying a programme of development so drawn up shall, if necessary, apply for a fresh investigation, under the conditions laid down in the preceding paragraph.
>
> No State shall be obliged to carry out a programme of development unless it has formally accepted the obligation to do so.

Article 3

> If a Contracting State desires to carry out operations for the development of hydraulic power, partly on its own territory and partly on the territory of another Contracting State or involving alterations on the territory of another Contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed.

Article 4

> If a Contracting State desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other Contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed.

The following norms of international law appear implicit in these articles:

(*a*) If the reasonable development of hydraulic power requires international investigation, the States concerned are under a duty to co-operate in that investigation in order to find solutions favourable to the interests of all the States concerned. There is also an obligation to join, in good faith, in an effort to draw up a scheme of development for the agreed solution;

(*b*) When development of hydraulic power in the territory of one State requires the use of—or affects changes in—the territory of another State, the development cannot be carried out in the absence of an international agreement. Both States are required to engage in good faith negotiations for the purpose of concluding an agreement "which will allow such operations to be executed";

(*c*) A State may not unilaterally engage in activities on its own territory for the development of hydraulic power which could cause serious prejudice to another State, in the absence of authorizing international agreement. The States concerned are required to engage in good faith in negotiations for the purpose of reaching an agreement or agreements that will permit the development of the power. There is perhaps an implicit condition that the development programme agreed upon should eliminate the prospect of serious injury or that this injury be compensated by some benefit from hydraulic works or by payments or other means satisfactory to the injured party.

87. The foregoing norms, although limited to a single aspect of watercourse use, and naturally to the contracting States, are general in nature and applicable to any watercourse capable of producing hydroelectric power. In each case, the general norm is to be applied by means of an agreement expressly tailored to fit the requirements of the international watercourse and the specific problems of the States concerned.

88. Articles 5 and 6 of the 1923 Geneva Convention are designed to assist in the formulation of the agreements called for under articles 2, 3 and 4. Article 5 states, again in an indirect fashion, that the technical aspects of the agreements should be developed on the

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[94] *Integrated River Basin Development* . . . (*op. cit.*), p. 44.

[95] League of Nations, *Treaty Series*, vol. XXXVI, p. 75.

basis of considering as a unit the area affected by the development:

Article 5

The technical methods adopted in the agreements referred to in the foregoing articles shall, within the limits of the national legislation of the various countries, be based exclusively upon considerations which might legitimately be taken into account in analogous cases of development of hydraulic power affecting only one State, without reference to any political frontier.

This is an early expression of the concept of basin or sub-basin development. From the scientific and technical point of view, the optimum development of hydroelectric power in any watercourse system can be achieved only if water retention and water releases are co-ordinated throughout the watercourse system. As a group of experts convened by the United Nations put it:

From the experience that has accumulated through development of numerous areas—the Damodar, Nile, Rhone, Tennessee and Volga, to name only a few—it is now possible to distinguish certain lessons that have been learned, and to outline in broad terms the character of work which seems essential to productive use of river basin development as a tool of social action. It is also possible to define the more troublesome problems of an economic, social and administrative character that will be involved in carrying out new river basin programmes.

The need for integrated river basin development arises from the relationship between the availability of water and its possible uses in the various sectors of a drainage area. It is now widely recognized that individual water projects—whether single or multipurpose—cannot as a rule be undertaken with optimum benefit for the people affected before there is at least the broad outline of a plan for the entire drainage area. Integrated river basin development with the aim stated involves the co-ordinated and harmonious development of the various works in relation to all the reasonable possibilities of the basin. These may include irrigation and drainage, electric power production, navigation, flood control, watershed treatment, industrial and domestic uses of water, recreation and wildlife conservation.[96]

89. Article 6 of the 1923 Convention sets forth eight subjects with which the agreements specified in articles 2, 3 and 4 of that Convention might deal:

The agreements contemplated in the foregoing articles may provide, amongst other things, for:

(*a*) General conditions for the establishment, upkeep and operation of the works;

(*b*) Equitable contributions by the States concerned towards the expenses, risks, damage and charges of every kind incurred as a result of the construction and operation of the works, as well as for meeting the cost of upkeep;

(*c*) The settlement of questions of financial co-operation;

(*d*) The methods for exercising technical control and securing public safety;

(*e*) The protection of sites;

(*f*) The regulation of the flow of water;

(*g*) The protection of the interests of third parties;

(*h*) The method of settling disputes regarding the interpretation or application of the agreements.

These eight suggested subjects of agreement afford a fairly adequate structure for developing a bilateral or multilateral treaty providing for the effective hydroelectric development of an international river. In the light of experience since the adoption of the 1923 Convention, additional provisions to deal specifically with such matters as determination and allocation of benefits, collection and exchange of hydrographic data, and the setting up of joint management machinery, will be desirable.

90. There is a substantial difference between the eleven relevant factors in article V of the Helsinki Rules and the eight subjects of agreement in article 6 of the 1923 Convention. The difference stems from the different ends sought. The Helsinki Rules contemplate consideration of specified relevant factors in determining or adjudicating the permissible uses by States of water in an international drainage basin. The subjects of agreement in the Convention are directed towards producing agreement among directly interested States with respect to a single use for an individual watercourse.

91. These ends are not divergent but supplemental. General principles regarding all uses of international watercourses are essential if the ever growing and conflicting demands for water throughout the world are to be satisfied. These general principles must be supported by rules that provide how these principles should be applied on a general basis. But these general principles and rules need to be supplemented in a manner that will assist in the development of regulations for application to specific uses of the water of individual watercourses. What is required—without prejudice to the question whether it is the river, the river system, or the drainage basin that is in point—is a blending of the approach of the Helsinki Rules with that of the 1923 Convention. To this end, the following articles are proposed:

Article 2. User States

For the purpose of these articles, a State which contributes to and makes use of water of an international watercourse shall be termed a user State.

Article 3. User agreements

The present articles may be supplemented by user agreements among user States.

It may also be useful to include, at this juncture, a clause on definitions which will complement the paramount definition found in article 2.

Article 4. Definitions

For the purposes of the present articles:

1. "Contracting State" means a user State party to these articles which may or may not be party to a user agreement.

[96] *Integrated River Basin Development* ... (*op. cit.*), p. 1. See also *Report of the United Nations Water Conference* (*op. cit.*), Recommendation G.

2. "Co-operating State" means a user State party to a user agreement which is not party to these articles.

3. "Non-contracting State" means a user State which is not party either to these articles or to a user agreement.

C. Parties to user agreements

92. Although the 1923 Geneva Convention entered into force, there is no record of agreements entered into pursuant to its articles 2, 3 or 4. Only a few States ratified it. None of them was situated on the same watercourse, so the need for an implementing agreement did not arise. None the less, the solution which it adopted, that of dealing with the disparity of the character and uses of international watercourses through recourse to subsidiary agreements between the parties to a general convention, is a sound and innovative way to approach the problem.

93. The 1923 Convention envisages bilateral agreements as the appropriate form for the development of hydroelectric power. The Commission, however, will be required to lay down principles regarding all possible uses of an international watercourse, including the reciprocal interplay of navigation. When the watercourse drains several States, all those States should be entitled to become parties to any subsidiary agreement applying to that watercourse. This concept is illustrated by the River Plate Basin Treaty (Brasilia, 23 April 1969),[97] to which Argentina, Bolivia, Brazil, Paraguay and Uraguay are parties, as well as by other treaties which are referred to below.

94. The River Plate Basin Treaty entered into force on 14 August 1970. By its terms, the parties agree to combine efforts to promote the harmonious development and physical integration of the Plate Basin:

To this end, they shall promote, within the scope of the basin, the identification of areas of common interest and the undertaking of surveys, programes and works, as well as the drafting of operating agreements and legal instruments they deem necessary, and which shall tend toward:

a) Advancement and assistance in navigation matters;

b) Reasonable utilization of water resources, particularly through regulation of watercourses and their multiple and equitable uses;

c) Conservation and development of animal and vegetable life;

d) Perfection of highway, rail, river, air, electrical and telecommunication interconnections;

e) Regional complementation through the promotion and installation of industries of interest to the Basin development;

f) Economic complementation in frontier areas;

g) Reciprocal co-operation in matters of education, health and combating of disease;

h) Promotion of other projects of common interest, particularly those related to inventory, assessment and utilization of the area's natural resources; and

i) Total familiarity with the River Plate Basin.

The foregoing list of objectives affords an excellent example of the broad range of subject-matter which requires consideration in dealing with a drainage basin on an integrated basis. It extends beyond the scope of the current work of the Commission on watercourses; however, if the Commission were to produce a set of articles of general acceptability, it will have provided a foundation for achievement of the broader goals listed in the River Plate Basin Treaty.

95. Article VI of the Treaty provides:

Article VI

The stipulations of the present Treaty shall not inhibit the Contracting Parties from entering into specific or partial agreements, bilateral or multilateral, tending towards the attainment of the general objectives of the Basin development.

While the Treaty deals with a single, if immense, basin, that basin contains two sub-basins of very wide geographical extent, each with at least three concerned States. Thus the inclusion of such a proviso for sub-basin agreements is understandable.

96. Nevertheless, the better course appears to be to include a requirement in the draft articles that a user agreement should apply throughout each watercourse and that all user States should be entitled to become parties to the user agreement. This would have the desirable result of promoting an integrated system which, from the technical point of view, is considered both the most efficient method of using an international watercourse and one that results in providing the greatest benefits to all the user States:

In spite of the fact that most States possess water resources in several basins, and all water resources available need to be considered as a whole for national programming purposes, the waters within the geographical area of a particular basin have been found to constitute a critical and, therefore, a most useful conceptual unit for establishing a legal régime and for organizing co-operation and collaboration with respect to water resources development, conservation and use. The basin is a naturally delimited area within which the waters appear and are stored or discharged to the common terminus. Changes, natural or man-made, within the basin are likely to produce effects only on the water resources within that basin. The basin concept provides, therefore, a much needed rational basis for dealing with non-maritime water-related problems.[98]

97. A more detailed analysis of like thrust is contained in a recent ECE publication:

59. With regard to the full stage of river basin development, it is reasonable to work out a complete regulation and utilization plan for the river basin as a part of the unified planning system at an earlier stage of development. In such plans, and other plans prepared on a higher level of development, greater emphasis should be given to water demand control (changes in technology, basin-wide re-use, recycling, economic means and stimulators, etc.) to automatization, to the management of river basin

[97] See American Society of International Law, *op. cit.*, vol. VIII, No. 5 (September 1969), p. 905. See also *Yearbook ... 1974*, vol. II (Part Two), pp. 291–292, document A/CN.4/274, paras. 60–64.

[98] *Management of International Water Resources ...* (*op. cit.*), para. 28.

development, to water quality, environmental architecture and the joint management and regulation of surface and groundwater resources, including coastal waters, and to the inter-basin transfer of water between large river basins. Because of the increase in uncertainties according to the length of the planning horizon, it is very important to ensure flexibility of long-term plans.

60. Planning may be applied to regions formed on the basis of various requirements (administrative and political, historical and economic, etc.) or to river basins, i.e., significant hydrological entities. In the long term, it seems preferable to aim at river basin management rather than regional management. In cases where a river basin is composed of several regions, the regions should be grouped together with a view to the gradual introduction of joint hydrological planning.

61. The socio-economic growth of countries with common river basins and its effect on the water management in these countries, as well as the quantitative and qualitative limitations of common water resources, need careful long-term planning for the benefit of all riparian countries. In view of the large variety of interests of the riparian countries, this planning process, being similar in many ways to the long-term planning process of national river basins, needs a gradual approach. This includes long-term plans for separate activities, joint research work on data and the collection of information. In the framework of existing organizations, the preparation of comprehensive long-term water management plans for international river basins can be approached in two steps: first the harmonization of long-term plans prepared by the individual riparian countries for their part of the basin, secondly the joint preparation of a basin-wide plan prepared by a team of experts from the interested countries. The forms of co-operation, which may also be different from those indicated above, will be determined jointly by the riparian countries concerned in each specific case.[99]

98. In modern treaties on river basins, the usual practice has been for all riparian States of the watercourse to be parties to the convention, or at least be eligible to be parties. The Statute of the Organization of the Senegal Riparian States (1968)[100] is a notable example. Its Article 34 provides that the Statute enters into force only after ratification or approval by all the signatory States, which include all the Senegal riparian States. The Act regarding navigation and economic co-operation between the States of the Niger Basin (1963)[101] provides, in article 2, that the "utilisation of the River Niger, its tributaries and sub-tributaries is open to each riparian State in respect of the portion of the River Niger basin lying in its territory . . .". The Convention and Statute relating to the development of the Chad Basin (1964)[102] anticipates the participation of all the riparian States. The Treaty for Amazonian Co-operation (1978)[103] to which Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela are signatories, thus includes all the States in the Amazon Basin. These examples are not exhaustive.

99. The problem of river pollution provides a strong argument for the view that a user agreement should include all the States from which water drains into an international watercourse. There are various categories of pollutants whose effects are sufficiently toxic and are so persistent that, once introduced into a watercourse, they will remain a danger to life until the watercourse runs into the sea. Some of the substances remain dangerous even after they have moved into the sea, particularly in estuary and coastal waters. And some pollutants may persist in the bed of the watercourse or infiltrate ground water.

100. The most effective way to eliminate dangers of this nature is by co-operative action of all the States that contribute to and make use of the water of the watercourse, i.e. the user States. In some cases, if only one such State fails to join in the co-operative effort, it may severely impair the benefits of corrective action that is being taken by the other watercourse State. The Convention for the protection of the Rhine against chemical pollution (Bonn, 1976)[104] may be said to illustrate the need for action by all the States concerned, in that France, the Federal Republic of Germany, Luxembourg, the Netherlands, Switzerland as well as EEC are all parties. Its Article 1 sets forth the major steps to be taken, as well as the need for those steps:

Article 1

1. In order to improve the quality of the Rhine waters, the Contracting Parties will take, in accordance with the following provisions, appropriate measures to:

a. Eliminate pollution from the surface waters of the Rhine basin by dangerous substances included in the families and groups of substances shown in Annex I. . . . They propose to achieve gradually the elimination of discharges of those substances, taking into account the results of studies made by experts concerning each one, as well as the technical means available.

b. Reduce the pollution of the Rhine waters by dangerous substances included in the families and groups of substances shown in Annex II . . ..

2. The measures referred to in paragraph 1 above shall be adopted taking into account, within reason, that the waters of the Rhine are used for the following purposes:

a. Production of drinking water for human consumption,

b. Consumption by domestic and wild animals,

c. Conservation and development of natural species, both fauna and flora, and conservation of the self-purification property of water,

d. Fishing,

e. Recreation, taking into account health and aesthetic requirements,

[99] *Long-Term Planning of Water Management: Proceedings of the Seminar on Long-Term Planning of Water Management, Zlatni Piasatzi (Bulgaria), 17–22 May 1976*, vol. I (United Nations publication, Sales No. E.76.II.E.27), part I, sect. B, paras. 59–61.

[100] United Nations, *Treaty Series*, vol. 672, p. 251.

[101] *Ibid.*, vol. 587, p. 9.

[102] For the English and French texts, see *Journal officiel de la République fédérale du Cameroun* (Yaoundé), 4th year, No. 18 (15 September 1964), pp. 1003 *et seq.* See also B. Rüster and B. Simma, eds., *International Protection of the Environment* (Dobbs Ferry, N.Y., Oceana, 1977), vol. XI, p. 5633.

[103] See American Society of International Law, *op. cit.*, vol. XVII, No. 5 (September 1978), p. 1045.

[104] *Ibid.*, vol. 16, No. 2 (March 1977), p. 242.

f. Direct or indirect supply of fresh water for agricultural lands,

g. Production of water for industrial use;

and the need to preserve an acceptable quality of sea water.

3. The provisions of this Convention are but a first step to achieve the objective referred to in paragraph 1 above.

...

The Bonn Convention of 1976 (which does not appear to have come into force as of this writing) deals with but one aspect of pollution. The basic treaty to which the Rhine States are parties, namely, the Agreement of 29 April 1963 which establishes the International Commission for the Protection of the Rhine against Pollution,[105] and another 1976 Convention, on the Protection of the Rhine against Pollution by Chlorides,[106] are further examples of the need for common action by all States of a watercourse in preventing and reducing pollution of the watercourse.

101. If each user State should be—or at least should be eligible to be—a party to the user agreement, the question arises whether it is essential that every party to a user agreement must also be party to the convention which may evolve from the Commission's articles. While it might be anticipated that a State which is prepared to enter into a user agreement would also be prepared to become bound by the convention, there may be States which prefer to act only in the context of a specific international watercourse. There should be no objection in principle to authorizing such a user State to become party to the user agreement, subject to two qualifications. First, there would have to be one or more user States which are party both to the convention and to the user agreement to ensure that the user agreement is entered into within the framework of the convention. Secondly, the user agreement would have to reinforce this connection by recognizing the principles and rules set forth in the convention as applicable to the extent that provision on a matter is not made in the user agreement. Otherwise the objective of establishing basic, if residual, principles through the medium of the convention would be sacrificed. The following articles are proposed.

Article 5. Parties to user agreements

A user State not party to these articles may be party to a user agreement provided that one or more user States party to the user agreement are party to these articles.

Article 6. Relation of these articles to user agreements

1. A user agreement shall be entered into within the framework of these articles.

2. These articles shall apply to States party to a user agreement with respect to matters not regulated by the user agreement.

102. The entry into force of treaties is a topic generally dealt with in the context of final clauses. It is not the practice of the Commission to draft final clauses for the articles it prepares, although, if a clause normally considered as a final one has a direct relationship to the operative aspects of a set of draft articles, the Commission has not hesitated to propose such articles. Some instances of such proposals have been articles dealing with reservations and settlement of disputes.

103. The prior discussion in this section on the necessity both for development of general principles regarding the uses of fresh water and for recognition of the individual characteristics of international watercourses demonstrates that a set of articles on use of sweet water presents problems regarding entry into force that are not usually found in multilateral treaties. It has already been pointed out[107] in connection with the 1923 Geneva Convention that the Convention did not have tangible results because, although it entered into force, no two of the parties were so located on the same river as to have a joint interest in hydroelectric production. This precedent demonstrates that the generally accepted provisions for the entry into force of treaties require reconsideration in respect of articles on the uses of international watercourses. The collection of clauses on entry into force for multilateral treaties in *The Treaty Maker's Handbook*[108] indicates that the almost invariable condition is that of ratification by a specified number of the States entitled to ratify. Occasionally all such States are required to ratify, but the customary requirement is for ratification by some fixed number, or a proportionate number, of the States entitled to ratify. Certain clauses lay down additional qualifications. One type of requirement is ratification by specified individual States, either by themselves, as in the 1947 Treaty of Peace with Hungary,[109] or in addition to a fixed number of other unspecified States, as in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.[110] A not uncommon requirement, particularly in financial and economic treaties, is that the ratifying States include, for example, a number of States which together hold a certain position in a commodity market, or have invested a certain amount of capital in an international institution.

104. The clause on entry into force is thus adaptable to a wide variety of situations. The situation as far as

[105] See Rüster and Simma, eds., *op. cit.*, vol. X (1977), p. 4820.

[106] See American Society of International Law, *op. cit.*, vol. XVI, No. 2 (March 1977), p. 265.

[107] See para. 92 above.

[108] H. Blix and J. Emerson, eds., *The Treaty Maker's Handbook* (Dobbs Ferry, N.Y., Oceana, 1973), pp. 75–86.

[109] United Nations, *Treaty Series*, vol. 41, p. 135.

[110] *Ibid.*, vol. 729, p. 161.

international watercourses are concerned is that, to be effective, the draft articles should come into force between two or more States of the same watercourse.

105. The question then arises whether there is any objection to the draft articles coming into force for an individual watercourse when two States of that watercourse have signified their intent to be bound by the articles. The clauses of entry into force of conventions based upon draft articles approved by the Commission have generally required a substantial number of ratifications or accessions as a prerequisite to entry into force. Twenty-two ratifications were required by the four Geneva Conventions on the Law of the Sea.[111] However, the Optional Protocol concerning the compulsory settlement of disputes (arising out of the Conventions on the Law of the Sea)[112] has no clause on entry into force as such. It is entitled "Optional Protocol of Signature", although its article V provides that the Protocol "is subject to ratification, where necessary, according to the constitutional requirements of the signatory States". Articles I and II, however, make it clear that the Protocol is in effect for any two States that are parties to the Protocol whenever a dispute may arise regarding the interpretation or application of any of the Conventions on the Law of the Sea to which they are both parties. The Conventions on Diplomatic Relations,[113] Consular Relations[114] and Special Missions[115] also prescribe ratification by twenty-two States. However, the Optional Protocol to each of these Conventions regarding settlement of disputes requires only two ratifications, as does the Optional Protocol to the Convention on Diplomatic Relations concerning acquisition of nationality. The 1961 Convention on the Reduction of Statelessness[116] entered into force two years after deposit of the sixth ratification or accession. At the other extreme, the Vienna Convention on the Law of Treaties[117] will not come into force until deposit of the 35th instrument of ratification or accession. The most recent treaties, the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents[118] and the 1978 Vienna Convention on Succession of States in Respect of Treaties,[119] have returned to the provision requiring ratification or accession by twenty-two States.

106. The reason usually advanced for a substantial number of ratifications or accessions to bring a convention originated by the Commission into force is that a general law-making treaty should have mustered substantial support in the world community before it is adopted as a codification or progressive development of international law. Whatever the merit of that approach with regard to the present set of articles, the Commission, as has been noted, is dealing with a novel and probably unique situation. The demand for a set of world-wide minimum principles and rules must be met in a manner that accords full recognition to the widely varying needs of diverse watercourses. Moreover, if they are to be effective, the articles will take effect within the confines of each individual watercourse.

107. In this situation, reliance on safety in numbers, which is a principal basis for demanding a great many ratifications or accessions, is not an operable mechanism. For example it would be possible to put the required number of ratifications or accessions at such an extreme number as 60. Nonetheless, that number could be reached without giving the articles practical force if no two of the 60 States were in the same watercourse system. This possibility is another illustration of the need for the Commission to take the nature of water into account in formulating rules. As noted, one of the principal physical characteristics of water is that it drains to the sea or other terminus within its own distinct watershed. As far as any individual State is concerned, its activities relating to the use of water in a specific watercourse area can affect only those other States that are wholly or partially in that area. Consequently, whether one State outside that watercourse area is a party to the articles or whether 50 States are parties to the articles is irrelevant to the effectiveness of the articles on that watercourse.

108. In these circumstances, the appropriate course of action is to provide that the articles will apply to each international watercourse as soon as such application can be effective. Obviously, when the area includes only two States, full effect can be achieved when both those States have ratified or acceded to the articles. What should be the position when more than two States are included in the area? It may be helpful to consider the overall geographic situation. The report by the Secretary-General of 27 October 1972 on technical and economic aspects of international river basin development[120] contains (in its annex III) a very useful breakdown in tabular form (reproduced on following page).

109. Of the 200 river basins included in the table, 180 have four or fewer riparian States. There could be little objection to applying the articles to a river basin in which one half, or two out of four, user States are parties to the articles. In the category of five to seven

[111] See footnote 4 above.

[112] United Nations, *Treaty Series*, vol. 450, p. 169.

[113] *Ibid.*, vol. 500, p. 95.

[114] *Ibid.*, vol. 596, p. 261.

[115] General Assembly resolution 2530 (XXIV), annex.

[116] In *Human rights: Compilation of International Instruments* (United Nations publication, Sales No. E.78.XIV.2), p. 76.

[117] See footnote 64 above.

[118] General Assembly resolution 3166 (XXVIII), annex.

[119] See footnote 3 above.

[120] E/C.7/35. See also *Official Records of the Economic and Social Council, Fifty-fourth session, Supplement No. 4* (E/5247), paras. 129–137.

Table of first order international river basins according to number of constituent countries

Region	Area	Number of basins constituted by countries									
		2	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*Total*
Africa	A	3	2	6		2	1		3		17
	B	30	8								38
Americas	A	10	2		1		1				14
	B	43	3								46
Asia	A	7	5	2		2					16
	B	20	3	1							24
Europe	A		2		1		1			1	5
	B	35	5								40
Total	A	20	11	8	2[a]	4[b]	3[c]		3[d]	1[e]	52
	B	128	19	1							148
		148	30	9	2	4	3		3	1	200

A = more than 100,000 square kilometres.
B = less than 100,000 square kilometres.
[a] La Plata, Elbe.
[b] Chad, Volta, Ganges-Brahmaputra, Mekong.
[c] Zambezi, Amazon, Rhine.
[d] Niger, Nile, Congo.
[e] Danube.

States there is a total of nine rivers; then there are three rivers in the column for nine States and one river in the column for ten States. There is obviously a problem of increasing difficulty in applying the articles to a river basin when only two States out of seven, nine, or ten have become parties. Nevertheless, the articles could have substantial utility in certain geographic situations and would have standard-setting utility under all circumstances. To the extent that the draft articles codify customary international law, they formulate law binding on all States, whether or not party to the articles. To the extent that the draft articles constitute progressive development of the law, they will point the direction for forward movement for all States. The following article is accordingly proposed:

Article 7. Entry into force for an international watercourse

These articles shall enter into force for an international watercourse on the thirtieth day following the deposit of the second instrument of ratification or accession by a user State.

110. A further question is whether there should be an article on the general entry into force of the articles among all the States parties and, if so, what its content should be. Whether a standard clause or a more specialized clause will be needed will become clear as work on the articles progresses. It is suggested that a decision on the point be deferred at this time.

CHAPTER IV

Regulation of data collection and exchange

111. The importance of river data collection and exchange is widely recognized, as evidenced by the presence of provisions for it in international declarations and resolutions and by the practice of States. Moreover, State practice indicates the need for the collection and exchange of data at two levels: as a standard provision in instruments regarding watercourse management, and as an integral part of the settlement of water disputes.

A. Data collection

112. On 12 December 1974, the General Assembly of the United Nations adopted resolution 3281 (XXIX), containing the Charter of Economic Rights and Duties of States, article 3 of which is to the point:

Article 3

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

The terms of this provision clearly embrace international watercourses. An international watercourse necessarily is a natural resource shared by two or more countries. Moreover, the nature of the debate surrounding the adoption of article 3 suggests that it was designed to apply to international watercourses. The provision respecting "a system of information" is cast

in mandatory terms: in the exploitation of shared natural resources each State "must co-operate". The fundamental importance of information in the process of co-operation is emphasized by specifying that it is "on the basis" of a system of information that States must co-operate. Such co-operation is required "in order to achieve optimum use of such resources". At the same time, the Charter of Economic Rights and Duties of States it not an instrument which of itself gives rise to international legal obligations; it is a recommendatory resolution of the United Nations General Assembly.

113. Recommendation 51 of the United Nations Conference on the Human Environment, adopted in June 1972, endorsed the creation of river-basin commissions

to permit undertaking on a regional basis:

(i) Collection, analysis, and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;

(ii) Joint data-collection programmes to serve planning needs.

...[121]

The recognition of the need for river basin data is clear.

114. The Asian-African Legal Consultative Committee has dealt substantially with the non-navigational uses of international watercourses. Two draft proposals on "the law of international rivers" were placed before the Committee in 1970, one jointly proposed by Iraq and Pakistan and one proposed by India. Article V of the Indian draft recapitulated the list of factors in the Helsinki Rules relevant to determining a State's share of the water in an international watercourse. At the Committee's twelfth session, in 1971, the Rapporteur presented "Draft Proposals on the Law of International Rivers" based upon both drafts. Although the Draft Proposals did not refer to the Helsinki Rules, the members of the Committee's Standing Sub-Committee on the Law of International Rivers, appointed in 1972, agreed upon the following factors pertinent to determining a State's "reasonable and equitable share" of a watercourse:

(a) The geography of the basin;

(b) The hydrology of the basin;

(c) The climate affecting the basin;

(d) The past and existing utilization of the waters;

(e) The economic and social needs of each basin State;

(f) The population dependent on the waters of the basin in each basin State;

(g) The comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) The availability of other water resources;

(i) The avoidance of unnecessary waste in the utilization of waters of the basin; and

(j) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses.[122]

While the Draft Proposals do not expressly state the need to collect data, several of the relevant factors can be reasonably applied only if such information is available. In particular, the initial three factors relate to data on the hydrologic characteristics of the basin. Application of the other factors would give rise to the need for collection of other types of information.

115. The activities of the International Law Association reveal a history of concern for the management of international watercourses and a recognition of the importance of data collection and exchange. A resolution entitled "The Uses of the Waters of International Rivers", adopted by the ILA in 1958, contained the recommendation that:

3. Co-riparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to stream-flow, quantity, and quality of water, rain and snow fall, water tables and underground water movements.[123]

This was followed in 1972 by article 3 of the "Draft Articles on Flood Control" (subsequently adopted by the ILA Conference), which provides that:

Co-operation with respect to flood control may, by agreement between basin States, include among others:

(*a*) collection and exchange of relevant data;

(*b*) preparation of surveys, investigations and studies and their mutual exchange;

...

(*g*) setting up of a regular information service charged to transmit the height of water levels and the discharge quantities.[124]

As already discussed, chapter II (articles IV–VIII) of the Helsinki Rules lists some of the factors relevant to international watercourse management.[125] As is true of the Draft Proposals of the Asian-African Legal Consultative Committee, application of at least the first three factors (geography, hydrology and climate of the basin) is dependent upon the collection of pertinent information.

116. Agreements vary in the degree of specificity assigned to the collection of appropriate data. Among them, the 1964 Agreement concerning the Niger River Commission and the navigation and transport on the River Niger[126] outlines in article 2(*c*), as one of the duties of the River Niger Commission, the responsibility "to collect, evaluate and disseminate basic data on the whole of the basin".

[121] *Report of The United Nations Conference on the Human Environment* (United Nations publication, Sales No. E.73.II.A.14), p. 17.

[122] Asian–African Legal Consultative Committee, *Report of the Thirteenth Session; held in Lagos from 18 to 25 January 1972* (New Delhi, 1973), pp. 83–84.

[123] ILA, *Report of the Forty-eighth Conference, New York, 1958* (London, 1958), p. ix.

[124] *Idem, Report of the Fifty-fifth Conference, New York, 1972* (London, 1974), p. 48.

[125] See paras. 68 *et seq.* above.

[126] United Nations, *Treaty Series*, vol. 587, p. 19.

The 1971 Agreement concerning frontier rivers between Finland and Sweden[127] states, in chapter 9, article 3, that:

> The Frontier River Commission shall maintain continuous observation of water flow at the point where the River Tärentö (Tärendö) flows out of the River Torne. As the basis for this activity the Commission shall have the necessary studies and calculations made as soon as possible in order to determine the volume of water flowing in each of the two rivers under prevailing natural conditions.

Protocol No. 1 of the 1946 Treaty of friendship and neighbourly relations between Iraq and Turkey, relative to the waters of the Tigris and Euphrates and their tributaries,[128] provides (in article 1) that:

> Iraq may, as soon as possible, send to Turkey groups of technical experts in its service to make investigations and surveys, collect hydraulic, geological and other information needed for the selection of sites for the construction of dams, observation stations and other works to be constructed on the Tigris, the Euphrates and their tributaries, and prepare the necessary plans to this end.
>
> ...[129]

The 1944 Treaty between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande (Rio Bravo)[130] provides in article 9 (*j*) for the collection of data and for the construction, maintenance and operation of the necessary stations and mechanisms:

> (*j*) The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record....

The 1969 Agreement for the regulation, channelling, dredging, buoyage and maintenance of the River Paraguay, signed by Argentina and Paraguay,[131] provides in article IX for a broad range of information by stating that:

> With a view to carrying out the studies and works referred to in the preceding article, appropriate topohydrographic and hydrological surveys, surveys of the river-bed and of the amounts of sediment and matter in suspension and surveys relating to pollution, climatology, and so forth, shall be made, the cost thereof being borne as indicated in article VIII.

Detailed provisions are also found in the annexes of the 1956 Agreement between the Union of Soviet Socialist Republics and the People's Republic of China on joint research operations to determine the natural resources of the Amur River basin and the prospects for development of its productive potentialities and on planning and survey operations to prepare a scheme for the multi-purpose exploitation of the Argun River and the Upper Amur River,[132] of which annex No. 1, section 1, requires research operations consisting of surveys "of the physical and geographical characteristics of the Amur River Basin (geomorphological, climatological, hydrological, pedological, pedologic-geochemical, geobotanical, silvicultural and pisciculturaI conditions)". Annex No. 2, section A, 1 provides that:

> The purpose of the hydrometric operation shall be to provide data to determine the variations in the level and flow of the rivers, their winter flow, their solid flow and the chemical composition of the water.

117. Intergovernmental boards also provide for the collection of data. The Danube Commission was established in 1921 under the Convention Instituting the Definitive Statute of the Danube,[133] which stated that the Commission "shall establish such administrative, technical, sanitary and financial services as may be considered necessary". Contemporary services performed by the Commission include the following: "To co-ordinate the hydrometeorological services on the Danube, and to publish a single hydrological bulletin and short-term and long-term hydrological forecasts for the Danube".[134]

The Revised Convention relating to the navigation of the Rhine signed at Mannheim in 1868[135] was negotiated to supervise navigation and related activities on the Rhine. Article 43 created a Central Commission; article 31 provided for the gathering of hydrotechnical data as follows:

> Hydrotechnical engineers appointed by the Governments of all the riparian States shall carry out visits of inspection from time to time, for the purpose of ascertaining the results of action taken to improve the condition of the river and noting any obstacles hampering navigation.
>
> The Central Commission (article 43) shall specify the time at which and the sections of the river where these inspections shall take place. The engineers shall report thereon to the Central Rhine Commission.

Data collection is also required under the 1976 Convention on the Protection of the Rhine against

[127] *Ibid.*, vol. 825, p. 191.

[128] *Ibid.*, vol. 37, p. 226.

[129] *Ibid.*, pp. 287 and 289.

[130] *Ibid.*, vol. 3, p. 313.

[131] *Ibid.*, vol. 709, p. 311.

[132] USSR, Ministry of Foreign Affairs, *Sbornik deistvuiushchikh dogovorov, soglashenii i konventsii, zakliuchennykh SSSR s inostrannymi gosudarstvami* (Treaties, Agreements and Conventions in force, concluded by the USSR with foreign countries) (Moscow, 1956), vol. XVIII, p. 323. See also *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 280.

[133] League of Nations, *Treaty Series*, vol. XXVI, p. 175.

[134] UNITAR, *International Navigable Waterways: Financial and legal aspects of their improvement and maintenance* (report on the Symposium held at Buenos Aires from 30 November to 4 December 1970), Study No. 6 (New York, 1974), p. 90.

[135] Council of Europe, *European Yearbook* (The Hague, Martinus Nijhoff, 1956), vol. II, p. 258. See also *Legislative Texts* ... (*op. cit.*), treaty No. 111.

Chemical Pollution.[136] Article 8 specifies that each Contracting Party bears responsibility for controlling discharge in conformity with the Convention and stipulates that yearly reports on the data obtained must be made to the International Commission by each treaty party. Article 10, paragraph 1, further provides that:

1. In order to control the Rhine water content of Annex I and II substances each Government will assume responsibility at the measuring stations on the Rhine for the installation and operation of measuring instruments and systems serving to determine the concentration of the aforementioned substances.

The International Joint Commission, Canada/United States of America, habitually provides for the collection of data through the actions of boards it creates for the purposes of supervision of lake levels, regulation and supervision of dams and diversion canals, and co-ordination of the activities of the Governments of the United States and Canada.[137] For example, the International Great Lakes Levels Board was established by the Joint Commission in 1964 to review the factors causing fluctuations in water supply in the Great Lakes and to examine, among other things, the feasibility of further regulation of water supplies and the changes that would be required in then existing structures to accomplish additional regulation. To accomplish its study, the Board analysed the level and flow of water, based upon calculation of "net basin supply", as follows:

Net basin supply is a term used to describe the net water supply to a lake resulting from: precipitation on the lake surface; runoff from the tributary drainage area; groundwater flow into or out of the lake; and evaporation from the lake. Although available techniques do not permit the accurate determination of these factors separately, the net basin supplies can be computed quite accurately by employing reliable lake level, flow and diversion records for the required monthly and quarter-monthly periods . . ..[138]

118. A recent example of the role of data collection in the settlement of disputes is provided by the 1977 Agreement between Bangladesh and India on sharing of the Ganges waters at Farakka and on augmenting its flows.[139] Articles II and III set forth the basis for the division of waters at Farakka; article II states, in part:

(i) The sharing between Bangladesh and India of the Ganges waters at Farakka from the 1st January to the 31st May every year will be with reference to the quantum shown in column 2 of the Schedule annexed hereto which is based on 75 per cent availability calculated from the recorded flows of the Ganges at Farakka from 1948 to 1973.

In article IV, the Agreement goes on to stipulate that a joint committee be created to "observe and record at Farakka the daily flows".

Another example, the 1970 exchange of letters constituting an agreement between France and Spain amending the arrangement of 12 July 1958 relating to Lake Lanoux,[140] contains more detailed provisions regarding data collection. It sets forth the type of monitoring devices to be used and the method of emplacement, as well as specifying quantities of water to be released.

119. The foregoing examination of State practice and of the provisions of international declarations and resolutions reveals a wide diversity in requirements and recommendations for data collection. Such disparity reflects variations both in the available methods of data collection and in the characteristics of each international watercourse.

120. According to the *Manual of river basin planning* prepared by the United Nations, water resources development "requires data on precipitation, river stage, river discharge, sediment transportation, yield and storage of groundwater, and the quality of water as well as other related meteorological data such as temperature".[141] But although a vast amount of data is appropriate to watercourse development, most information—including that mentioned above—falls generally into periodic measurement of the quality and quantity of surface runoff and groundwater contribution.

121. The potential quantity of water in any watercourse equals precipitation minus the amount lost through evaporation and transpiration.[142] A relatively simple method of calculating quantity is its equation with the difference between total catchment precipitation and total evaporation losses, with allowances for changes in storage. Reliance solely on such a formula is limited, however, by the inability of the formula to deal with instances of flood peaks or with short-term, rapid changes in water quantity.[143] More comprehensive measurement of water quantity is provided by determination of "stage" (river or lake height), measurement of mean velocity of water flowing past a section of a watercourse and calculation of their relationship (called the "stage-discharge relationship").[144] Tests of water quality, on the other hand, include analyses of the presence of micro-organisms, dissolved gases, special salts, hardness, salinity, acidity, dissolved solids, suspended solids and the observation of temperature, colour, odour and taste.[145]

122. In determining what data should be collected, States must consider the uses to which the data are to

[136] For reference, see footnote 104 above.

[137] L.M. Bloomfield and G.F. Fitzgerald, *Boundary Waters Problems of Canada and the United States* (Toronto, Carswell, 1958), p. 36.

[138] International Great Lakes Levels Board, *Regulation of Great Lakes water levels; Report to the International Joint Commission* (Washington, D.C., 1973), p. 65.

[139] See footnote 93 above.

[140] United Nations, *Treaty Series*, vol. 796, pp. 240–243.

[141] *Multiple-purpose River Basin Development—Part 1: Manual of river basin planning*. Flood Control Series, No. 7, (United Nations publication, Sales No. 1955.II.F.1), p. 11.

[142] *Ibid.*, p. 12.

[143] Ward, *op. cit.*, p. 357.

[144] *Ibid.*, pp. 357–358.

[145] *Multiple-purpose River Basin Development* ... (*op. cit.*), p. 25.

be put, the resources at a State's disposal, and the ease of collection of data. In the case of water quantity, the following passage is illustrative of the impact of use:

> There are different requirements to be met depending upon the phase of development. For example, maximum flood stage and flood discharge are required for planning flood control embankments, while minimum river stage and duration are essential for planning navigation. Important to most fields of water resources development are (*i*) the *mean values* of the hydraulic elements (discharge, river stage, sediment discharge, etc.)...; (*ii*) the variation (daily, weekly, seasonal or annual) of the hydraulic elements in chronological order, which are presented as hydrographs or histograms; (*iii*) the frequency and duration of occurrence of the various hydraulic elements with respect to their magnitude; (*iv*) the accumulated values of some hydraulic elements such as runoff with respect to time; and (*v*) the extremes of the hydraulic elements, their magnitude and frequency of occurrence.[146]

The position regarding data on water quality is different:

> In the case of domestic supplies, the required analysis is generally prescribed by regulation or ordinances relating to public health. Water for industrial use must be suitable for the special processes involved. Irrigation water must not contain objectionable salts, solids and other substances, dissolved and suspended beyond certain limits. Surface waters utilized for recreation purposes must be free from pollutional materials creating a nuisance and from pathogenic bacteria, while those for fish breeding should be free from toxic substances and should meet necessary standards as to dissolved oxygen.[147]

A State's resources will affect the methods of data collection employed. Both manual and automatic techniques are available. Selection of one method over another depends, in part, upon the presence of trained manpower and the necessary financial resources. Some types of information are more easily gathered than others. While data on groundwater are highly desirable, for example, they are relatively more difficult to obtain than those relating to surface water.

123. In the light of these considerations, article 8, on "data collection", is proposed as follows:

Article 8. Data collection

1. A contracting State shall collect and record data with respect to precipitation and evaporation of water and with respect to the stage of flow, mean velocity and abstraction of the water of an international watercourse in its territory as follows:

(*a*) ... *(to be completed)*

(*b*) ... *(to be completed)*

(*c*) ... *(to be completed)*

(*d*) ... *(to be completed)*

...

2. Each contracting State shall employ its best efforts to collect and record data in a manner which facilitates co-operative utilization of the data by contracting and co-operating States.

3. User agreements may provide for the collection of such additional data, notably in respect of water quality and water-related disease, as may be significant for development, use and environmental protection of the international watercourse. They may specify the method of data collection and the nature of the records to be employed.

124. The proposed provisions are designed to ensure the collection of a minimum amount of data adequate to fulfil the aims of watercourse management, to avoid unrealistically uniform regulation, and to take advantage of the flexibility inherent in user agreements.

125. While data in addition to precipitation, evaporation, stage flow, mean velocity and abstraction are of benefit in watercourse management, a requirement for additional data would have to be considered on a case-by-case basis in the light of cost-benefit analysis. To make their collection mandatory and to specify the method of collection would be to overlook the diversity that exists among watercourses and among the needs—and resources—of user States. Data on water quality are a case in point. While information regarding the quality of water is essential for any watercourse, there is no standard as regards information on water quality that is applicable to all watercourses. Establishment of provisions on water quality is a matter best regulated by user agreements.

126. Each of the four elements on which data are required in paragraph 1 of article 8 is fundamental to any international system of regulation, however, and acknowledgement of the importance of these factors is basic to the formulation of general provisions regarding the uses of international watercourses. Collection of the four types of information specified provides a basis for co-operative action and lays the foundation for further measurement. Moreover, flexibility is permitted insofar as these four basic provisions can be implemented to provide information on a variety of water conditions and relationships, and to meet the objectives and resources of individual States. At the same time, the Special Rapporteur wishes to call attention to the Commission's need for technical, professional advice and guidance in the more precise formulation of such provisions. Blanks have been left in the draft article to emphasize this need. While the four elements regarding which data are to be collected are specified, the exact nature of the data is left undetermined pending consultation with hydrologic experts.

127. Paragraph 2 emphasizes the desirability, but does not impose the obligation, of consonant methods of collection and recording, to the co-operative benefit of the States concerned. Recognition of the utility and importance of basin-wide agreement on the character and quality of information and the methods of its collection is contained in paragraph 3, which contemplates the possibility of user agreements requiring

[146] *Ibid.*, p. 14.

[147] *Ibid.*, pp. 24–25.

additional data calibrated to the singular nature of a particular watercourse.

B. Data exchange

128. A requirement for data exchange among co-operating States is the natural complement of article 8. A review of some of the agreements cited earlier reveals, for example, that the Commission created in the 1971 Agreement between Finland and Sweden concerning frontier rivers[148] is empowered, in chapter 2, article 3, to "enter into direct contact with authorities of either State and may call upon them for assistance in obtaining any necessary information and arranging for any necessary consultations".

The 1944 treaty, mentioned above, between the United States and Mexico,[149] provides in article 9 (*j*): "The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate Section".

The 1956 Agreement between the People's Republic of China and the Union of Soviet Socialist Republics[150] stipulates in article 5 that:

> The Soviet and Chinese organizations shall, for information purposes, exchange data, reports and other documentation on research, planning and survey operations carried out in the Amur Basin before 1956, and shall exchange similar material in carrying out the operations mentioned in articles 1 and 2.

Article 39 of the Convention Constituting the Definitive Statute of the Danube[151] requires that:

> The International Commission of the Danube and the European Commission of the Danube shall take all measures necessary to ensure, so far as it is possible and advisable, a uniform system of administration for the Danube.
>
> The two Commissions shall, for this purpose, regularly exchange all information, documents, minutes, plans and projects which may interest both. They may by agreement draw up certain identical regulations relative to the navigation and policing of the river.

129. It will be recalled that the United Nations Conference on the Human Environment adopted a recommendation providing for "exchanges of hydrologic data".[152]

The "draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States",[153] which were approved in 1978 by members of the UNEP Intergovernmental Working Group on natural resources shared by two or more states, are of similar thrust. Two relevant clauses are contained in the draft principles. Principle 5 provides:

> States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

Principle 7 adds:

> Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

130. The Helsinki Rules[154] also deal with the question of exchange, and state in paragraph 1 of article XXIX that:

> With a view to preventing disputes from arising between basin States as to their legal rights or other interest, it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to, such waters.

Other specifications by ILA on the need for exchange of data are set forth earlier in this report.[155]

131. Article 9, on exchange of data, is accordingly proposed as follows:

Article 9. Exchange of data

1. Data collected under the terms of paragraphs 1 and 2 of article 8 of these articles shall be made available to contracting and co-operating States at regular intervals of....

2. Contracting and co-operating States shall use their best efforts to comply with requests from contracting and co-operating States for special data (data not included in the provisions of article 8, paragraph 1) and with requests from contracting and co-operating States for data collected prior to the entry into force of these articles for the contracting State requested or to the entry into force of the user agreement for the co-operating State requested.

3. User agreements may regulate additional aspects of data exchange.

132. While the need to exchange data is generally acknowledged, specific questions emerge (what data? with whom? under what conditions?). Paragraph 1 provides a partial answer to these queries. First, it extends the application of the provisions of article 8 to all contracting and co-operating States, for it is in the best interests of international co-operation and rational and equitable development that all States parties to article 8, through adherence to the articles or to a user agreement, be the recipients of the benefits of data collection. Secondly, paragraph 1 of article 9 reinforces the importance of the data whose collection is prescribed in article 8, paragraph 1. Thirdly, it provides for the regular flow of such data, which is

[148] See footnote 74 above.
[149] See footnote 130 above.
[150] See footnote 132 above.
[151] See footnote 133 above.
[152] See para. 113 above.
[153] UNEP/GC.6/17.
[154] See footnote 29 above.
[155] See para. 115 above.

essential to development plans for the use of water and is the basis of estimates of short-term and long-term availability. The intervals at which such data are to be provided are left blank; this further illustrates the need for professional advice.

133. Paragraph 2 of article 9 recognizes that other kinds of data play an important role in the co-operative utilization of a watercourse system. Data such as snow survey reports, for example, provide additional information for the development of co-operative utilization of a watercourse and should be available to contracting and co-operating States which recognize that need. Moreover, previously gathered data may also be desired by a contracting or co-operating State, and paragraph 2 contemplates their exchange. Finally, paragraph 3 offers contracting States the possibility of negotiating user agreements to provide for other data exchange. (The exchange of data relative to special aspects of international watercourses, such as the production of hydroelectricity or the need for flood control, is not included explicitly within the terms of article 9. Special provisions relating to these and other characteristics may be elaborated in connection with specific uses).

C. Costs of data collection and exchange

134. It is proposed that draft article 10, on costs of data collection and exchange, read as follows:

Article 10. Costs of data collection and exchange

1. Costs of the collection and exchange of data pursuant to article 8, paragraph 1, and article 9, paragraph 1, shall be borne by the State providing the data.

2. The requesting State shall bear the costs incurred by the requested State in fulfilling a request for special data, as defined in article 9, paragraph 2, and in making available data collected prior to:

(*a*) the entry into force of these articles for the contracting State requested, or

(*b*) the entry into force of the user agreement for the co-operating State requested.

3. User agreements may provide for different or additional cost provisions relating to the collection and exchange of data.

135. Paragraphs similar to paragraphs 1 and 2 of article 10 are standard provisions of many hydrological agreements. The Agreement concerning the utilization of the rapids of the Uruguay River in the Salto Grande area, concluded by Argentina and Uruguay in 1946,[156] is accompanied by an Additional Protocol,[157] article 3 of which provides that:

> The cost of the topographical and geological surveys and that of establishing and operating each meteorological station shall be borne by the respective Governments.

Article 9 of the 1956 Agreement between the Union of Soviet Socialist Republics and the People's Republic of China[158] specifies that:

> All expenses arising from the presence of Soviet specialists in Chinese territory and Chinese specialists in Soviet territory for the purposes indicated in Article 6 shall be borne by the sending Party.

The Agreement concerning the Niger River Commission and the navigation and transport on the River Niger[159] provides in its article 10 that:

> Any expenditure incurred in respect of special services rendered to a State by the Commission shall be paid by that State.

136. Paragraphs 1 and 2 of article 10 provide for apportionment of the costs of gathering and exchanging data in accordance with the following principle: a State's assumption of responsibility for the collection and dissemination of data under article 8, paragraph 1, and article 9, paragraph 1, gives rise to its obligation to assume the resultant expense; however, since some requests are of an extraordinary nature, it is provided that the costs of their fulfilment shall be borne by the requesting State. Finally, it remains possible for States to negotiate supplementary or alternate provisions on cost sharing through user agreements.

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[156] United Nations, *Treaty Series*, vol. 671, p. 17.

[157] *Ibid.*, p. 38.

[158] See footnote 132 above.

[159] See footnote 126 above.

DOCUMENT A/CN.4/324

Replies of Governments to the Commission's questionnaire

[*Original: English*]
[*13 July 1979*]

CONTENTS

INTRODUCTION

1. By paragraph 4(*e*) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.[1] Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add.1.[2]

2. By paragraph 5 of resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97.

4. At the thirtieth session of the Commission replies received to this note were issued in document A/CN.4/314.[3]

5. The present document contains an additional reply to the above-mentioned note received from the Government of Yugoslavia. It has been organized along the same lines as documents A/CN.4/294 and Add.1 and A/CN.4/314; that is, it contains the reply mentioned, giving first the general comments and observations and then the replies to the specific questions reproduced below.

6. The text of the questionnaire is as follows:

A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?

C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:

(*a*) Agricultural uses:
1. Irrigation;
2. Drainage;
3. Waste disposal;
4. Aquatic food production;

(*b*) Economic and commercial uses:
1. Energy production (hydroelectric, nuclear and mechanical);
2. Manufacturing;
3. Construction;
4. Transportation other than navigation;
5. Timber floating;
6. Waste disposal;
7. Extractive (mining, oil production, etc.);

(*c*) Domestic and social uses:
1. Consumptive (drinking, cooking, washing, laundry, etc.);
2. Waste disposal;
3. Recreational (swimming, sport, fishing, boating, etc.)?

E. Are there any other uses that should be included?

F. Should the Commission include flood control and erosion problems in its study?

G. Should the Commission take account in its study of the interaction between use for navigation and other uses?

H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

I. GENERAL COMMENTS AND OBSERVATIONS

Yugoslavia

[*Original: English*]
[*13 June 1979*]

Yugoslavia has concluded with neighbouring countries bilaterial intergovernmental agreements on the non-navigational uses of shared water resources. The principles and rules of conduct contained in these agreements proceed from the broad significance of principle which Yugoslavia attaches to good-neighbourly relations with other countries, and are related to the agreed procedure of mutual information and consultations as well as of the settlement of all questions of mutual interest through mutual agreement. The successful functioning of mixed commissions for water-economy established by Yugoslavia with the neighbouring countries falls within the same context.

II. REPLIES TO SPECIFIC QUESTIONS

Question A

What would be the appropriate scope of the definition of an international watercourse, in a study of

[1] *Yearbook... 1974*, vol. II (Part One), pp. 301–304, document A/9610/Rev.1.

[2] *Yearbook... 1976*, vol. II (Part One), pp. 147–183.

[3] *Yearbook... 1978*, vol. II (Part One), pp. 253–261.

the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

As regards the appropriate scope of the definition of the international watercourse, the thesis that it is applied to watercourses covering or flowing through or dividing two or more States is acceptable to us. In our opinion it would be useful to adopt a definition. However, in view of the differing opinions regarding this question, we consider that in order to save time it is not necessary to press for the elaboration of a definition in the United Nations International Law Commission.

Question B

Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?

Question C

Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

We hold the view that the geographical concept of an international drainage basin is not indispensable, and that it would be more recommendable to proceed in each concrete case from a concept which would take into account all the relevant aspects, including the geographical one, leaving the final solution to the option of the States concerned.

It would be useful, in our view, if the Commission dealt with the possibility of a legal examination of the adequate international standards for the quality of waters and the regime of their quantity, which States should adhere to in their mutual relations when waters flow from the territory of one State to the territory of the other.

Question D

Should the Commission adopt the following outline for fresh water uses as the basis of its study:

(a) *Agricultural uses:*
   1. *Irrigation;*
   2. *Drainage;*
   3. *Waste disposal;*
   4. *Aquatic food production;*

(b) *Economic and commercial uses:*
   1. *Energy production (hydroelectric, nuclear and mechanical);*
   2. *Manufacturing;*
   3. *Construction;*
   4. *Transportation other than navigation;*
   5. *Timber floating;*
   6. *Waste disposal;*
   7. *Extractive (mining, oil production, etc.);*

(c) *Domestic and social uses:*
   1. *Consumptive (drinking, cooking, washing, laundry, etc.);*
   2. *Waste disposal;*
   3. *Recreational (swimming, sport, fishing, boating, etc.)?*

Question E

Are there any other uses that should be included?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

The list of questions contained in the questionnaire is acceptable but not as a compulsory order for considerations.

We also consider that it should be recommended to the International Law Commission to dwell on the problem of inadequate use of watercourses, which may cause changes in the climate.

Question F

Should the Commission include flood control and erosion problems in its study?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

We uphold the inclusion in the mentioned study of the question of protection against flood and erosion. In this context, we feel that it would be useful to analyse simultaneously the interdependence of the maintenance of the quality and quantity of waters and the problem of afforestation and denudation.

Question G

Should the Commission take account in its study of the interaction between use for navigation and other uses?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

In preparing its study, the Commission should have in mind the interconnection of navigable and non-navigable aspects of the use of international water-

courses, taking account of the need for maintaining the appropriate water level for safe navigation.

Question H

Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

The Yugoslav Government attaches great importance to the question of pollution of international watercourses and, in this context, to the protection of the environment. However, we consider that a separate examination of pollution problems would not be practical. We are in favour of reviewing this problem simultaneously with the examination of the various forms of the use of these waters, as contained in the list under Question "D" of the questionnaire.

Question I

Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

Yugoslavia

[*Original: English*]
[*13 June 1979*]

The International Law Commission should, within financial possibilities, ensure adequate advisory assistance in the technical, scientific and economic spheres.

REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS (PARAGRAPH 2 OF GENERAL ASSEMBLY RESOLUTION 32/48)

[Agenda item 6]

DOCUMENT A/CN.4/325

Report of the Working Group on review of the multilateral treaty-making process*

[*Original: English*]
[*23 July 1979*]

CONTENTS

* The International Law Commission approved the Report of the Working Group at a private meeting held on 30 July 1979. At the 1580th meeting of the Commission, on 31 July 1979, the Chairman placed on record the decision of the Commission to approve the report and to transmit—in accordance with General Assembly resolution 32/48—its observations contained therein to the Secretary-General.

Introduction

i. By General Assembly resolution 32/48 of 8 December 1977, entitled "Review of the multilateral treaty-making process", the Secretary-General was requested "to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties". Also in that resolution, the Assembly, bearing in mind "the important contribution of the International Law Commission to the preparation of multilateral treaties during the past twenty-nine years", provided for participation of the Commission in the review in question. The Commission was invited, as were Governments, to submit its observations on the subject by 31 July 1979, for inclusion in the Secretary-General's report.

ii. Pursuant to that invitation, the Commission included in the agenda of its thirtieth session an item entitled "Review of the multilateral treaty-making process".[1] At its 1486th meeting, held on 25 May 1978, the Commission set up a Working Group composed of Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Frank X.J.C. Njenga, Mr. C.W. Pinto and Mr. Alexander Yankov, to consider preliminary questions raised by resolution 32/48 and to recommend to the Commission the action to be taken in response to the General Assembly's invitation.[2]

iii. At the meetings of the Working Group in 1978, there were exchanges of views as to the way in which the Commission could best respond to the invitation of the General Assembly. The Commission, at its 1526th meeting, on 26 July 1978, adopted the report of the Working Group and, as recommended by the Working Group, decided to include in its report to the General Assembly on the work done at the thirtieth session the paragraphs quoted below:

164. The Commission considers that a review of the multilateral treaty-making process constitutes a very important question and that such an endeavour requires serious consideration and thought. In the light of that fact, and of the role the Commission plays, pursuant to its Statute, in the progressive development of international law and its codification, the Commission welcomes the opportunity to make a contribution to the study of the question.

165. In accordance with General Assembly resolution 32/48, the Secretary-General's report is to be a factual report on the techniques and procedures used in multilateral treaty-making, primarily within the United Nations. It would take account of other treaty-making practices to the extent needed for purposes of comparison. The report would describe the various technical and procedural United Nations patterns in treaty-making so as to facilitate the assessment of their merits by the General Assembly.

166. It had been recognized, during discussion in the Sixth Committee of the General Assembly, that the International Law Commission's observations would necessarily be more in the nature of an appraisal. The Commission will wish to make a careful evaluation of its performance and potential. In so doing, the Commission will be greatly helped by past reports of its Planning Group and by its members' extensive experience in other treaty-making forums.

167. It has to be stressed that the Commission's productive capacity depends primarily upon two factors: first, the work that the Commission can accomplish during a 12-week annual session and the work that its members, particularly the Special Rapporteurs, can accomplish at other times of the year; secondly, the analysis of materials, selection of documentation and preparation of studies by the Codification Division of the Office of Legal Affairs in the sphere of work of the Commission on the various topics on its agenda . . .

168. Moreover, as was recognized during the debate on this question in the Sixth Committee of the General Assembly, an assessment of the technical and procedural aspects of treaty-making, as practised by the Commission, would have to be set in a wider context that took into account the subject-matter of the topics chosen for codification and progressive development. Indeed, a study of the process of selection of topics, and of the interplay between the work of the Commission and that of other treaty-making forums, should be one of the most interesting and constructive facets of the Commission's response to the General Assembly's invitation to furnish comments.

169. In the light of the foregoing considerations, the Commission approved the recommendations of the Working Group that the Group be reconstituted, taking into account as far as possible the need for continuity of membership, at the beginning of the Commission's thirty-first session, and that it be asked to present a final report to the Commission not later than 30 June 1979.[3]

iv. At the thirty-third session of the General Assembly, in the course of the consideration by the Sixth

[1] See *Yearbook . . . 1978*, vol. II (Part Two), p. 148, document A/33/10, para. 161.

[2] *Ibid.*, para. 162.

[3] *Ibid.*, paras. 164–169.

Committee of the Commission's report on the work of its thirtieth session, many representatives spoke on the preliminary observations made by the Commission on the topic of review of the multilateral treaty-making process. Their views were recorded in the report of the Sixth Committee as follows:

259. Several representatives noted favourably the preliminary observations which the Commission had submitted on the review of the multilateral treaty-making process. The hope was expressed that as the Commission itself expected[,] serious attention would be paid to this question during its next session in order to facilitate discussion on that topic at the thirty-fourth session of the General Assembly.

260. Certain representatives stressed the utmost importance of the role which the Commission had played and would play in the progressive development of international law and its codification. The view was expressed that in its self-evaluation of the treaty-making procedure, the Commission would no doubt wish to consider the law-making process, bearing in mind that the codification process could no longer be viewed as a function exclusively devoted to finding legal solutions based on precedents, and that it should also conform to the realities of international life. As progressive development of the law came more and more to the fore, the drafters of treaties could not be indifferent to the purpose to be served by the legal régimes they were preparing. It was necessary to test legal norms against the needs of the international community, searching for rules to reflect universal aspirations, many of which were as yet incompletely understood and only partly articulated. Reference was made in this connection to the long list of multilateral treaties that had not come into force for want of a minimum level of support. Mention was also made [of] the fact that there were treaties currently being drafted the elaboration of which had been entrusted to non-legal organs of the United Nations.[4]

v. At its thirty-first session, the Commission included in its agenda the item "Review of the multilateral treaty-making process", and at its 1546th meeting, on 6 June 1979, reconstituted the Working Group established at its previous session, with an enlarged membership. Accordingly, the Working Group was composed as follows: Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Frank X.J.C. Njenga, Mr. C.W. Pinto, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, Sir Francis Vallat and Mr. Alexander Yankov.

vi. The Working Group held five meetings between 13 June and 23 July 1979. An informal preparatory working paper compiled by the Secretariat entitled "The role of the United Nations International Law Commission in the multilateral treaty-making process" was considered by the Working Group at its first meetings. At its fourth meeting, the Working Group had before it another working paper, entitled "Draft report of the Working Group", submitted by its Chairman. At its fifth meeting, the Working Group adopted that working paper, together with some conclusions, as the report of the Working Group. The following report is submitted by the Working Group to the Commission for its consideration and approval.

[4] *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 259–260.

Observations of the International Law Commission on the review of the multilateral treaty-making process, submitted pursuant to General Assembly resolution 32/48

1. In accordance with General Assembly resolution 32/48 of 8 December 1977, the International Law Commission transmits for inclusion in the report on the techniques and procedures used in the elaboration of multilateral treaties to be prepared by the Secretary-General pursuant to that resolution its observations on the review of the multilateral treaty-making process.

2. Those observations are presented in nine sections, as follows:

A. The International Law Commission as a United Nations body;

B. Object and functions of the International Law Commission;

C. Programme of work of the International Law Commission;

D. Role of the International Law Commission and its contribution to the treaty-making process through the preparation of draft articles;

E. Consolidated methods and techniques of work of the International Law Commission as applied in general to the preparation of draft articles;

F. Other methods and techniques employed by the International Law Commission;

G. Relationship between the General Assembly and the International Law Commission;

H. Elaboration and conclusion of conventions on the basis of draft articles prepared by the International Law Commission following a General Assembly decision to that effect;

I. Conclusions.

A. The International Law Commission as a United Nations body

3. As a means of fulfilling the task entrusted to it under Article 13 (1) of the Charter of the United

Nations, the General Assembly, following the recommendations of the Committee on the Progressive Development of International Law and its Codification, by resolution 174 (II) or 21 November 1947 established the International Law Commission, to be constituted and to exercise its functions in accordance with the provisions of the Statute annexed thereto.[5]

4. The Commission is a permanent and part-time subsidiary organ of the General Assembly. In accordance with its Statute, it consists of 25 members who are persons of recognized competence in international law, elected for five years, in a manner such as to assure representation in the Commission as a whole of the main forms of civilization and of the principal legal systems of the world. The members of the Commission sit in their individual capacity and not as representatives of Governments.

5. Members of the Commission are elected by the General Assembly from a list of candidates nominated by States Members of the United Nations. Casual vacancies are filled by the Commission itself, having regard to the same provisions originally addressed to the General Assembly concerning qualifications. The Commission's members are eligible for re-election.

6. The Commission sits at the Office of the United Nations of Geneva, as provided in article 12 of its Statute. Under present arrangements, the Commission annually holds a 12-week session in the spring and early summer. At each session, the Commission elects the five officers who constitute the Bureau of the session: the Chairman, First and Second-Chairmen, Chairman of the Drafting Committee and Rapporteur. These officers, plus former Chairmen of the Commission and the Special Rapporteurs, constitute the Enlarged Bureau of any given session. The practice has developed that, on the recommendation of the Enlarged Bureau, the Commission sets up for a particular session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Commission appoints at each session a Drafting Committee.[6] Also, subcommittees or working groups may be established for the performance of specific tasks entrusted to them by the Commission.[7]

7. At the beginning of each session, the Commission adopts the agenda for the session. The provisional agenda is prepared by the Secretariat on the basis of the relevant decisions of the General Assembly and the Commission and the pertinent provisions of the Statute. The order in which items are listed in the agenda adopted does not necessarily determine their actual order of consideration by the Commission, the latter being rather a result of *ad hoc* decisions. The agenda of a given session is to be distinguished from the Commission's programme of work, which is established as indicated below.[8] Not every topic on the programme of work of the Commission is necessarily included in the agenda of a particular session.

8. At its first session in 1949, the Commission decided that the rules referred to in rule 161 (establishment and rules of procedure of subsidiary organs) of the General Assembly Rules of Procedure would be provisionally applicable to the Commission and that it would, if need arose, draft its own rules of procedure.[9] Accordingly, rule 125 of the Rules of Procedure of the General Assembly, which provides that decisions of committees shall be made by a majority of the members present and voting, applies to the proceedings of the Commission. However, over the years the Commission has increasingly taken decisions on both substantive and procedural matters without a vote, by common understanding or consensus.

The Commission holds its plenary meetings in public unless it decides otherwise, in particular when dealing with certain organizational or administrative matters. Summary records of the public meetings are issued provisionally for participants only, and after Commission members have had the opportunity to correct the provisional versions, are subsequently printed in final form in volume I of the *Yearbook of the International Law Commission*, a United Nations publication.

9. According to article 14 of the Commission's Statute, "the Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfil its task". The Codification Division of the Office of Legal Affairs of the United Nations has, as one of its main functions, that of providing the secretariat for the Commission. In order to facilitate the work of the Commission and its Special Rapporteurs, the Codification Division prepares studies, research projects, surveys and complilations on general questions relating to the progressive development of international law and its codification, as well as on particular topics on the programme of work of the Commission or aspects thereof. Published studies, research projects and surveys prepared by the Codification Division for the Commission are issued as documents of the Commission and printed in volume II of the *Yearbook of the International Law*

[5] A general introduction to the Commission and its work is given by the publication entitled *The Work of the International Law Commission* (United Nations publication, Sales No. E.80.V.11). The publication includes an account of the organization, programme and methods of work of the Commission, as well as brief descriptions of the various topics of international law the Commission has dealt with. It also gives an account of the actions decided upon by the General Assembly following the consideration of those topics by the Commission and of the results achieved by diplomatic conferences or the Assembly itself when considering draft articles prepared by the Commission.

[6] See paras. 45–46 below.

[7] See para. 37 below.

[8] See paras. 20–23 below.

[9] See *Yearbook... 1949*, pp. 10–11, 1st meeting, para. 18.

Commission. The Codification Division also publishes, for the assistance of the Commission, the United Nations Legislative Series, each volume of the Series being a compilation of laws, decrees, treaty provisions and other relevant materials concerning a specific topic, as well as the series entitled *Reports of International Arbitral Awards*, an annotated collection of texts of arbitral awards.[10]

B. Object and functions of the Commission

10. Article 1, paragraph 1, of the Statute of the Commission provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". Paragraph 2 of the same article states that the Commission "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law".[11] The Commission has therefore been invested by the General Assembly with general permanent functions in its own field of activity, as defined by its Statute, occupying in that respect a central position within the United Nations system in the task of assisting the General Assembly in the promotion of the progressive development of international law and its codification.

11. Other subsidiary organs set up within the United Nations have also been entrusted with functions aimed at or resulting in the promotion of the progressive development of international law and its codification by the United Nations. The United Nations Commission on International Trade Law (UNCITRAL), the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space and the Commission on Human Rights could be mentioned as examples of bodies established on a permanent basis and dealing with questions of international law or matters relevant thereto.

Special or *ad hoc* committees set up by the General Assembly are also frequently entrusted with functions having or presenting an interest for the promotion of the progressive development of international law and its codification. The work done by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and the Special Committee on the Question of Defining Aggression could be singled out in that context. Other special or *ad hoc* committees, such as the *Ad Hoc* Committee on International Terrorism, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages and the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, are engaged in work which may also result in furthering the development of international law and its codification. A point common to all the above-mentioned permanent or *ad hoc* bodies is that their contributions to the progressive development of international law and its codification take place in specific fields as defined in their mandates. Article 18 of the Statute of the Commission provides that it shall "survey the whole field of international law with a view to selecting topics for codification". Moreover, in the course of the years, the General Assembly has referred to the Commission for consideration topics belonging to various fields of international law.[12]

12. The functions of the Commission are set out in Chapter II of its Statute.[13] The opening article of that chapter, article 15, makes a distinction "for convenience" between the expressions "progressive development" (as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States") and "codification" (as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine"). Having made such a distinction, the Statute enumerates separately the methods to be followed by the Commission, on the one hand with regard to the progressive development of international law, and on the other with regard to the codification of international law. The general method for the progressive development of international law is provided in article 16 of the Statute. Provision is made in article 17 for a specific method with respect to the progressive development of international law in certain cases. The method for the codification of international law is outlined in articles 18 to 23 of the Statute.

13. In practice, however, the functions performed by the Commission proved not to require a method for "codification" and another for "progressive development", the draft articles prepared on particular topics incorporating and combining elements of both *lex lata* and *lex ferenda*. When submitting its final draft articles on the *law of the sea* to the General Assembly in 1956, the Commission made the following observations to that effect:

25. When the International Law Commission was set up, it was thought that the Commission's work might have two different aspects: on the one hand the "codification of international law"

[10] At its first two sessions, the Commission, pursuant to article 24 of its Statute, considered ways and means for making the evidence of customary international law more readily available and made recommendations thereon to the General Assembly. The publications entrusted to the Codification Division referred to above had their origin in the said recommendations of the Commission and in actions taken by the General Assembly.

[11] During its first thirty-one sessions, however, the Commission, with the endorsement of the General Assembly, has worked almost exclusively in the field of public international law.

[12] See para. 21 below.

[13] Reproduced as an annex to this document.

or, in the words of article 15 of the Commission's Statute, "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine"; and on the other hand, the "progressive development of international law" or "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".

26. In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.

27. In these circumstances, in order to give effect to the project as a whole, it will be necessary to have recourse to conventional means.[14]

14. Another statement underlining the close inter-relationship between "codification" and "progressive development" in the Commission's work may be found in the following general considerations made by the Commission when submitting to the General Assembly its final draft articles on *consular relations:*

29. The codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason, the Commission agreed, in accordance with the Special Rapporteur's proposal, to base its draft articles not only on customary international law, but also on the material furnished by international conventions, especially consular conventions.

30. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which, if incorporated in a draft codification, may be expected to obtain the support of many States.

31. If it should not prove possible, on the basis of the two sources mentioned—conventions and customary law—to settle all controversial and obscure points, or if there remain gaps, it will be necessary to have recourse to the practice of States as evidenced by internal regulations concerning the organization of the consular service and the status of foreign consuls, in so far, of course, as these are in conformity with the fundamental principles of international law.

32. It follows from what has been said that the Commission's work on this subject is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's statute. The draft to be prepared by the Commission is described by the Special Rapporteur in his report in these words:

> "A draft set of articles prepared by that method will therefore entail codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."[15]

15. In connection with its most recent final draft articles, the Commission reiterated its observations regarding the incorporation into the draft articles in question of elements of both "codification" and "progressive development":

Law of treaties (1966)

The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.[16]

Special missions (1967)

In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.[17]

Representation of States in their relations with international organizations (1971)

The Commission's work on the representation of States in their relations with international organizations constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.[18]

Succession of States in respect of treaties (1974)

The Commission's work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.[19]

Most-favoured-nation clauses (1978)

... the Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the

[14] *Yearbook ... 1956*, vol. II, pp. 255–256, document A/3159, paras. 25–27.

[15] *Yearbook ... 1961*, vol. II, p. 91, document A/4843, paras. 29–32.

[16] *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, Part II, para. 35.

[17] *Yearbook ... 1967*, vol. II, p. 346, document A/6709/Rev.1, para. 23.

[18] *Yearbook ... 1971*, vol. II (Part One), p. 283, document A/8410/Rev.1, para. 50.

[19] *Yearbook ... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, para. 83.

Commission's Statute. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.[20]

16. As a consequence of the considerations discussed in the preceding paragraphs, the distinction made "for convenience" in the Statute between the method applicable to "progressive development" and the method applicable to "codification" has not been strictly maintained in the practice of the Commission. Actually a consolidated procedure based on the relevant provisions of the Statute has evolved, the Commission devising the most adequate and effective method and form of identifying and embodying the rules of international law relating to a given topic—draft articles prepared in a form to render them capable of serving as a basis for the conclusion of an international convention, should this be decided upon in an appropriate way. Similarities in the Statute between the methods it provides for "progressive development" and for "codification" have, on the other hand, facilitated the development of the consolidated procedure. The achievements of the Commission so far, the authority attached to its work, and the high degree of support and acceptability that its draft articles receive in the Sixth Committee of the General Assembly and in conferences of plenipotentiaries are the best proof of the merits of the consolidated method followed by the Commission. It must also be added that the Commission had applied that method in a flexible manner, making, within the general framework provided for by it, the adjustments that the specific features of the topic concerned or other circumstances demand. Moreover, the Commission has constantly under review its methods and techniques of work, as requested by the General Assembly,[21] taking into account the comments or suggestions made in that respect in the Sixth Committee or in the Commission itself with a view to speeding-up or streamlining its procedure to respond more readily to the tasks entrusted to it.

17. Governments have an important role in every stage of the work of codification and progressive development carried out by the Commission. Individually, they furnish information at the outset of the Commission's work and comment upon its drafts, and collectively, through the General Assembly, they decide sometimes upon the initiation or priority of the work and always upon its outcome. The Statute of the Commission contains provisions designed to give Governments an opportunity to make their views known at each stage of the Commission's work. Thus, with regard to progressive development, article 16 (*c*) requires the Commission, at the outset of its work, to circulate a questionnaire to Governments inviting them to supply data and information relevant to items included in the plan of work, and article 16 (*g*) requires the publication of a Commission document containing its drafts along with explanations, supporting materials and the information supplied by Governments in reply to the questionnaire. Under article 16 (*h*) and (*i*), Governments are then invited to submit comments on this document, and these must be taken into consideration by the Commission in preparing its final drafts. Similar provisions appear also in regard to codification in articles 19, 21 and 22.

18. Moreover, although the Statute of the Commission is silent on the matter, the Commission has from its first session submitted to the General Assembly a report on the work done at each of its sessions. The well-established practice of annually considering the Commission's reports in the Sixth Committee has facilitated the development of the existing relationship between the General Assembly and the Commission. The Sixth Committee has indicated broad policy guidelines when assigning topics to the Commission or when giving priority to some topics, and has exercised its judgement as to action in regard to the Commission's final drafts and recommendations. The policy supervision of the Sixth Committee, however, has tended to be exercised with great restraint. The fact that the Commission is a subsidiary organ of the General Assembly has not prevented wide acceptance in the Sixth Committee of the view that the Commission should have a substantial degree of autonomy in the exercise of its own functions and that it should not be subject to detailed directives from the Assembly. On the other hand, at each of its sessions the Commission takes fully into consideration the recommendations addressed to it by the General Assembly and the observations made in the Sixth Committee in connection with the Commission's work in general or its specific drafts.

19. Working independently, although in close contact with States through the Sixth Committee of the General Assembly and the procedure of written comments, the Commission is enabled to formulate texts embodying an objective determination of the legal rules governing the particular area of international relations concerned as well as taking into account the different trends existing today in the principal legal systems of the world, so as to facilitate the progressive development of international law in a coherent manner and in accordance with the current interests, structures and needs of the international community as a whole. In this connection it should be noted that, in accordance with article 26 of its Statute, the Commission has established and maintained a permanent relationship of co-operation with regional legal bodies such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission for International Law.

[20] *Yearbook ... 1978*, vol II (Part Two), p. 16, document A/33/10, para. 72.

[21] See, for example, General Assembly resolutions 31/97 of 15 December 1976, 32/151 of 19 December 1977 and 33/139 of 19 December 1978.

C. Programme of work of the International Law Commission

20. At its first session, in 1949, the Commission reviewed, pursuant to the relevant provisions of its Statute and on the basis of a Secretariat memorandum entitled *Survey of international law in relation to the work of codification of the International Law Commission*,[22] 25 topics for possible inclusion in a list of topics for study. Following its consideration of the matter, the Commission drew up a provisional list of 14 topics selected for codification,[23] as follows:

(1) Recognition of States and Governments;
(2) Succession of States and Governments;
(3) Jurisdictional immunities of States and their property;
(4) Jurisdiction with regard to crimes committed outside national territory;
(5) Regime of the high seas;
(6) Regime of territorial waters;
(7) Nationality, including statelessness;
(8) Treatment of aliens;
(9) Right of asylum;
(10) Law of treaties;
(11) Diplomatic intercourse and immunities;
(12) Consular intercourse and immunities;
(13) State responsibility;
(14) Arbitral procedure.[24]

21. It was understood that the foregoing list of topics was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.[25] By its resolution 373 (IV) of 6 December 1949, the General Assembly approved part I of the Commission's report covering its first session, which included the list of topics provisionally selected by the Commission for codification. Since 1949, the General Assembly has referred to the Commission for study, in some cases following an earlier initiative of the Commission itself, the following topics or items:

Draft Declaration on Rights and Duties of States;
Formulation of the Nürnberg principles;
Question of international criminal jurisdiction;
Reservations to multilateral conventions;
Question of defining aggression;
Draft Code of Offences against the Peace and Security of Mankind;
Relations between States and international organizations;
Juridical regime of historic waters, including historic bays;
Special missions;
Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations;
Most-favoured-nation clause;
Question of treaties concluded between States and international organizations or between two or more international organizations;
The law of the non-navigational uses of international watercourses;
Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law;
International liability for injurious consequences arising out of acts not prohibited by international law;
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier;
Review of the multilateral treaty-making process.

In several cases, topics listed above have been referred by the General Assembly to the Commission, becoming new or separate topics on its programme of work, following consideration by the Commission of the parent topic included in the 1949 list. Such was the case, for instance, with respect to topics such as relations between States and international organizations (General Assembly resolution 1289 (XIII) of 5 December 1958), judicial regime of historic waters, including historic bays (General Assembly resolution 1453 (XIV) of 7 December 1959), special missions (General Assembly resolution 1687 (XVI) of 18 December 1961), the most-favoured-nation clause (General Assembly resolution 2272 (XXII) of 1 December 1967), question of treaties concluded between States and international organizations or between two or more international organizations (General Assembly resolution 2501 (XXIV) of 12 November 1969) and international liability for injurious consequences arising out of acts not prohibited by international law (General Assembly resolution 3071 (XXVIII) of 30 November 1973). In some of those cases, the General Assembly's recommendation followed its consideration of a resolution previously adopted to that effect in a codification conference of plenipotentiaries: juridical regime of historic waters, including historic bays; special missions; and question of treaties concluded between States and international

[22] United Nations publication, Sales No. 1948.V.I (I).

[23] The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration (*Yearbook ... 1949*, p. 280, document A/CN.4/13, para. 14).

[24] *Ibid.*, p. 281, para. 16. The eleven topics not selected by the Commission were the following: subjects of international law; sources of international law; obligations of international law in relation to the law of States; fundamental rights and duties of States; domestic jurisdiction; recognition of acts of foreign States; obligations of territorial jurisdiction; territorial domain of States; pacific settlement of international disputes; extradition; laws of war (*ibid.*, pp. 280–281, para. 15).

[25] In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission grouped together systematically all the rules it had adopted concerning the "regime of the high seas" and the "regime of territorial waters" (two topics included in the 1949 list) with those which it had earlier elaborated regarding the continental shelf, the contiguous zone and the conservation of the living resources of the sea in a single final consolidated draft entitled "Articles concerning the law of the sea" (*Yearbook ... 1956*, vol. II, pp. 256 *et seq.*, document A/3159, chap. II, sect. II).

organizations or between two or more international organizations. In other instances, the referral of a topic by the General Assembly to the Commission was made quite independently of previous work of the Commission on a parent topic or of a resolution adopted by a codification conference. This was the case, for example, with regard to topics such as the law of the non-navigational uses of international watercourses (resolution 2669 (XXV) of 8 December 1970); question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (resolution 2780 (XXVI) of 3 December 1971) and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (resolutions 31/76 of 13 December 1976 and 33/139 and 33/140 of 19 December 1978).

22. The topics or items referred by the General Assembly to the Commission, together with those on the 1949 list, have constituted the Commission's total programme of work at any one time.[26] The inclusion of a topic or item in the programme of work of the Commission does not necessarily imply, however, its immediate study by the Commission. Actual consideration by the Commission of a topic or item on its programme results, rather, from further decisions of the General Assembly and of the Commission as to the priority to be given to the study of the topic or item concerned. Topics or items selected for priority consideration constitute, while under study, "the current programme of work" of the Commission.

23. The programme of work has been reviewed from time to time by the Commission with a view to bringing it up to date, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics which are no longer suitable for treatment. Such a review has sometimes taken place at the request of the General Assembly. In 1962, for example, the Commission considered its future programme of work pursuant to General Assembly resolution 1686 (XVI) of 18 December 1961, which contained, *inter alia*, a recommendation to the Commission to that effect. The resolution had been adopted by the General Assembly in the context of an item entitled "Future work in the field of the codification and progressive development of international law", discussed in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly. Another overall review of the Commission's programme of work took place in the Commission in 1973, on the basis of a working paper entitled "Survey of International Law" prepared by the Secretary-General in 1971.[27] In recent years, the Enlarged Bureau of the Commission and its Planning Group have sometimes been entrusted with the task of making recommendations relating to the Commission's current programme of work going beyond the organization of work of the forthcoming session of the Commission. It was, for example, on the basis of recommendations made by the Enlarged Bureau and its Planning Group that the Commission concluded, in 1977, that it was advisable to place on its active or current programme the topic on the 1949 list entitled "Jurisdictional immunities of States and their property" as well as the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" included in 1974 as a separate topic on the programme of work of the Commission, pursuant to General Assembly resolution 3071 (XXVIII) of 30 November 1973.[28] On the same occasion the Commission agreed that two topics on its programme of work, namely the "Right of asylum" and the "Juridical regime of historic waters, including historic bays", did not appear to require active consideration by the Commission in the near future.[29] In its resolution 32/151 of 19 December 1977, the General Assembly invited the Commission to commence work on the topics "Jurisdictional immunities of States and their property" and "International liability for injurious consequences arising out of acts not prohibited by international law".

D. Role of the Commission and its contribution to the treaty-making process through the preparation of draft articles

24. With the ever-increasing importance of treaties as a source of international law and their fundamental role in the history of international relations, an importance and role acknowledged in the preamble of the Vienna Convention on the Law of Treaties,[30] the conclusion of multilateral agreements has become the main device in the legal regulation of relations between States. The process of progressive development of international law and its codification could not but follow such a general trend. Thus, in exercising the functions attributed to it by Article 13, paragraph 1 (*a*), of the Charter of the United Nations, the General Assembly has increasingly called for the conclusion of multilateral treaties as a means of promoting the progressive development of international law and its

[26] A topic the Commission considered but which was not included in the 1949 list or referred to it by the General Assembly was "Ways and means for making the evidence of customary law more readily available". This topic was considered by the Commission on the basis of article 24 of its Statute.

[27] *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

[28] *Yearbook ... 1977*, vol. II (Part Two), document A/32/10, paras. 108 and 110.

[29] *Ibid.*, para. 109.

[30] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

codification and recommended that articles prepared by the Commission serve as a basis for the conclusion of codification conventions. As a result the preparation of draft articles by the International Law Commission, a primary task inherent in its functions, has become an undertaking frequently leading to the elaboration of multilateral treaties, constituting to that extent part and parcel of the contemporary multilateral treaty-making process.

25. The contribution of the Commission to the multilateral treaty-making process is, however, determined not only by its object (the promotion of the progressive development of international law and its codification), but also by the specific tasks entrusted to the Commission by its Statute. It is not for the Commission to elaborate multilateral treaties or conventions, but rather to prepare drafts susceptible of providing a basis for the elaboration of such treaties or conventions by States, should the General Assembly decide to make a recommendation to that effect. The contribution of the Commission to the treaty-making process in the sense indicated, namely through the preparation of draft articles, is, on the other hand, expressly recognized in the Statute of the Commission in connection with the progressive development of international law as well as with its codification. Thus article 15 of the Statute states that the expression "progressive development of international law" is used for convenience as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law". Furthermore, according to article 17 of its Statute, the Commission "shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General". As regards the codification of international law, article 23 of the Statute empowers the Commission to recommend to the General Assembly that it recommend Commission drafts to States with a view to the conclusion of a convention or that a conference be convened to conclude a convention.

26. The record of Commission activities over more than thirty years of its existence includes several drafts prepared by the Commission on the basis of which important multilateral conventions have been concluded, testifying to the progressive development of international law and its codification in the respective fields. Those conventions, and their related instruments, are the following:

Conventions on the Law of the Sea and Optional Protocol (1958)
- Convention on the Continental Shelf
- Convention on Fishing and Conservation of the Living Resources of the High Seas
- Convention on the High Seas
- Convention on the Territorial Sea and the Contiguous Zone
- Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes

Convention on the Reduction of Statelessness (1961)

Vienna Convention on Diplomatic Relations and Optional Protocols (1961)
- Vienna Convention on Diplomatic Relations
- Optional Protocol concerning Acquisition of Nationality
- Optional Protocol concerning the Compulsory Settlement of Disputes

Vienna Convention on Consular Relations and Optional Protocols (1963)
- Vienna Convention on Consular Relations
- Optional Protocol concerning Acquisition of Nationality
- Optional Protocol concerning the Compulsory Settlement of Disputes

Convention on Special Missions and Optional Protocol (1969)
- Convention on Special Missions
- Optional Protocol concerning the Compulsory Settlement of Disputes

Vienna Convention on the Law of Treaties (1969)

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)

Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975)

Vienna Convention on Succession of States in Respect of Treaties (1978)

27. The four conventions on the Law of the Sea of 1958, the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on Succession of States in Respect of Treaties of 1978 were all elaborated on the basis of draft articles prepared by the Commission as a result of the study of topics included in the list of topics selected by the Commission for codification in 1949.[31] The three other conventions listed in the preceding paragraph—the Convention on Special Missions of 1969, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975—were elaborated on the basis of draft articles prepared by the Commission following the study of topics in addition to those contained in the 1949 list.

28. The Convention on Special Missions, for example, originated from an initiative taken by the Commission when submitting its final draft articles on diplomatic intercourse and immunities to the General Assembly in 1958. In the introduction to the said draft articles, the Commission singled out the problem of "*ad hoc* diplomacy" covering, *inter alia*, special missions sent to a State for limited purposes. In 1960, it adopted three draft articles constituting a pre-

[31] See para. 20 above.

liminary survey of the subject-matter, which were referred by General Assembly resolution 1504 (XV) of 12 December 1960 to the United Nations Conference on Diplomatic Intercourse and Immunities, to be considered by it together with the draft articles adopted by the Commission on diplomatic intercourse and immunities. Following a recommendation of the Conference that the General Assembly refer the subject of special missions to the Commission for further study "in the light of the Vienna Convention on Diplomatic Relations", the General Assembly, in resolution 1687 (XVI) of 18 December 1961, requested the Commission to do so and to report back to the General Assembly. Pursuant to that request, the Commission prepared draft articles on the topic and submitted them to the General Assembly in 1967 with a recommendation that appropriate measures be taken "for the conclusion of a convention on special missions".[32] The General Assembly, in its resolution 2273 (XXII) of 1 December 1967, included an item entitled "Draft Convention on Special Missions" in the agenda of its 1968 and 1969 sessions "with a view to the adoption of such a convention by the General Assembly". At its twenty-fourth session, the Assembly completed the elaboration of the convention and adopted it by resolution 2530 (XXIV) of 8 December 1969.

29. The topic "Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law" was brought to the attention of the General Assembly in 1971 by the Commission. By its resolution 2780 (XXVI) of 3 December 1971, the General Assembly requested the Commission to study the topic in question as soon as possible, in the light of the comments of Member States, with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly. Pursuant to this request, the Commission prepared the draft articles in 1972, on the basis of which the General Assembly elaborated the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which it adopted by resolution 3166 (XXVIII) of 14 December 1973.

30. The topic "Relations between States and intergovernmental organizations" was included in the programme of work of the Commission in accordance with a request made by the General Assembly in resolution 1289 (XIII) of 5 December 1958, following a reference to the question made by the Commission in the report it submitted to the Assembly at that time. By its resolution 2780 (XXVI) of 3 December 1971, the General Assembly expressed its desire that an international convention be elaborated and concluded expeditiously on the basis of the draft articles on the first part of the topic adopted by the Commission in 1971 (Representation of States in their Relations with International Organizations) and in the light of the comments and observations submitted in accordance with that resolution. By its resolutions 2966 (XXVII) of 14 December 1972, and 3072 (XXVIII) of 30 November 1973, the General Assembly made arrangements for the convening of an international conference. The Conference met in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

31. The record of codification conventions concluded on the basis of draft articles prepared by the Commission prompted the General Assembly, on the occasion of the twenty-fifth anniversary of the United Nations, to express in its resolution 2634 (XXV) of 12 November 1970 its profound gratitude to the Commission "for its outstanding contribution to the achievements of the Organization during this period, particularly through the preparation of drafts which have served as basis for the adoption of important codification conventions". In addition to the codification conventions already concluded on the basis of draft articles it had prepared, the Commission, in 1978, adopted its final draft articles on most-favoured-nation clauses and submitted them to the General Assembly with a recommendation that the draft "should be recommended to Member States with a view to the conclusion of a convention on the subject".[33] Topics on the 1949 list or added subsequently to the programme of work of the Commission by actions taken by the General Assembly and by the Commission, or aspects thereof, currently under study in the Commission might eventually result in, if so decided by the General Assembly and States, the adoption of new codification conventions in a relatively near future. Those topics are: State responsibility; Succession of States in respect of matters other than treaties; question of treaties concluded between States and international organizations or between two or more international organizations; the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; the law of the non-navigational uses of international watercourses; jurisdictional immunities of States and their property; international liability for injurious consequences arising out of acts not prohibited by international law; and relations between States and international organizations (second part of the topic). Sets of draft articles on State responsibility for internationally wrongful acts, succession of States in matters other than treaties, and treaties concluded between States and international organizations or between international organizations are already in an advanced stage of preparation within the Commission. Moreover, the General Assembly, in

[32] *Yearbook ... 1967*, vol. II, p. 347, document A/6709/Rev.1, para. 33.

[33] *Yearbook ... 1978*, vol. II (Part Two), p. 16, document A/33/10, para. 73.

its resolution 33/139 of 19 December 1978, has recommended that the Commission should continue the study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made or to be submitted by Governments "with a view to the possible elaboration of an appropriate legal instrument".

32. It should further be recalled that contributions of the Commission to the multilateral treaty-making process may also result from the consideration of proposals and draft multilateral conventions submitted to it pursuant to article 17 of its Statute, by, *inter alia*, principal organs of the United Nations other than the General Assembly.

At its second and third sessions, in 1950 and 1951, the Commission was notified of resolutions adopted by the Economic and Social Council of the United Nations (resolutions 304 D (XI) of 17 July 1950 and 319 B III (XI) of 11 August 1950), in which the Council requested the Commission to deal with two subjects: the nationality of married women and the elimination of statelessness. The Commission dealt with these subjects in connection with the comprehensive topic of "nationality, including statelessness", which had already been selected for codification by the Commission in 1949. The Special Rapporteur for the topic "nationality, including statelessness" prepared, in 1952, a draft convention on the nationality of married persons. The Commission decided, however, that the question of the nationality of married women could only be considered "in the context, and as an integral part, of the whole subject of nationality including statelessness" and did not therefore take further action with regard to the draft. Thereafter the question of the nationality of married women was considered by other United Nations organs, including the Commission on the Status of Women, culminating in the adoption on 29 January 1957 of the Convention on the Nationality of Married Women.

In 1953, at its fifth session, the Commission on the basis of draft conventions prepared by the Special Rapporteur on the topic, adopted on first reading a draft Convention on the Elimination of Future Statelessness and a draft Convention on the Reduction of Future Statelessness and invited Governments to submit their comments thereon. The Economic and Social Council approved the principles of the two draft conventions by its resolution 526 B (XVII) of 26 April 1954. The Commission then revised the two draft conventions, in the light of the comments received from Governments, and in 1954 submitted its final texts of the two draft conventions to the General Assembly. The General Assembly, in resolution 896 (IX) of 4 December 1954, expressed its desire that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States had communicated to the Secretary-General their willingness to co-operate in such a conference. The United Nations Conference on the Elimination or Reduction of Future Statelessness met in 1959 and 1961, and on 30 August 1961 adopted the Convention on the Reduction of Statelessness.

33. Lastly, it should be pointed out that the contribution of the Commission to the multilateral treaty-making process has not been confined to the preparation of draft articles that have served as a basis for the conclusion of codification conventions in particular topics of international law. In preparing its 1966 draft articles on the law of treaties, which served as a basis for the conclusion of the Vienna Convention on the Law of Treaties of 1969, the Commission made a contribution to the codification and development of the very rules of treaty-making. The convention embodies, *inter alia*, a number of rules of direct relevance to the treaty-making process, particularly those in Part II, which sets out the rules governing the conclusion and entry into force of treaties.[34] The results of the work of the Commission on another topic which was on the 1949 list, arbitral procedure, may in some way also be considered as being relevant to treaty-making, both multilateral and bilateral. The Commission prepared in 1958 a set of draft articles entitled "Model Rules on Arbitral Procedure" which, according to the comments contained in the report of the Commission, would have no binding effect on States unless accepted by them and save to the extent that each one is accepted by them in conventions of arbitration or in a *compromis*. Having taken note of the Commission's comments and the relevant chapter of its report, the General Assembly, in its resolution 1262 (XIII) of 14 November 1958, brought the draft articles on arbitral procedure "to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or *compromis*."[35]

E. Consolidated methods and techniques of work of the Commission as applied in general to the preparation of draft articles

34. The methods and techniques followed by the Commission as applied to the preparation of draft articles are based on the provisions embodied in its Statute as well as on the arrangements governing its sessions. The object, functions and composition of the Commission as well as the established procedural stages for codifying and progressively developing a given topic have a direct bearing on such methods and techniques. However, out of the need to incorporate

[34] Part II of the draft articles on treaties concluded between States and international organizations or between international organizations, currently under preparation, also sets out rules governing the conclusion and entry into force of the treaties falling within the scope of the draft articles.

[35] It may be recalled that originally the Commission, at its fifth session (1953), adopted a draft convention on arbitral procedure. See para. 80 below.

elements of both *lex lata* and *lex ferenda* in the rules to be formulated, the Commission, as indicated above,[36] follows generally speaking a consolidated system of methods and techniques which incorporates the various elements set forth in articles 16 to 23 of its Statute.

35. Three main stages in the consideration of a given topic may be distinguished within the consolidated method followed by the Commission: a first preliminary stage, devoted mainly to the organization and planning of the work, the appointment of a Special Rapporteur and the gathering of relevant materials; a second stage, during which the Commission carries out the first reading of the draft articles submitted by the Special Rapporteur; a third and final stage, devoted to a second reading of the provisionally adopted draft articles in the light of the comments and observations made by Governments, as well as intergovernmental organizations concerned when appropriate. The role performed by the Special Rapporteur is of paramount importance, particularly during the second and third stages referred to above. The work done by the Drafting Committee during those stages is also essential. The Secretariat is also entrusted with various tasks and is frequently called upon to make contributions, especially during the preliminary and second stages.

1. Preliminary stage of the consideration of a topic

(a) *Plan of work on a topic selected for consideration and appointment of a Special Rapporteur*

36. After the decision has been taken to undertake work on a topic already placed on its programme of work, the Commission engages in a discussion as to when and how to deal with it. This discussion normally results in the appointment of a Special Rapporteur for the topic in question. A discussion on the plan of work on a topic may also take place when, notwithstanding a previous study of the topic, it is decided that its codification should be approached *ex novo* or differently.

37. On a number of occasions, the initial appointment or the replacement of a Special Rapporteur has been preceded by the assignment of the topic to a sub-committee or working group for examination and establishment of a plan of work. For example, in 1962, the Commission appointed sub-committees on State responsibility and on the succession of States and Governments. At its 1963 session, the Commission approved the conclusions and recommendations, including a plan of work, set out in the report of each sub-committee and thereafter appointed Special Rapporteurs for the two topics.[37] The appointment of a Special Rapporteur has also been preceded by the referral of the topic to a sub-committee or working group on the following topics under current consideration: the question of treaties concluded between States and international organizations or between two or more international organizations;[38] the law of the non-navigational uses of international watercourses;[39] jurisdictional immunities of States and their property;[40] and international liability for injurious consequences arising out of acts not prohibited by international law.[41] In all the cases referred to in the present paragraph, those members of the Commission who had served as chairmen of the sub-committees or working groups concerned were appointed Special Rapporteurs for the respective topics after the Commission had approved the conclusions and recommendations set out in the reports of those bodies. Members of sub-committees or working groups are frequently requested to submit written contributions, in the form of memoranda or working papers, in order to facilitate the work of such sub-committees or working groups.[42]

38. New arrangements for dealing with a topic which has been the subject of an earlier plan of work may be made by the Commission when, upon reflection, it seems appropriate to do so. For example, in 1963 a Special Rapporteur was appointed for the three aspects of the topic "Succession of States and Governments" identified by the Commission following the report of the Sub-committee on Succession of States and Governments. However, in 1967, two of the three aspects of that topic were assigned each to a Special Rapporteur, in order to advance the study of the topic more rapidly. The third aspect was left aside for the time being, without having been so assigned. This re-arrangement of the original plan greatly facilitated the finalization by the Commission, in 1974, of the

[36] Paras. 13 *et seq.*

[37] See *Yearbook ... 1963*, vol. II, pp. 223–225, document A/5509, paras. 51–61, and *ibid.*, pp. 227 and 260, annexes I and II.

[38] *Yearbook ... 1971*, vol. II (Part One), pp. 347–348 document A/8410/Rev.1, paras. 114–118.

[39] *Yearbook ... 1974*, vol. II (Part One), pp. 300–301 document A/9610/Rev.1, paras. 146–159.

[40] *Yearbook ... 1978*, vol. II (Part Two), pp. 152–153 document A/33/10, paras. 179–190.

[41] *Ibid.*, pp. 149–150, document A/33/10, paras. 170–178, and chap. VIII, sect. C, annex.

[42] Thus, for example, members of the Sub-committees on State responsibility and on succession of States and Governments submitted memoranda and working papers printed in the Yearbook of the Commission (*Yearbook ... 1963*, vol. II, pp. 237 *et seq.*, document A/5509, annex I, append. II; and *ibid.*, pp. 282 *et seq.*, annex II, append. II). The Chairman of the Sub-committee on treaties concluded between States and international organizations or between two or more international organizations sent to the members of the Sub-committee a questionnaire requesting their views on the methods of treating the topic and its scope, the replies to which, together with the questionnaire, are printed in the Commission's Yearbook (*Yearbook ... 1971*, vol. II (Part Two), pp. 185 *et seq.*, document A/CN.4/250). Members of the Sub-committee on the law of non-navigational uses of international watercourses also submitted memoranda setting forth suggestions on the contents of a working plan for the topic, as well as on organizational and substantive matters having a bearing on such a plan (*Yearbook ... 1974*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex, para. 5).

draft articles on succession of States in respect of treaties as well as the completion, at the thirty-first session, of the first reading of the draft articles on succession of States in respect of matters other than treaties.

39. The Special Rapporteur is appointed by the Commision from among its members. Once appointed, the Special Rapporteur is expected to submit to the Commission a substantive report on the topic entrusted to him. However, at the Commission's request or on his initiative, his initial presentation may be of a general and exploratory character, in the form of a working paper or preliminary report.

40. It has been the established practice in the Commission that a newly appointed Special Rapporteur deals with his topic as he deems it most appropriate. The Commission, however, on the occasion of the appointment of the Special Rapporteur or upon his submission of a working paper or a preliminary or further report, may engage in a general debate or discussion aimed at giving him guidelines or instructions on aspects such as the manner of treatment, parts of the subject to be dealt with and priorities to be given to them, especially in the light of relevant decisions of the General Assembly or in cases where the topic has been already dealt with by a previous Special Rapporteur or if it is related to subjects already dealt with or being dealt with by the Commission. For example, at its fifteenth session (1963), the Commission, while approving the recommendations contained in the reports of the Sub-Committees on State Responsibility and on the Succession of States and Governments, pointed out that the questions listed in the report of the Sub-Committee on State Responsibility were intended solely to serve as an *aide-mémoire* for the Special Rapporteur and that the report of the Sub-Committee on Succession of States and Governments laid down guiding principles for the Special Rapporteur, who, however, would not be obliged to conform to them in detail.[43] On the other hand, a newly appointed Special Rapporteur may feel the need for guidelines or instructions and request them from the Commission or its members. This occurred, for instance, in 1956 when the Special Rapporteur for the topic of consular relations submitted a questionnaire to other members of the Commission with a view to obtaining their opinion thereon for his guidance in the preparation of his first report.[44] Another example occurred in 1961 on the occasion of the appointment of the fourth Special Rapporteur on the topic of the law of treaties. The newly appointed Special Rapporteur requested guidance of the Commission. The Commission, in response, held a debate which revealed the main approaches to the subject which the Special Rapporteur might follow.[45]

41. For the preparation of his initial report or reports, the Special Rapporteur has at his disposal the data and information furnished by Governments and, when appropriate, intergovernmental organizations, as well as the substantive assistance of the Secretariat.[46] For the preparation of subsequent reports, the Special Rapporteur has, in addition, the benefit of the discussions held in the Commission on the basis of his initial reports and the subsequent conclusions and decisions of the Commission; the comments and observations of representatives of Member States made in the Sixth Committee of the General Assembly in the course of its consideration of the item concerning the report that the Commission submits annually to the Assembly; the reports of the Sixth Committee to the General Assembly on its consideration of that item; and the relevant recommendations contained in the resolutions adopted by the General Assembly.[47] The Special Rapporteur may also consult with experts with a view to elucidating technical questions.[48]

(b) *Request for data and information from Governments*

42. Following the decision to undertake work on a given topic, the Commission usually asks the Secretary-General to address a request to Governments to furnish it with data and information relevant to the topic in question, which may take the form of texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other materials. The request may also take the form of a questionnaire elaborated by the Commission. A recent example of this method of gathering data and information is provided by the Commission's questionnaire transmitted to Governments of Member States in 1975, through the Secretary-General, in connection with the study of the law of non-navigational uses of international watercourses.[49] Questionnaires may also be prepared by Special Rapporteurs in consultation with

[43] *Yearbook ... 1963*, vol. II, p. 224, document A/5509, paras. 54 and 60.

[44] *Yearbook ... 1956*, vol. II, p. 301, document A/3159, para. 36.

[45] *Yearbook ... 1961*, vol. I, p. 99, 597th meeting, paras. 28–35; pp. 247 *et seq.*, 620th meeting; 621st meeting, pp. 254 *et seq.*, paras. 1–47; and *ibid.*, vol. II, p. 128, document A/4843, para. 39.

[46] See para. 43 below.

[47] For reports submitted by the Special Rapporteur for the purpose of the second reading by the Commission of a set of draft articles, the Special Rapporteur also has available to him the written comments and observations on the preliminary draft articles received from Governments and, if requested, intergovernmental organizations (see para. 50 below).

[48] See *Yearbook ... 1954*, vol. II, document A/2693, paras. 60 and 63; and *Yearbook ... 1956*, vol. II, p. 255, document A/3159, paras. 15–18.

[49] See *Yearbook ... 1974*, vol. II (Part One), pp. 302 and 303, document A/9610/Rev.1, chap. V, annex, paras. 17 and 30; and *Yearbook ... 1975*, vol. II, pp. 183–184, document A/10010/Rev.1, para. 138.

the Secretariat[50] or by the Secretariat alone, in both cases with the concurrence of the Commission. Data and information may be requested from intergovernmental organizations when, in view of the subject matter of the topic, the Commission or the Special Rapporteur concerned deems it advisable. This request may also take the form of a questionnaire.[51] The Secretariat systematizes the data and information thus gathered, which is transmitted to the Special Rapporteur and published as a document of the Commission, later to be included in the *Yearbook of the International Law Commission* or as a compilation in a volume of the United Nations Legislative Series.

(c) *Studies and research projects by the Secretariat*

43. At the preliminary stage of the consideration of a topic, the Secretariat may, at the Commission's request or on its own initiative, prepare substantive studies and carry out research projects to facilitate the commencement of work on the topic by the Commission and the Special Rapporteur concerned. Secretariat studies and research projects may be also requested by the Commission or the Special Rapporteur concerned at other stages in the consideration of a topic.

2. First reading of the draft articles submitted by the Special Rapporteur

(a) *Discussion of the Special Rapporteur's reports*

44. The reports submitted by the Special Rapporteur for the Commission's consideration, as distinguished from working papers or preliminary reports, normally contain a set of draft articles with commentaries. After the introduction of the report by the Special Rapporteur and an exchange of views thereon, the Commission proceeds to an article by article discussion with a view to the formulation of a set of draft articles. Prior to its consideration by the Commission, each draft article is introduced by the Special Rapporteur. Members may submit amendments or alternative formulations to the draft articles presented by the Special Rapporteur or written memoranda thereon. Upon the conclusion of its consideration of a given draft article, the Commission transmits it, together with pertinent suggestions and proposals, to the Drafting Committee.

(b) *The Drafting Committee*

45. Committees in the nature of drafting committees were set up by the Commission to deal with specific topics or questions at its first three sessions; however, a standing Drafting Committee had been used at each session of the Commission since its fourth session (1952). The Chairman of the Drafting Committee is elected by the Commission, and, since 1974, is a member of the Commission's Bureau for the session concerned. This represents a change in the previous practice, begun in 1955, by which the First Vice-Chairman of the Commission also served as Chairman of the Drafting Committee. Other members of the Drafting Committee are appointed by the Commission at each session on the recommendation of the Chairman of the Commission, with a view to ensuring an adequate representation and taking into account other factors, including linguistic competence. The Rapporteur of the Commission for the session concerned also takes part in the Committee's work. Special Rapporteurs who have not been appointed members of the Drafting Committee take part in the Committee's work when the draft articles relating to their topics are considered. Under the Commission's terms of referral, the Special Rapporteur normally prepares and submits new texts to the Drafting Committee as a basis for the consideration of the draft articles in question. The Drafting Committee is provided with simultaneous interpretation services, but no records of its discussions are maintained.

46. The Drafting Committee prepares texts of draft articles for the consideration of the Commission and assists the Commission in co-ordinating and consolidating the draft articles. The texts as submitted by the Committee may embody solutions not only to questions of drafting but also to points of substance which the Commission "has been unable to resolve or which appeared likely to give rise to unduly protracted discussion".[52] The Committee therefore provides a framework not only for drafting but also for negotiation. Entrusting the Drafting Committee, whose proceedings are of an informal nature, with the functions referred to above has proved to be an extremely useful procedure which greatly helps to speed up the work of the Commission. The Drafting Committee constitutes an indispensable component of the Commission's methods of work and plays a major, central role in assisting the Commission in fulfilling the performance of its tasks.

[50] For example, this method was used in connection with the gathering of data and information on the topics of the law of treaties, arbitral procedure and regime of the high seas. See *Yearbook ... 1949*, p. 281, document A/925, para. 22, and *Yearbook ... 1950*, vol. II, pp. 380, 381 and 383, document A/1316, paras. 160, 165 and 182.

[51] For example, questionnaires have been prepared during recent years for the purpose of gathering information from international organizations on relations between States and international organizations and the question of treaties concluded between States and international organizations or between two or more international organizations, when such information was needed for the study of those topics by the Special Rapporteurs concerned. See *Yearbook ... 1971*, vol. II (Part One), p. 279, document A/8410/Rev.1, para. 15; *Yearbook ... 1978*, vol. II (Part Two), pp. 145 and 146, document A/33/10, paras. 148, 150–153.

[52] *Yearbook ... 1958*, vol. II, p. 108, document A/3859, para. 65.

(c) *Consideration by the Commission of the texts approved by the Drafting Committee*

47. The Commission discusses the text of each of the draft articles adopted by the Drafting Committee, following its introduction by the Committee Chairman. The Drafting Committee's texts are subject to amendments or alternative formulations submitted by members of the Commission and may be referred back to the Committee for further consideration. The texts of the draft articles recommended by the Drafting Committee and adopted by the Commission are included in the relevant chapter of the Commission's report for the session. As these texts generally reflect a common understanding, the need to vote on them seldom arises. In general, detailed explanations of dissenting opinions are not included in the report, which may, however, state that for the reasons given in the records a member was opposed to the adoption of a certain article.

(d) *Transmittal of provisional draft articles to Governments for comments and observations*

48. The result of a first reading by the Commission is a set of provisional draft articles, with commentaries, on a given topic. The Commission will then usually decide to transmit them, through the Secretary-General, to Governments for their comments and observations, in accordance with articles 16 and 29 of its Statute. On some occasions, the Commission transmits provisional draft articles to Governments for the purpose indicated after having completed the first reading of the entire draft. In other instances, particularly when drafts of considerable length are involved, the Commission transmits provisional draft articles to Governments in instalments without waiting for the completion of the provisional draft as a whole. Provisional draft articles are sometimes transmitted by the Commission to certain intergovernmental organizations for their observations and comments, pursuant to General Assembly recommendations or when the subject-matter makes it advisable.

49. In the course of the first reading of provisional draft articles, or upon its completion, the Commission may deem it necessary to indicate that the draft articles have been prepared on the assumption that they would form the basis of a convention or that they are cast in such a form that they can be used as the basis for concluding a convention, should this be decided upon at a later stage.

3. SECOND READING OF THE DRAFT ARTICLES UNDER PREPARATION BY THE COMMISSION

(a) *Re-examination of the preliminary draft articles and the adoption of a final draft*

50. In the light of the written comments received from Governments and the oral observations made in the Sixth Committee, the Commission re-examines the preliminary draft adopted on the basis of a further report or reports by the Special Rapporteur. These reports of the Special Rapporteur usually include a summary of the comments and observations made on the respective articles of the draft and his suggestions as to whether to amend the given article, to leave it as it is, to delete it or to treat it in some other way. They also include a summary of the comments and observations received from intergovernmental organizations when comments and observations were requested from them as well as from States. The procedure of article-by-article consideration is followed by the Commission along the lines of that described above,[53] including the referral of articles, together with the relevant proposals and suggestions, to the Drafting Committee, which examines each article, elaborates its formula and reports back to the Plenary of the Commission. When considering the report of the Drafting Committee, the Commission follows the procedure enunciated above.[54] At this stage of the procedure it is not infrequent, in the practice, for the Commission to proceed to revising, co-ordinating and consolidating the articles, sections and parts of a given draft, particularly in connection with drafts of considerable length adopted in the course of consecutive sessions.[55] Normally, the Commission undertakes such a task with the assistance of the Special Rapporteur concerned and the Drafting Committee. In the case of the first aspect of the topic of relations between States and international organizations, however, the Commission was assisted in such an undertaking by a Working Group it established for such a purpose.[56] The Commission then proceeds to the adoption of the final draft articles on the topic and includes them in the report covering the work of the session which it submits to the General Assembly.

(b) *Recommendations by the Commission to the General Assembly with respect to the final draft articles*

51. When adopting the final draft articles, the Commission, pursuant to article 23 of its Statute, usually makes a formal recommendation to the General Assembly that an international convention or conventions should be concluded on the basis of the draft. The formulae of the recommendations in question vary.

[53] Paras. 44–46.

[54] See para. 47 above.

[55] In certain cases, the need for making an overall review of a given set of draft articles arises before they are adopted provisionally in first reading. Thus, for example, in the course of the current session the Commission undertook an overall review of all the draft articles on succession of States in respect of State property and State debts, including those articles of the draft adopted previously in the course of its first reading.

[56] *Yearbook ... 1971*, vol. II (Part One), p. 281, document A/8410/Rev.1, para. 39, and vol. II (Part Two), p. 107, documents A/CN.4/L.174 and Add.1–6.

52. Thus in some instances the Commission, basing itself on article 23, paragraph 1(*d*), of its Statute, recommended that an international conference of plenipotentiaries should be convened to elaborate a convention or conventions on the basis of the draft articles concerned. The wording of this kind of recommendation may, however, differ from case to case, as the examples below demonstrate:

Law of the Sea (1956)

The Commission therefore recommends, in conformity with article 23, paragraph 1(*d*) of its Statute, that the General Assembly should summon an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.[57]

Consular Relations (1961)

At its 624th meeting, the Commission, considering that it should follow the procedure previously adopted by the General Assembly in the case of the Commission's draft concerning diplomatic privileges and immunities, decided, in conformity with article 23, paragraph 1(*d*) of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft on consular relations and conclude one or more conventions on the subject.[58]

Law of treaties (1966)

At its 892nd meeting, on 18 July 1966, the Commission decided, in conformity with article 23, paragraph 1(*d*) of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.[59]

Representation of States in Their Relations with International Organizations (1971)

At its 1146th meeting, on 28 July 1971, the Commission decided, in conformity with article 23, paragraph 1(*d*), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the representation of States in their relations with international organizations and to conclude a convention on the subject.[60]

Succession of States in Respect of Treaties (1974)

At the 1301st meeting, on 26 July 1974, the Commission decided, in conformity with article 23 of its Statute, to recommend that the General Assembly should invite Member States to submit their written comments and observations on the Commission's final draft articles on succession of States in respect of treaties and convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject.[61]

53. In other cases, the Commission, basing itself on article 23, paragraph 1(*c*) of the Statute, confined itself to recommending the draft concerned to Member States with a view to the conclusion of a convention, without referring to the convening of an international conference or any other procedural means for concluding the convention:

Diplomatic Relations (1958)

At its 468th meeting, the Commission decided (under article 23, paragraph 1(*c*) of its Statute) to recommend to the General Assembly that the draft articles on diplomatic intercourse and immunities should be recommended to Member States with a view to the conclusion of a convention.[62]

Most-favoured-nation clauses (1978)

At the 1522nd meeting, on 20 July 1978, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that the draft articles on most-favoured-nation clauses should be recommended to Member States with a view to the conclusion of a convention on the subject.[63]

54. The recommendation made by the Commission when submitting the final draft articles on *special missions* presented a third main variant. In that case, the Commission decided, "in conformity with article 23 of its Statute, to recommend to the General Assembly that appropriate measures be taken for the conclusion of a convention on special missions."[64]

55. Sometimes the Commission includes in its recommendation to the General Assembly a specific comment/suggestion, such as the one contained in its recommendation on the draft articles dealing with the representation of States in their relations with international organizations:

The Commission wishes to refer to the titles given to parts and articles of its draft, which it considers helpful for an understanding of the structure of the draft and for promoting ease of reference. It expresses the hope, as it did concerning its draft articles on consular relations, law of treaties and special missions, that these titles, subject to any appropriate changes, will be retained in any convention which may be concluded in the future on the basis of the Commission's draft articles.[65]

The Commission has also made other kinds of comments when formulating its recommendations to the General Assembly with respect to final draft articles. Thus, for example, when recommending the conclusion of a convention or conventions on the law of the sea and the convening of an international conference for the purpose, the Commission made the following observations:

The Commission considers that such a conference has been adequately prepared for by the work the Commission has done.

[57] *Yearbook ... 1956*, vol. II, p. 256, document A/3159, para. 28. This recommendation was preceded by an exposé of the reasons upon which it was based, reproduced in para. 13 above.

[58] *Yearbook ... 1961*, vol. II, p. 91, document A/4834, para. 27.

[59] *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, para. 36.

[60] *Yearbook ... 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, para. 57.

[61] *Yearbook ... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, para. 84.

[62] *Yearbook ... 1958*, vol. II, p. 89, document A/3859, para. 50.

[63] *Yearbook ... 1978*, vol. II (Part Two), p. 16, document A/33/10, para. 73.

[64] *Yearbook ... 1967*, vol. II, p. 347, document A/6709/Rev.1, para. 33.

[65] *Yearbook ... 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, para. 59.

The fact that there have been fairly substantial differences of opinion on certain points should not be regarded as a reason for putting off such a conference. There has been widespread regret at the attitude of the Governments after The Hague Codification Conference of 1930 in allowing the disagreement over the breadth of the territorial sea to dissuade them from any attempt at concluding a convention on the points on which agreement had been reached. The Commission expresses the hope that this mistake will not be repeated.

In recommending confirmation of the proposed rules as indicated in paragraph 28, the Commission has not had to concern itself with the question of the relationship between the proposed rules and existing conventions. The answer to that question must be found in the general rules of international law and the provisions drawn up by the proposed international conference.

The Commission also wishes to make two other observations, which apply to the whole draft:

1. The draft regulates the law of the sea in time of peace only.
2. The term 'mile' means nautical mile (1,852 metres) reckoned at sixty to one degree of latitude.[66]

56. Lastly, it should be noted that because of the terms of reference of the request to the Commission, final draft articles prepared by it may be submitted to the General Assembly as "draft conventions". Thus, the draft articles on the *elimination of future statelessness* and on the *reduction of future statelessness* were submitted by the Commission to the General Assembly as "draft conventions". Such a presentation rendered it unnecessary for the Commission to make any formal recommendation to the General Assembly that international conventions should be concluded on the basis of the submitted drafts.

F. Other methods and techniques employed by the Commission

57. The General Assembly has from time to time requested the Commission to report on particular legal problems or to examine particular texts or to prepare a particular set of draft articles. The question has then arisen whether the Commission, in performing such tasks, should use the methods laid down in its Statute for carrying out its normal work of progressive development and codification or whether it was free to adopt other methods in dealing with such cases. The Commission has consistently decided that it was free to adopt special methods for special tasks.[67]

58. Thus, the Commission has followed special methods in connection with assignments referred to it by the General Assembly for the purpose of giving a legal opinion, elaborating a definition or formulating conclusions or observations on a particular subject-matter, e.g. when dealing with the question of international criminal jurisdiction (1950), the definition of aggression (1951), reservations to multilateral conventions (1951), extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1963) and the review of the multilateral treaty-making process (1979). The Commission's reports containing draft articles with commentaries on the draft Declaration on the Rights and Duties of States (1949) and the Formulation of the Nürnberg Principles (1950) were also prepared by the use of *ad hoc* methods and techniques. Although a Special Rapporteur was appointed in the case of the latter topic, neither the text of the draft Declaration of the Rights and Duties of States nor the text of the Formulation of the Nürnberg Principles was subject to the procedure of a first and second reading. In the case of the draft Code of Offences against the Peace and Security of Mankind, the Commission, having appointed a Special Rapporteur for the topic in 1950, completed a draft code in 1951 and submitted it to the General Assembly, together with commentaries thereon, without recommending arrangements for its implementation. At its 1952 session, the Assembly omitted the item from its agenda on the understanding that the topic would continue to be considered by the Commission. The Commission accordingly, in 1953, requested the Special Rapporteur for the topic to prepare a new report, taking into account the observations received from Governments, and at its next session, in 1954, revised the draft Code and submitted it to the General Assembly,[68] refraining again from making recommendations as to how the Code was to become operative.[69]

59. More interesting for the subject-matter of the present observations are departures from the con-

[66] *Yearbook ... 1956*, vol. II, p. 256, document A/3159, paras. 30–32.

[67] The Commission was confronted with the question from its very first session, held in 1949. On that occasion, having been instructed by General Assembly resolution 178 (II) of 21 November 1947 to prepare a draft declaration on rights and duties of States, on the basis of a Panamanian draft, the Commission came to the conclusion that its function in relation to the draft declaration fell within neither of the two principal duties laid down upon it by its Statute, but constituted a "special assignment" from the General Assembly. Thereafter, the Commission submitted its 1949 draft "Declaration on Rights and Duties of States" immediately to the General Assembly, placing on record its conclusion that it was for the General Assembly to decide what further course of action should be taken in relation to the draft Declaration and, in particular, whether it should be transmitted to Governments of Member States for comments (*Yearbook ... 1949*, p. 290, document A/295, para. 53).

[68] *Yearbook ... 1954*, vol. II, pp. 149–150, document A/2693, paras. 41–50.

[69] In 1977, the Commission expressed the opinion that the draft Code could be reviewed in the future if the General Assembly so wished (*Yearbook ... 1977*, vol. II (Part Two), p. 130, document A/32/10, para. 111). An item entitled "Draft Code of Offences against the Peace and Security of Mankind" was inscribed on the agenda of the thirty-second session (1977) of the General Assembly at the request of certain Member States. After consideration by the Sixth Committee, the General Assembly, at its thirty-third session, adopted resolution 33/97 of 16 December 1978, thereby requesting the Secretary-General to invite Member States and relevant international intergovernmental organizations to submit their comments and observations on the draft Code. The Assembly also decided to include the item in the provisional agenda at its thirty-fifth session (1981).

solidated methods and techniques of work usually followed by the Commission in certain cases involving the preparation of draft articles which have provided a basis for the elaboration of conventional instruments or whose study is pursued on the assumption that the draft to be prepared should provide such a basis if so decided by the General Assembly at a later stage. The explanation for such departures are usually related to the nature of the topic and to the terms of reference set forth by the General Assembly for its study. The topics entitled "Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law" and "Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier" may be mentioned in this respect as examples of cases in which the Commission introduced variations in the basic method of work followed by it for the preparation of draft articles.

60. With regard to these two topics, the Commission, instead of appointing Special Rapporteurs, set up, at its twenty-fourth (1972) and thirtieth (1978) sessions, working groups to review the problems involved and, in the case of the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, to prepare a set of draft articles for submission to the Commission. The Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier identified in 1978 a series of issues relevant to the study of the topic. Reconstituted at the thirty-first session, the Working Group is studying the topic in the light of recommendations contained in General Assembly resolutions 33/139 and 33/140 of 19 December 1978.

61. The draft articles submitted in 1972 by the Working Group on the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law were not subject to the procedure of a first and second reading. On this topic, the Commission had before it written observations received from Member States in response to a request made by the General Assembly. In addition, the Commission had before it two texts of a draft convention submitted by Member States and a working paper containing draft articles submitted by one of the Commission's members. Extensive documentation relevant to the question was submitted by the Secretariat. After an initial general discussion, the Commission referred the matter to the Working Group. At the conclusion of the initial stage of its work, the Working Group submitted to the Commission a first report containing a set of draft articles. After considering the report, the Commission referred the set of draft articles back to the Working Group for revision in the light of the discussion. The Working Group submitted two further reports containing a revised set of draft articles, which were then provisionally adopted by the Commission and transmitted to the General Assembly as well as to Governments for their comments.[70] The General Assembly decided, in its resolution 2926 (XXVII) of 28 November 1972, to consider at its twenty-eighth session (1973) an item entitled "Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons", with a view to the final elaboration of such a convention by the General Assembly. The Convention was elaborated and adopted by the General Assembly in 1973.

62. Lastly, it should be noted that the Commission has always applied its consolidated method and techniques of work with flexibility to the preparation of draft articles. Minor variations in the application of the consolidated method and techniques are, therefore, ascertainable in the practice of the Commission when a given set of draft articles is compared retrospectively with another set or sets of draft articles from the standpoint of the steps followed by the Commission in their preparation. In certain cases, for instance, the two-readings procedure described in section E above was not strictly followed by the Commission. The preparation of the final draft articles on the law of the sea provides an interesting example in this respect. The Commission in 1953 adopted, after a second reading, draft articles on the continental shelf; the international regulation of fisheries; and the contiguous zone, prepared in the context of its work on the topic "regime of the high seas". The General Assembly decided, however, by its resolution 798 (VIII) of 7 December 1953, not to deal with any aspect of the topics, "regime of the high seas" or "regime of territorial waters" until all the problems involved had been studied by the Commission and reported on by it to the Assembly. In a further resolution (899 (IX) of 14 December 1954), the General Assembly requested the Commission to devote the necessary time to the study of the two topics mentioned "and all related problems" in order to complete its work on these topics and submit its final report for the Assembly to consider them as a whole. The consolidation by the Commission in 1956, pursuant to the Assembly requests referred to, of all the rules it had adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea into a single set of draft articles on the law of the sea, implied a systematic rearrangement of the rules concerned, which, in turn, led the Commission to introduce further changes in the text of some draft articles which had already been adopted in second reading.[71]

63. In other instances, the Commission made minor departures from its consolidated method and techniques of work in order to accelerate its work on a

[70] *Yearbook ... 1972*, vol. II, pp. 309–311, document A/8710/Rev.1, paras. 58–64.

[71] *Yearbook ... 1956*, vol. II, p. 255, document A/3159, para. 22.

given topic. This happened, for example, with the preparation of the draft articles on consular relations with respect to both the first and the second readings of the draft articles in question. Regarding the first reading, the Commission decided in 1959 that, because of the similarity of the topic of consular relations to that of diplomatic intercourse and immunities which had been debated at two previous sessions, members who might wish to propose amendments to the existing draft presented by the Special Rapporteur should come to the next (1960) session prepared to put in their principal amendments in writing, within a week, or at most ten days, of its opening.[72] With respect to the second reading of the said draft articles, the Commission shortened the deadline normally given to Governments for the submission of comments and observations.[73] As a result, the second reading of the 1960 provisional draft articles on consular relations took place at the next session (1961), when the Commission adopted and submitted to the General Assembly its final draft articles on the topic.

G. Relationship between the General Assembly and the International Law Commission

1. Annual report submitted by the Commission to the General Assembly

64. As noted earlier in these observations,[74] from its first session (1949), the Commission has submitted to the General Assembly a report on the work done at each session. The report is the vehicle whereby the Commission keeps the General Assembly informed regularly of the progress of its work on the various topics on its current programme as well as of its achievements in the preparation of draft articles on these topics. The report also serves as a means of giving to the Commission's drafts on the various topics the publicity provided for in the Statute of the Commission.

65. The report is adopted by the Commission at the end of the session concerned on the basis of a draft report prepared by the Rapporteur of the Commission with the assistance of the Special Rapporteurs concerned and the Secretariat. Before adopting it, the Commission examines the draft report paragraph by paragraph.

66. Apart from the chapters dealing with the organization of the session and other decisions and conclusions of the Commission, the report devotes separate chapters to the topics given substantive consideration at the session concerned. Each of the chapters devoted to topics which have been substantively considered at the session includes information on the progress of work and the future work of the Commission on the topic in question as well as, when appropriate, the texts of the draft articles prepared by the Commission on the topic and commentaries relating thereto and, whenever advisable or necessary, procedural recommendations calling for a decision on the part of the General Assembly. Comments and observations by Governments, and when appropriate by intergovernmental organizations, on a given set of provisional draft articles adopted by the Commission are included as an annex to the Commission's report in which the draft articles are presented in their final form to the General Assembly.

2. Consideration by the General Assembly of the reports of the Commission

67. The General Assembly as the parent body of the Commission exercises its functions with regard to the Commission mainly through the consideration of the report submitted annually to it by the Commission.[75] An item entitled "Report of the International Law Commission" is included by the General Assembly in its agenda for each regular session and allocated to the Sixth Committee, where the substantive discussion of the Commission's report takes place. The oral comments and observations on the various chapters of the Commission's report, including the draft articles contained therein, made by representatives of Member States in the Sixth Committee are included in the summary records of the Sixth Committee. An analytical summary of such comments has usually been included in the report on the item that the Sixth Committee submits to the General Assembly. The Sixth Committee's report also contains the draft resolution or resolutions on the work and activities of the Commission agreed upon as a result of the consideration of the item entitled "Report of the International Law Commission". Once adopted in plenary, such draft resolutions become resolutions of the General Assembly.

68. The resolution adopted by the General Assembly following consideration by the Sixth Committee of the item entitled "Report of the International Law Commission" contains a variety of recommendations and decisions addressed to the Commission. Some of those recommendations relate to the performance by the Commission of its task in general, but others concern the consideration by the Commission of specific topics. Such recommendations or decisions may be of a procedural or a substantive nature. They may, in addition, provide for the referral to the Commission of

[72] *Yearbook ... 1960*, vol. II, p. 145, document A/4425, para. 15.

[73] *Yearbook ... 1961*, vol. II, p. 90, document A/4843, para. 19.

[74] See para. 18 above.

[75] The exercise by the General Assembly of its functions regarding the Commission also takes place sometimes in the context of the consideration of separate items included in its agenda.

certain documents relevant to its consideration of particular draft articles.

(a) *Procedural recommendations concerning the Commission's beginning work on a topic, continuing work on a topic, giving priority to the study of a topic, completing particular draft articles under preparation, etc.*

69. Quite a number of General Assembly recommendations addressed to the Commission following consideration of the item entitled "Report of the International Law Commission" request the Commission to start studying a particular topic, to continue its work on a topic, to give priority to the study of one topic or another, to complete the first or second reading of a set of draft articles relating to a particular topic, etc.

70. Some General Assembly resolutions requested the Commission "to undertake the codification of a given topic on its programme,[76] or "to undertake the study of the question" or "study the topic" referred to in a particular resolution,[77] or to "make every effort to begin substantive work" on a given topic.[78] Some resolutions recommended that the Commission should "undertake ... a separate study" of a topic[79] or "commence its work" on a topic "by, *inter alia*, adopting preliminary measures provided for under article 16" of the Commission's Statute.[80] On other occasions, General Assembly resolutions have instructed the Commission to consolidate into a single draft, articles on a broad subject on some aspects of which draft articles had previously been prepared.[81] When making such recommendations the General Assembly sometimes requests that the Commission study the particular topic concerned "as an important question".[82]

71. In many resolutions the General Assembly has recommended that the Commission should "continue the work of codification and progressive development of the law" in a particular field[83] or should "continue its work" on a given topic.[84] There are also resolutions requesting the Commission "to study further" the subject "as soon as it considers it advisable"[85] or inviting the Commission "to give further consideration" to the topic "after study" of some other topics "has been completed by the United Nations"[86] or inviting it "to commence work" on a topic "at an appropriate time and in the light of progress made on draft articles" on other topics under preparation,[87] and thereby introducing an element of timing as to the consideration of the topic by the Commission. The General Assembly recommended on one occasion to the Commission that it should "expedite the study" of a topic under consideration.[88]

72. In some resolutions the General Assembly has made recommendations or taken decisions on the question of the priority to be given by the Commission to the study of particular topics or to the preparation of draft articles concerning these topics. The scope of such recommendations and decisions, however, vary from case to case. Thus, for example, the General Assembly has sometimes requested or recommended that the Commission include in its priority list topics the study of which had not yet been undertaken, at that time, by the Commission. This occurred, for example, with respect to the regime of the territorial waters,[89] diplomatic intercourse and immunities[90] and succession of States and Governments.[91] In other cases, the General Assembly recommended that a certain priority be given to the preparation of draft articles under consideration by the Commission by using formulae such as: "to continue on a high priority basis" its work on a given topic "with a view to completing the preparation of a first set of draft articles ... at the earliest possible time";[92] or "to continue on a priority basis" its work on a particular topic "with a view to the preparation of a first set of

[76] For example, resolutions 685 (VII) of 5 December 1952 (diplomatic intercourse and immunities), 799 (VIII) of 7 December 1953 (State responsibility), and 1400 (XIV) of 21 November 1959 (right of asylum).

[77] For example, resolutions 1453 (XIV) of 7 December 1959 (juridical regime of historic waters, including historic bays), 2272 (XXII) of 1 December 1967 (most-favoured-nation clause), 2501 (XXIV) of 12 November 1969 (question of treaties concluded between States and international organizations or between two or more international organizations).

[78] For example, resolution 2400 (XXIII) of 11 December 1968 (State responsibility).

[79] For example, resolution 3071 (XXVIII) of 30 November 1973 (international liability for injurious consequences arising out of acts not prohibited by international law).

[80] For example, resolution 3071 (XXVIII) of 30 November 1973 (the law of non-navigational uses of international watercourses).

[81] For example, in connection with the preparation by the Commission of its 1956 draft articles on the law of the sea, see resolution 798 (VIII) of 7 December 1953 and 899 (IX) of 14 December 1954.

[82] For example, resolution 2501 (XXIV) of 12 November 1969 (question of treaties concluded between States and international organizations or between two or more international organizations).

[83] For example, resolution 1902 (XVIII) of 18 November 1963 (law of treaties).

[84] For example, resolution 33/139 of 19 December 1978 (law of the non-navigational uses of international watercourses).

[85] For example, resolution 1687 (XVI) of 18 December 1961 (special missions).

[86] For example, resolution 1289 (XIII) of 5 December 1958 (relations between States and intergovernmental organizations).

[87] For example, resolution 32/151 of 19 December 1977 (international liability for injurious consequences arising out of acts not prohibited by international law; jurisdictional immunities of States and their property).

[88] Resolution 2272 (XXII) of 1 December 1967 (State responsibility).

[89] Resolution 374 (IV) of 6 December 1949.

[90] Resolution 685 (VII) of 5 December 1952.

[91] Resolution 1686 (XVI) of 18 December 1961.

[92] For example, resolution 3495 (XXX) of 15 December 1975 (State responsibility).

draft articles" on the topic concerned;[93] or "to proceed with the preparation, on a priority basis, of draft articles" on a given topic.[94] On certain occasions the General Assembly left it to the Commission to "decide upon the priority to be given to the topic" in question.[95]

73. Certain General Assembly resolutions, when recommending to the Commission that it continue to work on a particular topic, set forth specific goals. Formulae to that effect vary, as exemplified as follows: to study, "with a view to preparing a set of draft articles", or to "proceed with the preparation of draft articles" on a topic;[96] to continue its work with a view to making "substantial progress in the preparation of draft articles" on a topic[97] or "with a view to ... making progress in the consideration" of a given topic;[98] completing "the first reading of the draft articles" on a topic;[99] or continue work "with the object of presenting final drafts" on topics or "complete the second reading" thereof.[100] Some of the latter resolutions specified that completion of the first or second reading of a given set of draft articles under preparation should be achieved at a given session of the Commission. There are also resolutions which recommend the continuance of a study of a topic "with a view to the possible elaboration of an appropriate legal instrument".[101]

74. It may be noted that on several occasions the General Assembly endorsed general conclusions and decisions reached by the Commission on the study of particular topics.[102]

75. Finally, reference should be made to the fact that the General Assembly customarily transmits to the Commission for its attention the records of the discussion on the Commission's report at a given session of the General Assembly. There are also cases where the General Assembly made a specific decision transmitting to the Commission documentation relevant to the consideration of a particular topic or aspects thereof.[103]

(b) *Substantive recommendations concerning the study of a given topic or the preparation of a specific set of draft articles*

76. Apart from provisions in General Assembly resolutions recommending that the Commission should proceed with the study of a given topic or the preparation of a specific set of draft articles, taking into account previous General Assembly recommendations, views expressed in the General Assembly and its Sixth Committee and written comments submitted by Governments and, as the case may be, by international organizations, the General Assembly on occasion gives the Commission broad guidance on matters closely related to the substance of a topic under study or of a draft under preparation.

77. For example, the General Assembly recommended that the Commission should continue the work of codification and progressive development of the law of treaties "in order that the law of treaties may be placed upon the widest and most secure foundations".[104] It was also recommended that the Commission continue its work on State responsibility "giving due consideration to the purposes and principles enshrined in the Charter of the United Nations",[105] and on the succession of States and Governments "with appropriate reference to the views of States which have achieved independence since the Second World War".[106]

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[93] For example, resolution 3071 (XXVIII) of 30 November 1973 (State responsibility).

[94] For example, resolutions 31/97 of 15 December 1976 and 32/151 of 19 December 1977 (succession of States in respect of matters other than treaties; treaties concluded between States and international organizations or between international organizations).

[95] For example, General Assembly resolutions 2780 (XXVI) of 3 December 1971 and 2926 (XXVII) of 28 November 1972 (law of the non-navigational uses of international watercourses).

[96] For example, resolutions 2780 (XXVI) of 3 December 1971 (question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law) and 3071 (XXVIII) of 30 November 1973 (succession of States in respect of matters other than treaties; most-favoured-nation clause).

[97] For example, resolution 2780 (XXVI) of 3 December 1971 (State responsibility).

[98] For example, resolution 2634 (XXV) of 12 November 1970 (succession of States in respect of matters other than treaties).

[99] For example, resolutions 2780 (XXVI) of 3 December 1971 (succession of States in respect of treaties), 3495 (XXX) of 15 December 1975 (most-favoured-nation clause) and 33/139 of 19 December 1978 (succession of States in respect of matters other than treaties).

[100] For example, resolutions 2045 (XX) of 8 December 1965 (law of treaties), 2167 (XXI) of 5 December 1966 (special missions), 2634 (XXV) of 12 November 1970 (relations between States and international organizations), 3071 (XXVIII) of 30 November 1973 (succession of States in respect of treaties), and 32/151 of 19 December 1977 (most-favoured-nation clause).

[101] For example, resolution 33/139 of 19 December 1978 (status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

[102] For example, General Assembly resolutions 32/151 of 19 December 1977 (second part of the topic of relations between States and international organizations; status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier) and 33/139 of 19 December 1978 (State responsibility).

[103] For example, by its resolution 900 (IX) of 14 December 1954, the General Assembly decided to refer the report of the International Technical Conference on the Conservation of the Living Resources of the Sea to the Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in [its] final report" on the law of the sea.

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

[105] *Ibid.*

[106] *Ibid.*

(c) *Decisions on recommendations made by the Commission to conclude a convention on the basis of final draft articles prepared by it*

78. As was indicated above,[107] final draft articles on a given topic are normally submitted by the Commission to the General Assembly, together with a formal recommendation concerning the conclusion of a convention on that basis. Thus, when the General Assembly receives a report of the Commission containing a final set of draft articles together with such a recommendation, the General Assembly is called upon to take a decision as to whether or not such a convention should be concluded and, in the affirmative, what organ should be entrusted with the task of elaborating and concluding the convention in question.

79. The Commission has recommended to the General Assembly the conclusion of conventions on the basis of final draft articles prepared by it on a number of occasions. On all those occasions except one,[108] the General Assembly has endorsed the recommendation made to that effect by the Commission. This was the case with the final draft articles relating to the law of the sea, diplomatic intercourse and immunities, consular relations, law of treaties, special missions, representation of States in their relations with international organizations and succession of States in respect of treaties. Moreover, the General Assembly called for the elaboration and conclusion of a conventional instrument or instruments in a case in which its final draft articles were presented to it by the Commission in the form of "draft conventions" because of the particular terms of reference of the request (elimination or reduction of future statelessness). In another case, the General Assembly decided to elaborate and conclude a convention on the basis of draft articles submitted to it by the Commission as "provisional" (prevention and punishment of crimes against diplomatic agents and other internationally protected persons).

80. The draft convention on arbitral procedure submitted to the General Assembly by the Commission, as final, in 1953, together with a formal recommendation to conclude a convention on the topic, provides, on the other hand, the only example in which the General Assembly declined to endorse the recommendation made by the Commission. By its resolution 797 (VIII) of 7 December 1953, the General Assembly decided to transmit the draft on arbitral procedure to Member States "with a view to the submission by Governments of whatever comments they may deem appropriate"; an item on the question also was included in the provisional agenda of its tenth session. At that session, the General Assembly, by resolution 989 (X) of 14 December 1955, invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee "in so far as they may contribute further to the value of the draft on arbitral procedure" and to report to the Assembly at its thirteenth session. By the same resolution, the General Assembly decided to place the question on the provisional agenda at its thirteenth session, "including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure". At its thirteenth session, the General Assembly had before it the report requested from the Commission. The revised draft articles on arbitral procedure contained in that report were this time submitted by the Commission to the General Assembly as "model rules". By resolution 1262 (XIII) of 14 November 1958, the General Assembly brought the draft on arbitral procedure submitted by the Commission to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or *compromis*.[109]

81. As already mentioned,[110] the Commission is also empowered by its Statute to recommend to the General Assembly that an international conference of plenipotentiaries be convened for the elaboration and conclusion of a recommended convention on the basis of draft articles prepared by the Commission. Such a recommendation was made by the Commission when submitting its final draft articles on the law of the sea, consular relations, the law of treaties, the representation of States in their relations with international organizations, and the succession of States in respect of treaties. In all those cases, the General Assembly decided to entrust the elaboration and conclusion of the convention concerned to an international conference of plenipotentiaries as recommended by the Commission. It also decided to convene an international conference of plenipotentiaries in a case in which the Commission did not make such a recommendation, namely, that of the draft articles on diplomatic intercourse and immunities.

82. In some instances, before adopting a decision on the conventional form to be given to a set of final draft articles submitted to it by the Commission and/or on the convening of an international conference of plenipotentiaries to that effect, the General Assembly has given to itself and Governments of Member States time for further reflection. In those cases, an item relating to the draft articles prepared by the Commission is included in the agenda of a subsequent session of the General Assembly, and Governments are invited to submit comments and observations on the form and/or the procedure in which work on the draft articles concerned should be completed. Thus, for example, at its thirteenth session, the General Assem-

[107] See paras. 51–56 above.

[108] See para. 80 below.

[109] See para. 33 above.

[110] See para. 25 above.

bly made a decision to include the item entitled "Diplomatic intercourse and immunities" in the provisional agenda of its fourteenth session "with a view to the early conclusion of a convention" on the matter and to consider at that session "the question to what body the formulation of the convention should be entrusted".[111] Initial consideration by the General Assembly of the Commission's final draft articles on succession of States in respect of treaties provides another example. At its twenty-ninth session, the General Assembly decided to include an item entitled "Succession of States in respect of treaties" in the provisional agenda of its thirtieth session for the purpose of determining the procedure and form in which work on the said draft articles should be completed.[112]

83. The most recent example of a General Assembly decision aimed at providing a delay for reflection relates to the draft articles on most-favoured-nation clauses adopted by the Commission in 1978. By resolution 33/139 of 19 December 1978, the General Assembly decided to include in the provisional agenda of its thirty-fifth session an item entitled "Consideration of the draft articles on most-favoured-nation clauses". By the same resolution, States were requested by the General Assembly, *inter alia*, to comment on the recommendation of the Commission that the draft articles should be recommended to Member States with a view to the conclusion of a convention on the subject.

84. In the case of the Commission's draft conventions on the elimination or reduction of future statelessness, General Assembly resolution 896 (IX) of 4 December 1954 expressed the desire that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness "as soon as at least twenty States have communicated to the Secretary-General their willingness to co-operate in such a conference". After that condition was fulfilled, and the Secretary-General reported on the matter to the General Assembly, the conference was convened in 1959.

85. Before adopting its final decisions on the form to be given to a set of draft articles submitted by the Commission and/or the body to be entrusted with such a task, the General Assembly has invited States and, as the case may be, specialized agencies and other interested intergovernmental organizations to submit, also in writing, comments and observations on the relevant chapter of the Commission report and, in particular, on the final draft articles contained therein, and eventually on those provisions relating to the topic on which the Commission was unable to take decisions. This kind of request for comments and observations was made, for example, in the case of the draft articles on diplomatic intercourse and immunities, representation of States in their relations with international organizations, succession of States in respect of treaties, and the most-favoured-nation clauses.[113] In the last-mentioned case, organs of the United Nations with competence on the subject-matter were also invited to submit their comments and observations. The Secretary-General is usually requested to circulate the above-mentioned comments and observations in due time.

H. Elaboration and conclusion of conventions on the basis of draft articles prepared by the Commission following a General Assembly decision to that effect

1. By an international conference convened by the General Assembly

86. Ten conventions have been elaborated and concluded, on the basis of draft articles prepared by the Commission, by international conferences convened to that effect by the General Assembly: the four 1958 conventions on the law of the sea (High Seas; Territorial Sea and Contiguous Zone; Fishing and Conservation of the Living Resources of the High Seas; Continental Shelf); the 1961 Convention on the Reduction of Statelessness; the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Vienna Convention on the Law of Treaties; the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the 1978 Vienna Convention on Succession of States in Respect of Treaties. The 1958 Conference on the Law of the Sea elaborated and adopted an Optional Protocol concerning the compulsory settlement of disputes related to the said four conventions on the law of the sea. The 1961 Conference on Diplomatic Intercourse and Immunities and the 1963 Conference on Consular Relations elaborated and adopted two Optional Protocols, each related to one of the adopted conventions and concerning, respectively, acquisition of nationality and compulsory settlement of disputes.

87. When making a decision that an international conference of plenipotentiaries should be convened to

[111] General Assembly resolution 1288 (XIII) of 5 December 1958. A somewhat similar decision was taken by the General Assembly in connection with the Commission's draft articles on representation of States in their relations with international organizations. In resolution 2780 (XXVI) of 3 December 1971, the Assembly decided to elaborate and conclude a convention on the basis of the draft articles, but it postponed its decision as to the body to be entrusted with that task. An item entitled "Representation of States in their relations with international organizations" was included in the provisional agenda of the next regular session of the General Assembly.

[112] General Assembly resolution 3315 (XXIX) of 14 December 1974.

[113] General Assembly resolutions 1282 (XIII) of 5 December 1958, 2780 (XXVI) of 3 December 1971, 3315 (XXIX) of 14 December 1974, and 33/139 of 19 December 1978.

elaborate and conclude a conventional instrument or instruments on the basis of draft articles prepared by the Commission, the General Assembly resolution providing for that decision usually sets forth the task which is before the conference concerned. An elaborate formula on the task entrusted to the conference was included in General Assembly resolution 1105 (XI) of 21 February 1957 on the convening of the first United Nations Conference on the Law of the Sea. Having emphasized that the various problems of the law of the sea "were closely linked together juridically as well as physically" and "closely interdependent", the Assembly requested the Conference "to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate". The Conference was also requested to "study the question of free access to the sea of land-locked countries, as established by international practice of treaties".

88. Other formulae used by General Assembly resolutions concerning the task before the conference concerned read as follows:

Diplomatic intercourse and immunities (1959)

Decides that an international conference of plenipotentiaries shall be convoked to consider the question of diplomatic intercourse and immunities and to embody the results of its work in an international convention, together with such ancillary instruments as may be necessary.[114]

Consular relations (1961)

Decides that an international conference of plenipotentiaries be convened to consider the question of consular relations and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.[115]

Law of treaties (1966)

Decides that an international conference of plenipotentiaries shall be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.[116]

Representation of States in their Relations with international organizations (1972)

Decides that an international conference of plenipotentiaries shall be convened as soon as practicable to consider the draft articles on the representation of States in their relations with international organizations and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.[117]

Succession of States in respect of treaties (1975)

Decides to convene a conference of plenipotentiaries in 1977 to consider the draft articles on succession of States in respect of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.[118]

89. Another decision of importance from the point of view of treaty-making which the General Assembly normally makes when convening an international conference is that determining what will be the basis for the work of the conference. There have evolved four types of formulae embodying such decisions:

(*a*) In resolution of 1105 (XI) of 21 February 1957, relating to the first Conference on the Law of the Sea, the General Assembly referred to it

the report of the International Law Commission as the basis for its consideration of the various problems involved in the development and codification of the law of the sea, and also the verbatim records of the relevant debates in the General Assembly, for consideration by the conference in conjunction with the Commission's report.

A more or less similar formula was included in General Assembly resolutions 1685 (XVI) of 18 December 1961 and 1813 (XVII) of 18 December 1962, relating to the Conference on Consular Relations.

(*b*) In resolution 1450 (XIV) of 7 December 1959, concerning the Conference on Diplomatic Intercourse and Immunities, the General Assembly referred to it only the relevant chapter of the Commission's report "as the basis for its consideration of the question", without any record of the relevant debates being specifically transmitted to the conference;

(*c*) In resolution 2166 (XXI) of 5 December 1966, relating to the Conference on the Law of Treaties, the General Assembly referred to it the Commission's draft articles "as the basic proposal for consideration" by the Conference. The records of relevant debates held at a subsequent session of the General Assembly were also transmitted to the Conference by General Assembly resolution 2287 (XXII);

(*d*) In resolutions 3072 (XXVIII) of 30 November 1973 and 31/18 of 24 November 1976, relating to the Conferences on the Representation of States in Their Relations with International Organizations and on Succession of States in Respect of Treaties, the General Assembly referred to the conferences the corresponding draft articles of the Commission "as the basic proposal for consideration", without any specific mention of the relevant debates being transmitted to the Conferences.

90. The General Assembly resolution 1105 (XI) convening the first United Nations Conference on the Law of the Sea:

Calls upon the Governments invited to the Conference and groups thereof to utilize the time remaining before the opening of the conference for exchanges of views on the controversial questions relative to the law of the sea.

[114] General Assembly resolution 1450 (XIV) of 7 December 1959. By its resolution 1504 (XV) of 12 December 1960, the General Assembly decided that the provisional draft articles on special missions adopted by the Commission in 1960 be referred to the Conference so that they might be considered together with the draft articles on diplomatic intercourse and immunities.

[115] General Assembly resolution 1685 (XVI) of 18 December 1961.

[116] General Assembly resolution 2166 (XXI) of 5 December 1966.

[117] General Assembly resolution 2966 (XXVII) of 14 December 1972.

[118] General Assembly resolution 3496 (XXX) of 15 December 1975.

On other occasions, the General Assembly made arrangements for the consideration by it of the subject prior to the opening of the conference concerned, including an item to that effect on the agenda of one of its subsequent sessions. Thus, for example, an item entitled "Consular relations" was included by resolution 1685 (XVI) of 18 December 1961 in the provisional agenda of its seventeenth session "to allow further expressions and exchanges of views concerning the draft articles on consular relations" before the opening of the Conference. Another example is provided by resolution 2166 (XXI), whereby the General Assembly decided to include an item entitled "Law of treaties" in the provisional agenda of its twenty-second session "with a view to further discussion of the draft articles in order to facilitate the conclusion of a convention on the law of treaties at the conference of plenipotentiaries convened pursuant to the present resolution".

91. Another arrangement which the General Assembly used to make when convening an international conference to consider draft articles prepared by the Commission is the request to States to submit to the Secretary-General for circulation written comments and observations on the final draft articles in order that they may be circulated to Governments prior to the opening of the conference. Such requests was embodied in the resolutions concerning the Conferences on Consular Relations, the Law of Treaties, the Representation of States in Their Relations with International Organizations and the Succession of States in respect of Treaties. In one case, the first United Nations Conference on the Law of the Sea, the General Assembly convening resolution 1105 (XI) requested the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the Conference, with terms of reference which included the following:

> To obtain, in the manner which they think most appropriate, from the Governments invited to the conference any further provisional comments the Governments may wish to make on the Commission's report and related matters, and to present to the conference in systematic form any comments made by the Governments, as well as the relevant statements made in the Sixth Committee at the eleventh and previous sessions of the General Assembly.

92. On two occasions, States intending to participate in conferences were invited by the General Assembly to submit any amendments to the draft articles prepared by the Commission that they might want to propose in advance of the Conference.[119] Amendments submitted pursuant to that invitation were circulated at the opening of the conferences in question.

93. The resolutions convening the codification conferences also include provisions which determine the States invited to participate.[120] Such resolutions also provide invitations to the interested specialized agencies and intergovernmental organizations to send observers to the conference. Over the last years, representatives of national liberation movements have likewise been invited to participate in codification conferences. The Secretary-General is also requested to arrange for the presence at the conferences of the Commission's Special Rapporteur on the topic in question. In the case of the first United Nations Conference on the Law of the Sea, the Secretary-General was also requested by the necessary General Assembly resolutions to arrange for the technical services of experts.

94. For all the codification conferences, the Secretary-General was requested to present recommendations concerning the methods of work and procedures. For the first United Nations Conference on the Law of the Sea, a decision was also made to the effect that appropriate experts were invited by the Secretary-General to advise and assist the Secretariat with recommendations concerning the methods of work and procedures of the conference and the preparation of working documents of a legal, technical, scientific or economic nature to be submitted to the Conference in order to facilitate its work. General Assembly convening resolutions also request the Secretary-General to arrange for the necessary staff and facilities and to submit relevant documentation to the conferences. Resolution 1105 (XI) of 21 February 1957 convening the first United Nations Conference on the Law of the Sea specified in that respect that the Secretary-General should transmit to the Conference "all such records of world-wide or regional international meetings as may serve as official background material for its work".

95. Each United Nations codification conference called to elaborate and conclude an international conventional instrument or instruments on the basis of draft articles prepared by the Commission approves its own rules of procedure as well as the basic methods of work and techniques to be followed in the conference. The articles of the Commission's draft and amendments thereto are considered first at committee level and then by the plenary of the conference. The first

[119] General Assembly resolutions 1813 (XVII) of 18 December 1962 (consular relations) and 2287 (XXII) of 6 December 1967 (law of treaties).

[120] In some cases, such as that of the Conference on the Representation of States in their Relations with International Organizations and the Conference on the Succession of States in Respect of Treaties, the General Assembly decided on the question of participation at the conference at a session subsequent to one at which it decided upon the convening of a conference to consider the draft articles adopted by the Commission and to conclude a convention thereon. Items entitled "Participation in the United Nations Conference on the Representation of States in Their Relations with International Organizations, to be held in 1975" and "Conference of plenipotentiaries on succession of States in respect of treaties" were included in the provisional agendas of the twenty-ninth and thirty-first sessions, respectively, of the General Assembly, for the purpose of determining questions of participation and other organizational matters.

United Nations Conference on the Law of the Sea set up five main committees, and the United Nations Conference on Consular Relations two main committees. In other cases, the conferences established a single committee of the whole. All United Nations codification conferences have been assisted by a drafting committee. Working groups are sometimes set up by the conference to consider specific questions and report back to a main committee or to the plenary of the conference.

96. After all articles and amendments thereto have been considered, the preamble of the instrument and the final clauses, the draft convention or conventions are put to the vote as a whole. Once adopted, the conventions, as well as related optional protocols, are open for signature and ratification or for accession. Each conference also adopts its final act, to which resolutions adopted by the conference are normally annexed.

2. By the General Assembly

97. The 1969 Convention of Special Missions and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, were elaborated and adopted, on the basis of the respective draft articles submitted by the Commission, by the General Assembly itself. The draft articles on special missions, prepared by the Commission following the two-reading procedure, had been recommended by the Commission for conclusion of a convention. The draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons had been provisionally adopted by the Commission and submitted to the General Assembly without any formal recommendations as to the conclusion of a convention on that basis.

98. Having received from the Commission the sets of draft articles mentioned above, the General Assembly made the following arrangements for the elaboration and conclusion on the respective conventions:

(*a*) States, and in the case of the draft articles on the prevention and punishment of crimes against internationally protected persons, "the specialized agencies and interested inter-governmental organizations", were invited to submit their written comments and observations on the draft articles prepared by the Commission;[121]

(*b*) The Secretary-General was requested to circulate those comments in order "to facilitate the consideration" of the draft articles by the General Assembly "in the light of those comments and observations";[122]

(*c*) The items entitled "Draft Convention on Special Missions" and "Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons" were included in the agenda of subsequent sessions of the General Assembly, "with a view to the adoption" (special missions) or "the final elaboration" (internationally protected persons) of the conventions in question.[123] Having been unable, because of lack of time, to conclude in a single session the elaboration of the Convention on Special Missions, the General Assembly inscribed again the item "Draft Convention on Special Missions" in the agenda of its following session, "with a view to the adoption of the Convention" at that session.[124]

(*d*) In the case of special missions, States were invited to include as far as possible in their delegations experts competent in the field, and the Secretary-General was requested to arrange for the presence of the Special Rapporteur of the International Law Commission for the topic as an expert during the debates on the topic at the twenty-third and twenty-fourth sessions of the General Assembly.[125]

99. The work of the elaboration of the two conventions was done by the Sixth Committee of the General Assembly, which studied in detail each of the provisions of the draft articles, amended them, prepared the preamble and final clauses of the conventions and, in the case of the articles on special missions, an Optional Protocol concerning the compulsory settlement of disputes arising out of the interpretation or application of the Convention. The Sixth Committee was assisted in both instances by a drafting committee it had established. The General Assembly adopted by resolution the Conventions and the Optional Protocol relevant to the Convention on Special Missions, recommended by the Sixth Committee, and opened the Conventions and the Optional Protocol for signature and ratification or for accession.[126] The General

[121] General Assembly resolutions 2273 (XXII) of 1 December 1967 (special missions), and 2926 (XXVII) of 28 November 1972 (internationally protected persons).

[122] *Ibid.*

[123] *Ibid.* The draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons had been prepared by a working group established for that purpose by the Commission.

[124] General Assembly resolution 2419 (XXIII) of 18 December 1968.

[125] General Assembly resolutions 2273 (XXII) and 2419 (XXIII).

[126] General Assembly resolutions 2530 (XXIV) of 8 December 1969 (Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes) and 3166 (XXVIII) of 14 December 1973 (Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents). When adopting the latter Convention by resolution 3166 (XXVIII), the General Assembly recognized that the provisions of the Convention

(*Continued on next page.*)

Assembly also adopted a resolution on the settlement of civil claims in connection with the Special Missions Convention.[127]

I. Conclusions

100. With the assistance of the Working Group established at its thirtieth session and enlarged at its thirty-first session,[128] the Commission, in the light of the General Assembly's request for observations, has made an evaluation of its own performance and of its potential. This has been done on the basis of the information contained in Sections A to H above.

101. This information shows that the techniques and procedures provided in the Statute of the Commission, as they have evolved during a period of three decades, are well adapted for the object stated in Article 1 of its Statute and further defined in Article 15, i.e. "the progressive development of international law and its codification".

102. Nevertheless, experience has shown that it is not normally feasible in any particular case to separate the elements of progressive development from those of codification, and that the Commission, as a permanent body of legal experts, is well qualified to prepare draft conventions or articles in those cases in which elements of progressive development predominate as well as those in which elements of codification predominate.

103. The Commission, while constantly keeping under review its techniques and procedures and adapting them to meet the needs of circumstances as they arise, considers that, on the whole, its rate of progress is satisfactory, in view of the time and resources at its disposal and the assistance which it requires from Governments at all stages.

104. Institutional features which contribute to the efficient performance of its functions by the Commission are: (*a*) Special Rapporteurs, (*b*) the Drafting Committee, and (*c*) Working Groups.

(*a*) The institution of Special Rapporteurs was foreseen in the Statute of the Commission. They have served the Commission well, but it will be necessary to provide them with more assistance and more facilities to enable them to perform their duties in the future.[129]

(*b*) The Drafting Committee, which has a somewhat wider mandate than a normal drafting committee, is an indispensable and very effective organ of the Commission.

(*c*) For preliminary examination of the scope of new topics and for special topics assigned to the Commission by the General Assembly, Working Groups created *ad hoc* have also proved to be valuable.

105. It is essential not only that the Commission should produce drafts of a high technical quality but also that these drafts should reflect the comments and observations of Governments, whether made directly or through their representatives in the General Assembly. The established procedures do, in fact, provide such opportunities for Governments to make comments and observations and for the Commission to examine them. It may, however, well become necessary for the Commission to make more use of questionnaires addressed to Governments than it has done in the past.

106. Finally, it should be noted that there is a risk that the rate of progress of the Commission may be impeded by its agenda becoming too congested, and it is for consideration whether topics selected for inclusion in its programme should, where appropriate, be specific rather than general.

(*Footnote 126 continued.*)

"could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid."

The Assembly also decided, in resolution 3166 (XXVIII), that that resolution, "whose provisions are related to the annexed Convention, shall always be published together with it".

[127] General Assembly resolution 2531 (XXIV) of 8 December 1969.

[128] See Introduction, paras. ii to vi above.

[129] Text of para. (*a*) as it was modified by the Commission.

ANNEX[a]

Statute of the International Law Commission

Article 1

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.

2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

[a] Text of the annex as it was approved by the Commission.

Chapter II. Functions of the International Law Commission

Article 15

In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet

been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

A. Progressive development of international law

Article 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines:

(*a*) It shall appoint one of its members to be Rapporteur;

(*b*) It shall formulate a plan of work;

(*c*) It shall circulate a questionnaire to the Governments, and shall invite them to supply within a fixed period of time data and information relevant to items included in the plan of work;

(*d*) It may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;

(*e*) It may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;

(*f*) It shall consider the drafts proposed by the Rapporteur;

(*g*) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in subparagraph (*c*) above;

(*h*) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;

(*i*) The Rapporteur and the members appointed for that purpose shall reconsider the draft taking into consideration these comments and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;

(*j*) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General-Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General.

2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow in general a procedure on the following lines:

(*a*) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subjects;

(*b*) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(*c*) The Commission shall submit a report and its recommendations to the General Assembly. Before doing so, it may also, if it deems it desirable, make an interim report to the organ or agency which has submitted the proposal or draft;

(*d*) If the General Assembly should invite the Commission to proceed with its work in accordance with a suggested plan, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (*c*) of that article may not, however, be necessary.

B. Codification of international law

Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(*b*) Conclusions relevant to:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with article 19. The Commission shall decide whether the opinions of any scientific institution or individual experts consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:

(*a*) To take no action, the report having already been published;

(*b*) To take note of or adopt the report by resolution;

(*c*) To recommend the draft to Members with a view to the conclusion of a convention;

(*d*) To convoke a conference to conclude a convention.

2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

...

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER (PARAGRAPH 5 OF PART 1 OF GENERAL ASSEMBLY RESOLUTION 33/139; PARAGRAPH 5 OF GENERAL ASSEMBLY RESOLUTION 33/140)

[Agenda item 7]

DOCUMENT A/CN.4/321 and Add.1–7*

Comments of States

[*Original: English, French Russian, Spanish*]
[*11, 15, 29 May, 5, 18, 22 June, and 30 August 1979*]

CONTENTS

NOTE

For the text of the treaties listed below, which are referred to in this document, see the following sources:

Convention on Special Missions (New York, 8 December 1969)	General Assembly resolution 2530 (XXIV), annex
Vienna Convention on Consular Relations (Vienna, 24 April 1963), hereinafter called "1963 Vienna Convention"	United Nations, *Treaty Series*, vol. 596, p. 261
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), hereinafter called "1961 Vienna Convention"	*Ibid.*, vol. 500, p. 95
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character	*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

* The comments of Bulgaria, the Byelorussian Soviet Socialist Republic and the German Democratic Republic, which were reproduced as mimeographed documents A/CN.4/321/Add.6–7, were circulated after the closure of the thirty-first session of the Commission.

Introduction

1. On 19 December 1978, the General Assembly adopted resolution 33/139, entitled "Report of the International Law Commission", paragraph 5 of section I of which reads as follows:

[*The General Assembly*]

...

... *recommends* that the International Law Commission should continue the study, including those issues it has already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on this item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument, and invites all States to submit their written comments on the preliminary study carried out by the Commission concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier for their inclusion in the report of the Commission on the work of its thirty-first session.

2. Also on 19 December 1978, the General Assembly adopted resolution 33/140, entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961", which reads as follows:

The General Assembly,

Taking note of the report of the Secretary-General[1] on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961,

Recalling its resolutions 3501 (XXX) of 15 December 1975 and 31/76 of 13 December 1976,

Noting with satisfaction that the number of States parties to the Vienna Convention on Diplomatic Relations of 1961 has increased since the adoption by the General Assembly of the above-mentioned resolutions,

Convinced of the desirability of the widespread acceptance of the Vienna Convention on Diplomatic Relations of 1961 and the necessity for strict observance and implementation by States of the provisions consolidated in that Convention in the interest of maintaining normal relations among them and developing international co-operation,

Concerned both at continuing instances of violations of the generally recognized rules of diplomatic law and at instances of violations of security of diplomatic missions and safety of their personnel,

Noting with appreciation the study by the International Law Commission of the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which could constitute a further development of the international diplomatic law,

1. *Requests* those States which have not yet become parties to the Vienna Convention on Diplomatic Relations of 1961 to give urgent consideration to acceding to that Convention;

2. *Calls upon* all States to observe and strictly implement the provisions of the Vienna Convention on Diplomatic Relations of 1961, especially to ensure better security of diplomatic missions and safety of their personnel, provided for in that Convention;

3. *Notes* the invitation in General Assembly resolution 33/139 of 19 December 1978 to States to submit written comments on the preliminary study carried out by the International Law Commission on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and observes that, in replying to such a request, States may also include comments and observations on the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 to be submitted to the General Assembly at a future session;

4. *Reaffirms* the continuing interest of the General Assembly in the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961;

5. *Decides* that the General Assembly will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. In pursuance of paragraph 5 of part I of resolution 33/139 and paragraph 3 of resolution 33/140, quoted above, the Secretary-General, by circular note dated 16 February 1979, asked States for any comments they might wish to submit. By 30 August 1979, comments had been received from 14 Governments (Austria, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Cuba, Czechoslovakia, Federal Republic of Germany, German Democratic Republic, Hungary, Kuwait, Switzerland, Union of Soviet Socialist Republics, United Kingdom). These comments are reproduced below.

4. The views expressed in the Sixth Committee of the General Assembly at its thirty-third session in 1978, during the consideration of agenda item 114 (Report of the International Law Commission on the work of its thirtieth session) are reflected in the summary records of the relevant meetings of the Sixth Committee.[2] The views expressed in the Sixth Committee at that session in connection with agenda item 116 (Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961) are reflected in the summary records of the relevant meetings of the Sixth Committee.[3]

Comments of States

Austria

[*Original: English*]
[*25 May 1979*]

The Government of Austria believes that the law with regard to the diplomatic courier is sufficiently

[1] A/33/224.

[2] See *Official Records of the General Assembly, Thirty-third session, Sixth Committee*, 27th and 31st–46th meetings; and *ibid., Sessional fascicle*, corrigendum.

[3] *Ibid.*, 14th–20th and 67th meetings; and *ibid., Sessional fascicle*, corrigendum.

developed in international agreements. Notwithstanding, it is believed that further study of this question would be useful. The International Law Commission should be requested to continue its work on the basis of the problems already identified, which might require more detailed regulation. Because of the very preliminary stage of the work of the Commission on this question, comments on particular points would appear to be premature. An interim report containing specific formulations should be prepared prior to requesting comments of Governments with regard to detailed aspects of the problem.

Apart from the foregoing, the Austrian Government is of the view that particular attention should be given to the problems arising from the gap which exists between the justified need of the world community for security from terrorist activities, in particular in civil aviation, on the one hand, and the equally justified request for the inviolability on the diplomatic pouch, on the other hand. A concrete problem that could be studied in this context would be the direct access to the apron of international airfields when delivering or receiving diplomatic pouches transported by pilots.

Bulgaria*

[*Original: English*]
[*28 August 1979*]

The People's Republic of Bulgaria fully supports the proposal to elaborate and adopt, within the shortest time possible, a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

The Bulgarian Government considers that existing international multilateral conventions in this field do not regulate in full the issues concerning the status of the diplomatic courier. That is why an additional protocol on this matter is needed with a view to clearly defining the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier—all the more so, because such a protocol can make a contribution to the maintenance and development of friendly relations among States.

The results of the preliminary study carried out by the International Law Commission concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier have brought out the need for further elaboration of the international legal norms consolidated in multilateral international conventions which treat these questions, namely: the 1963 Vienna Convention, the 1961 Vienna Convention, the Convention on Special Missions, and the 1975 Vienna Convention.

In the first place, it is necessary to work out a clear definition of the terms "diplomatic courier" and "diplomatic bag", as well as to formulate precisely the functions of the diplomatic courier, including the question of suspension of his functions. There is also need to elaborate a set of international rules relating to the immunities of the diplomatic courier and the facilities which the receiving or the transmitting State should accord to the diplomatic courier with respect to his movements within its territory in the performance of his duties.

The Government of the People's Republic of Bulgaria considers that, for a normal and unimpeded performance of the functions of the diplomatic courier, the future protocol should provide for the following:

The granting to the diplomatic courier of the privileges and immunities necessary for the performance of his functions;
Complete immunity of the diplomatic courier from the jurisdiction of the receiving State;
Immunity from arrest and/or detention of the diplomatic courier;
Exemption from personal examination or control;
Exemption from national or local dues and taxes;
Exemption from public service of any kind;
Inviolability of the premises and means of transportation of the diplomatic courier both in the receiving State and the transit State.

Other important matters which ought to be settled in the future protocol are:

The status of the *ad hoc* diplomatic courier;
The term of validity of privileges and immunities and the status of the diplomatic courier at break of diplomatic relations;
Recall of diplomatic missions;
The question of facilities granted to the diplomatic courier;
The problem of persons declared *non grata*;
Other issues.

It is also necessary to anticipate stipulations concerning the obligation of the diplomatic courier to observe the laws and statutes of the receiving State.

The protocol should clearly determine the status of the diplomatic bag by stressing its strict inviolability and by spelling out the obligation of both the receiving State and the transit State to take all necessary measures for ensuring the inviolability of the diplomatic bag.

It is also necessary that the future protocol regulate the obligations of third parties in *force majeure* circumstances, as well as the steps which the receiving and transit States must take in cases of incidents involving the diplomatic courier and in military conflicts between States.

In the opinion of the Government of the People's Republic of Bulgaria, the results of the preliminary study conducted by the Commission provide a reasonable basis [for the expectation that a good background has been laid] for elaborating within the shortest time-limits the protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

* Comments distributed after the closure of the thirty-first session of the Commission.

Byelorussian Soviet Socialist Republic*

[*Original: Russian*]
[*26 June 1979*]

The position of the Byelorussian SSR on the question of the implementation by States of the provisions of the 1961 Vienna Convention and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier has been stated both in the replies of the Byelorussian SSR to the inquiries of the Secretary-General of the United Nations, reproduced in documents A/31/145 of 1 September 1976 and A/33/224 of 5 September 1978, and in statements by the Byelorussian delegation in the Sixth Committee at the thirtieth, thirty-first and thirty-third sessions of the United Nations General Assembly. The Byelorussian SSR was also a sponsor of resolutions on this question adopted at the thirteith, thirty-first and thirty-third sessions of the General Assembly [resolutions 3501 (XXX), 31/76 and 33/140].

The Byelorussian SSR, reaffirming the views which it has already expressed on this question at the Secretary-General's request, would like to submit its comments on the preliminary study carried out by the International Law Commission concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

In the view of the Byelorussian SSR, there are several areas of inter-State relations in which there is a need for clearer supplementary regulations governing certain questions of diplomatic law.

In that connection the Byelorussian SSR considers it necessary and timely to elaborate norms of international law governing the functions and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It therefore took note with interest of the preliminary study carried out on this question by the Commission in implementation of General Assembly resolution 31/76 of 13 December 1976.[4] The Working Group on status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier established by the Commission identified 19 issues relating to this question which need to be examined in connection with the drafting of the relevant legal document. An analysis of these issues indicates that most of them have not been properly reflected in existing international legal instruments in the field of diplomatic law, a fact which again underscores the need to prepare, as a supplement to the 1961 Vienna Convention, a legal document on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which would be based on the provisions of that Convention and would take into consideration the corresponding provisions of similar conventions.

1. *Definition of "diplomatic courier"*

As is clear from the study undertaken by the Commission, neither the 1961 Vienna Convention nor any other convention of that kind contains a definition of the term "diplomatic courier".

In the course of further work on the question the Commission should formulate a definition of that term, taking into account the provisions of the four conventions in the field of diplomatic law studied in this context, which contain elements of a possible definition of the term "diplomatic courier". In such a definition it should be indicated that the diplomatic courier is a person authorized to deliver the diplomatic bag. His status should be confirmed by an official document, which should also indicate the number of packages constituting the diplomatic bag accompanied by him.

2. *Function of the diplomatic courier*

In defining the function of the diplomatic courier, account should be taken of the provisions of article 27 of the 1961 Vienna Convention, article 35 of the 1963 Vienna Convention, article 28 of the Convention on Special Missions and articles 27 and 57 of the 1975 Vienna Convention. Account should also be taken of the fact that the function of the courier is that of the State and not of the individual.

3. *Privileges and immunities of the diplomatic courier*

In the opinion of the Byelorussian SSR, for the performance of his functions the diplomatic courier should enjoy as full diplomatic status as possible. In performing his official functions the diplomatic courier should enjoy personal inviolability and immunity from arrest or detention. The receiving State or the transit State should be responsible for taking all appropriate steps to prevent any attack on the person, freedom or dignity of the diplomatic courier. In the performance of his official functions the diplomatic courier should also enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving State or the transit State.

The diplomatic courier should be exempt from personal examination or control. The personal baggage of the diplomatic courier should be exempt from customs inspection, save in exceptional cases were there are serious grounds for supposing that his personal baggage contains articles the import of which is prohibited by the law of the receiving State or the transit State. In such cases, the inspection should be conducted only in the presence of the diplomatic courier.

The receiving State or the transit State should be required to take all appropriate steps to ensure the inviolability of places where the diplomatic courier is staying while performing his official functions. The necessary protection should also be afforded to the means of transport used by the diplomatic courier.

* Comments distributed after the closure of the thirty-first session of the Commission.

[4] *Yearbook ... 1978*, vol. II (Part Two), pp. 138–139, document A/33/10, paras. 137–144.

The State to which the diplomatic bag belongs should retain the right to waive fully or in part the immunities of the diplomatic courier delivering it.

The receiving State or the transit State may, without having to explain its decision, notify the State to which the diplomatic bag belongs that the diplomatic courier delivering it is not acceptable. However, the receiving State cannot demand the recall of a diplomatic courier in its territory or the termination of his functions until he has delivered to the consignee the diplomatic bag in his charge.

4. *Duration of privileges and immunities of the diplomatic courier*

The provisions of existing conventions in the field of diplomatic law basically define the time of cessation of the immunities of an *ad hoc* diplomatic courier, which takes effect when the *ad hoc* diplomatic courier has delivered to the consignee the diplomatic bag in his charge

It would appear that the diplomatic courier should enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State for the purpose of performing his official functions until the time he leaves that territory.

5. *Consequences of the severance or suspension of diplomatic relations or armed conflict*

In the opinion of the Byelorussian SSR, in the event of the severance or suspension of diplomatic relations between the State to which the diplomatic bag belongs and the receiving State or the transit State, and also in the case of the outbreak of armed conflict between them, the receiving State or the transit State should be required to ensure the inviolability of the diplomatic bag in its territory and respect for the privileges and immunities of the diplomatic courier accompanying the bag.

6. *Definition of "diplomatic bag"*

In formulating a definition of the term "diplomatic bag" it should be indicated that the term means the official correspondence of the Government of a State or its diplomatic mission, intended for communication between the Government and the diplomatic mission or between the diplomatic mission and other missions and consulates of that State, regardless of where they are situated.

The packages constituting the diplomatic bag should bear visible external marks indicating their character and the State to which they belong and should contain only diplomatic documents or articles intended for official use.

7. *Status of the diplomatic bag*

It would seem necessary to note that the diplomatic bag may be accompanied or not accompanied by diplomatic courier. The diplomatic bag, whether accompanied or unaccompanied by diplomatic courier, is inviolable and should not be opened or detained; nor should its contents be ascertained by technical means without its being opened.

8. *Respect for the laws and regulations of the receiving State*

In the opinion of the Bvelorussian SSR, in the formulation of provisions on this point it should be indicated that, without prejudice to his privileges and immunities. the diplomatic courier enjoying such privileges and immunities should be required to respect the laws and regulations of the receiving State; he should also be required to refrain from interfering in the internal affairs of that State.

9. *Obligations of the receiving State or the transit State*

The existing conventions in the field of diplomatic law contain some provisions which could be used in the elaboration of international norms on this question.

In particular, it should be indicated that the diplomatic courier is to be protected by the receiving State in the performance of his functions. Transit States should afford diplomatic couriers and the diplomatic bag the same inviolability and protection as the receiving State is required to provide.

10. *Obligations of the receiving State or the transit State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions*

In the view of the Byelorussian SSR, in such cases the receiving State or the transit State should be required to notify the State to which the diplomatic bag belongs as quickly as possible and to hand over the diplomatic bag to an official representative of that State.

11. *Obligations of the third State in cases of* force majeure

In cases of *force majeure*, the State in whose territory the diplomatic courier or diplomatic bag is present should respect the privileges and immunities of the diplomatic courier and the status of the diplomatic bag.

In the opinion of the Byelorussian SSR, the rules of international law governing the functions and status of the diplomatic courier and the diplomatic bag accompanied or not accompanied by diplomatic courier might be laid down in an additional protocol to the 1961 Vienna Convention, which would be based on the provisions of that Convention and would take into consideration the relevant provisions of other conventions of a similar nature. The protocol should also indicate that, where necessary, the terms "diplomatic courier" and "diplomatic bag" will be equated with the terms "consular courier" and "consular bag", referred to in article 35 of the 1963 Vienna Convention; the terms "courier of the special mission" and "the special

mission's bag", referred to in article 28 of the Convention on Special Missions; the terms "courier of the mission" and "the mission's bag"; and the term "courier of the delegation" and "the delegation's bag", referred to in articles 27 and 57 respectively of the 1975 Vienna Convention.

The Byelorussian SSR reserves the right to submit additional comments on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier in connection with the further elaboration of international norms on this question.

The speedy elaboration and adoption of an additional protocol to the 1961 Vienna Convention regulating the functions and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would undoubtedly make a positive contribution to the further codification and progressive development of international diplomatic law and to the strengthening of mutual understanding and co-operation among States.

Canada

[*Original: English*]
[*30 April 1979*]

The Government of Canada considers that the 1961 Vienna Convention is declaratory of customary international law and would support any resolution calling upon States which have not yet done so to accede to the Convention.

The Government of Canada is of the view that questions arising from the implementation of the Convention should be resolved through bilateral means and doubts the necessity to develop further any particular aspect of the Convention.

With regard to the statute of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it is the opinion of the Government of Canada that articles 27 and 40 of the 1961 Vienna Convention, if strictly applied, provide sufficient guarantees to ensure the proper functioning and protection of official communications by couriers. Consequently, Canada does not see a need to elaborate additional or more detailed provisions on the matter.

Chile

[*Original: Spanish*]
[*8 May 1979*]

In accordance with the provisions of United Nations General Assembly resolutions 33/139 and 33/140, both dated 19 December 1978, the Secretary-General has informed the Government of Chile of the recommendation that the International Law Commission should continue its study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier in the light of comments made during the debate on that item in the Sixth Committee at the thirty-third session of the General Assembly and of comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument.

In addition, Member States were invited to submit, not later than 30 April 1979, their written observations or comments on the topic in question.

The Secretary-General's note added that it would be appreciated if States were to include comments and observations on the implementation of the provisions of the 1961 Vienna Convention, to be submitted to the General Assembly at a future session.

After placing on the agenda of its twenty-ninth session the item entitled "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", the Commission established a Working Group to deal with the topic. That Group tentatively identified 19 issues that might be considered.[5] At the same time, the intention was to harmonize those issues with the relevant rules of the following multilateral agreements: the 1961 Vienna Convention; the 1963 Vienna Convention; the Convention on Special Missions; and the 1975 Vienna Convention.

The issues tentatively identified by the Working Group and the comments that might be made on them are set out below:

1. *Definition of "diplomatic courier"*

Although the existing multilateral agreements contain no definition of "diplomatic courier", a consensus exists as to its actual meaning. On the basis of the provisions on the topic, the expression may be said to have the following meaning: diplomatic courier means the person who, duly authorized by his Government, is responsible for the custody and physical transport of the diplomatic bag, or for transmitting an oral message, from the sending State to the premises of the appropriate mission or office in the receiving State.

However, this issue should be linked to question No. 13, concerning the definition of "diplomatic bag". Furthermore, and for the sake of completeness, whatever definitions clause is drafted should also envisage the definition of "transit State" and that of "receiving State".

2. *Function of the diplomatic courier*

The existing multilateral conventions provide guidelines for defining the functions of the diplomatic courier. In performing his specific tasks, the diplomatic courier becomes the appropriate means used by a State to contact, in a safe and official manner, the particular diplomatic mission, consular office, permanent observer mission, special mission, or observer delegation which calls for its attention at the time. In practice, therefore, the courier has a number of functions, and hence the definition should be broad and flexible,

[5] See *Yearbook ... 1978*, vol. II (Part Two), p. 139, document A/33/10, paras. 142–143.

rather than narrow and restricted to a list of various activities.

3. *Multiple appointment of the diplomatic courier*

There would appear to be no objection to the multiple appointment of the diplomatic courier, if circumstances necessitate it.

4. *Privileges and immunities of the diplomatic courier*

With regard to this issue, the privileges and immunities should be limited strictly to the natural scope of the functions of the diplomatic courier. In the performance of his duties, the diplomatic courier acts as the official link between his Government and the seat of the mission or the office concerned, which means that his status resembles to some extent that of the diplomatic agent. In this respect, what should be stressed is the need to guarantee exemption from personal examination and from inspection of his baggage, the inviolability of his residence while he remains in the transit State or in the receiving State until he has delivered the bag or message, and the inviolability of means of transport. The grant of privileges and immunities to the diplomatic courier is therefore inherent in his status as a Government official holding diplomatic rank for the duration of his essentially temporary mission. As far as the waiver of such privileges is concerned, the principle set forth in article 3, paragraph 1, of the 1961 Vienna Convention, applying to the diplomatic agent, should remain applicable.

5. *Facilities accorded to the diplomatic courier*

The facilities to be accorded to the diplomatic courier are related to the deference and courtesies to be extended by States, in their relations with one another, to the representatives or envoys of other States. Consequently, it will be necessary to determine specific facilities case by case, according to circumstances, and for this reason a generic approach seems to be called for to the undertaking by States to facilitate, as far as possible, the performance of the functions of the courier—for example, by the timely and prompt granting of visas.

6. *Duration of privileges and immunities of the diplomatic courier*

It seems advisable to restate the principle laid down in the four existing multilateral conventions, namely that the privileges and immunities enjoyed by the diplomatic courier would cease to apply from the moment when the courier has delivered the diplomatic bag to the consignee.

7. *Nationality of the diplomatic courier*

In view of the fact that, through the diplomatic courier, the sending State extends its official activity in the transport and delivery of the diplomatic bag, and of the importance of entrusting such a mission to an official who is one of its own nationals and is duly authorized, the principle set forth in the 1963 Vienna Convention (article 35, para. 5) appears sound, namely that the courier shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State.

8. *End of functions of the diplomatic courier*

With regard to the termination of the functions of the diplomatic courier, there are two distinct points: one concerning his function at the international level, and the other concerning his function under internal law. So far as the first point is concerned, the courier's functions would terminate when he delivers the diplomatic bag which he has been instructed to carry and deliver to the consignee; so far as the second point is concerned, his functions would terminate at the time when he reports the completion of his mission in the receiving State to the authority or service which assigned the official mission to him.

9. *Consequences of the severance or suspension of diplomatic relations, the recall of diplomatic missions or armed conflict*

The function of the diplomatic courier, although he is accorded privileges and immunities similar to those of the diplomatic agent, is of a procedural rather than a substantively political nature. Consequently, the severance or suspension of diplomatic relations or the recall of missions should not influence decisively the functions of the courier during his passage through transit States. In strict law, the same would be true even in the event of an armed conflict with such States. In the event of the severance or suspension of diplomatic relations with the receiving State, or the recall of diplomatic missions, the diplomatic courier would act as a liaison between the sending State and the diplomatic mission agreeing to look after the interests of that State; such situations of bilateral abnormality would not then interfere with the performance of the courier's functions. In the event of armed conflict, the *de facto* situation would prevent the courier from continuing to perform his functions.

10. *Granting of visas to the diplomatic courier*

The granting of visas to the diplomatic courier would remain one of the facilities which transit States agree to provide, as noted under item 5.

11. *Persons declared not acceptable*

According to the principle laid down in article 9, paragraph 1, of the 1961 Vienna Convention, the declaration of a person as not acceptable relates directly to the members of the staff of a mission who do not possess diplomatic status. Consequently, the diplomatic courier would not be liable on those grounds to recall from the receiving State, since he is neither a member of the staff of the mission, nor

connected with it or with the receiving State in any permanent manner. On the other hand, owing to the essentially temporary nature of the functions of the courier, it would be feasible to appoint as courier a person who has been declared not acceptable, even for the State in question. As has already been mentioned, the diplomatic courier does not perform his functions within the mission or office, but outside it, as an official link between the sending State and the mission concerned, and hence he is not involved in the internal operations of the mission. Furthermore, the diplomatic courier's connection with the sending State's diplomatic or consular mission lasts only for as long as is necessary to deliver the communication or message brought by him; consequently, the declaration of a person as not acceptable, made on an occasion prior to that on which he is sent as a diplomatic courier, would not prevent him from accomplishing his particular mission. Nevertheless, in order to avoid in the future situations which might offend the sensibilities of the receiving State, sending States might undertake not to send as diplomatic couriers persons declared not acceptable by that country.

12. *Status of the diplomatic courier* ad hoc

The multilateral conventions referred to above all permit the designation of diplomatic couriers *ad hoc*. They state that, in any event, such a courier's privileges and immunities would be more limited, in that they would cease to apply upon delivery of what was entrusted to him to the consignee. Consequently, the diplomatic courier *ad hoc* should be governed by specific rules within the general rules applicable to the diplomatic courier, in respect of such questions as his legal status in the interim period elapsing between the delivery of the diplomatic bag and the time when he is entrusted with another.

13. *Definition of "diplomatic bag"*

This definition should be linked with the definition of the "diplomatic courier", as noted under item 1. It would, however, be desirable to draft a definition taking account of the provisions of the four multilateral conventions. As a result, the diplomatic bag would mean all packages which bear visible external marks of their character and permit the official movement of documents or articles intended exclusively for the use of the sending State and of its mission or office abroad.

14. *Status of the diplomatic bag accompanied by diplomatic courier*

This item concerns the security measures to be taken by States in respect of packages constituting a diplomatic bag. One of the factors to be considered is the principle that the bag may not be opened or detained; in addition, provision should be made for all such measures as are to be taken by the transit and receiving States for the adequate protection of the diplomatic bag, which are referred to under items 18 and 19.

15. *Status of the diplomatic bag not accompanied by diplomatic courier*

It is desirable to specify the rules applicable to the diplomatic bag in this case, if it is felt that in such circumstances there is a greater need for the protection and free transit of the packages constituting the bag. The principle established in the existing multilateral conventions should therefore be upheld, in the sense that the diplomatic bag should be entrusted to the highest ranking person in charge of the means of transport being used to carry it, namely the captain of the ship or aircraft concerned. Upon its arrival at the port or airport of entry in the receiving State, the diplomatic bag would be handed over to the mission official duly authorized for that purpose, who would take direct physical possession of the packages.

16. *Respect for the laws and regulations of the receiving State*

Unquestionably, the diplomatic courier must observe the laws and regulations of the receiving State. Without prejudice to the privileges and immunities to which he is entitled, the diplomatic courier should endeavour not to contravene the laws of the receiving State; while this obligation is expressly stipulated in the 1961 Vienna Convention (article 41, para. 1) in respect of all persons enjoying privileges and immunities, including the duty not to interfere in the internal affairs of that State, there is no reason why the principle should not be reiterated in the future rules concerning the diplomatic courier.

17. *Obligations of the receiving State*

The primary obligation of the receiving State may be described briefly as being to afford to the diplomatic courier the guarantees necessary for the enjoyment of the privileges and immunities which are inherent in his function. As the relevant multilateral conventions indicate, the diplomatic courier shall be protected by the receiving State. Consequently, rather than draw up a list of the specific secondary obligations which give effect to the principal obligation, it would be better to give a general definition of this duty. In the event of the diplomatic courier's death, or if some accident should prevent him from carrying out his functions, the future rule should be designed to ensure the protection of the packages constituting the diplomatic bag until they are handed over to another courier.

18. *Obligation of the transit State*

For the purpose of the prompt and complete performance of the mission entrusted to him, the diplomatic courier should be able to rely on the undertaking given by States to give him passport visas, if such visas are necessary. A provision embodying this

obligation on the part of transit States to permit movement through their territory would constitute an effective protection for the movement of the courier in the performance of his duty. For this purpose, it would be desirable to combine this principle with item 5, concerning the facilities to be accorded to the diplomatic courier. In the event of the diplomatic courier's death or of an accident in the transit State that prevents him from performing his functions, the principle to be followed would be analogous to that stated under item 17.

19. *Obligations of the third State in cases of* force majeure

If, in consequence of *force majeure* or of some fortuitous event, the diplomatic courier is compelled to make use of the territory of a third State, it is reasonable to infer that the protection of that State should be extended, for as long as necessary, to the person of the courier and to the diplomatic bag which he is accompanying.

diplomatic bag not accompanied by diplomatic courier should also be regulated.

The diplomatic courier service is one of the oldest and most necessary institutions in inter-State relations and, with the development of transport and communications, has come to include the dispatch of unaccompanied diplomatic bags.

Experience has shown that normal and unobstructed functioning of this service is an essential requirement for the satisfactory discharge of the duties of diplomatic missions, consular offices, special missions and representatives to international bodies.

For these reasons, the Government of Cuba believes that this matter should continue to receive the attention of the General Assembly and that it would be appropriate to return to the subject when the International Law Commission submits the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

Cuba

[*Original: Spanish*]
[*5 May 1979*]

The Government of the Republic of Cuba reiterates its interest in the maintenance of normal relations among States and in the development of international co-operation; it therefore regards it as vitally important that the rules of international law should be strictly observed in relations among States in order to maintain peace and international security, and it condemns once again breaches of the security, privileges and immunities of diplomatic missions and their staff in flagrant violation of the provisions of the 1961 Vienna Convention.

The Government of Cuba agrees on the need for those States that are not yet parties to the Convention to accede to it, and thus contribute to better implementation of its rules in the interests of the international community.

In order to prevent States from taking unilateral measures in interpreting and applying the provisions of article 27 of the 1961 Vienna Convention, which relate to the status of the diplomatic courier, the Government of Cuba believes that additional rules should be drawn up in respect not only of the definition of the term but also of other matters, such as the privileges and immunities of the diplomatic courier and his status in the event of suspension of diplomatic relations or permanent or temporary recall of diplomatic missions, and in the event of armed conflicts between States.

The Government of Cuba considers that these additional provisions should also cover the legal status of couriers referred to in the relevant Conventions of 1963, 1969 and 1975, since their functions are basically the same and they should therefore receive the same legal treatment. The legal status of the

Czechoslovakia

[*Original: English*]
[*23 April 1979*]

The Czechoslovak Socialist Republic fully supports the request, expressed by delegations of numerous States in foregoing sessions of the United Nations General Assembly, that a protocol be worked out that would unequivocally determine the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The reason behind that proposal is that the existing conventions codifying the so-called international diplomatic law are incomplete in this respect, and the mentioned protocol would suitably complement them. At the same time it would be of considerable significance for the further development of friendly relations among States.

The Czechoslovak Socialist Republic welcomes therefore that the International Law Commission is taking this matter under consideration.

In the view of the respective Czechoslovak authorities, the protocol should, in the first place, give a clear-cut answer as to who is a "diplomatic courier" and what is a "diplomatic bag". It should provide beyond any doubt for the personal inviolability of the diplomatic courier and, in that connection, for the obligations of the State on the territory of which the courier finds himself, i.e. both the receiving State and the transit State, to take all necessary measures for his protection. The protocol should also provide for the complete immunity of the diplomatic courier from the jurisdiction of the State in whose territory he travels, for his exemption from inspection of personal baggage, for the inviolability of his residence both in the receiving State and in the transit States, as well as for all the privileges and immunities granted to diplomatic representatives. It is equally necessary to determine the status of the diplomatic courier *ad hoc*.

The protocol should also clearly provide for the status of the diplomatic bag, whether accompanied or not accompanied by the diplomatic courier, and reaffirm and emphasize the absolute inviolability of the diplomatic bag as well as the obligation of both the receiving State and the transit States to take all necessary measures to ensure its inviolability.

The protocol should unambiguously provide for the obligations of the receiving State and the transit States in respect of the diplomatic courier and the diplomatic bag. It should also contain provisions concerning the obligations of third States in cases of *force majeure*. It would furthermore be useful if the protocol provided for the appropriate rights of the receiving State in respect of the diplomatic courier, i.e. to make it possible for the receiving State to declare the person of the diplomatic courier not acceptable. The protocol should also stipulate the duty of the diplomatic courier to observe the laws and regulations of the receiving State.

Finally, the protocol should provide that the status of the diplomatic courier and the diplomatic bag will analogically apply also to the couriers and the diplomatic bag referred to in the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention.

The respective Czechoslovak authorities are convinced that the Commission has undertaken a thorough preliminary research of this issue and that the results of its work accomplished so far provide a good foundation for the drafting of a protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier.

German Democratic Republic*

[*Original: English*]
[*11 July 1979*]

The Ministry of Foreign Affairs of the German Democratic Republic wishes to reaffirm its views set forth earlier in a written communication of 23 June 1976.[6]

The Ministry of Foreign Affairs considers the 1961 Vienna Convention to be an international legal instrument of the greatest significance. Strict observance of its norms and a further increase in the number of States parties to the Convention will effectively contribute to the preservation of international peace and security.

During the years since its entry into force the 1961 Convention has proved to be a useful regulatory mechanism, which is reflected, *inter alia*, in the fact that it has served as a model for further codification work and for the drafting of domestic legislation. The Convention, in general, meets present-day requirements as regards the creation of the legal framework for the conduct of diplomatic relations between States.

A review of developments since the Convention's adoption 18 years ago reveals, however, that it contains norms which require more precise language and further development. This goes, in particular, for the range of issues relating to freedom of communication as an essential element in the performance of functions by diplomatic missions. The practice of States over the past few years and the reservations expressed by several countries in respect of article 27 of the 1961 Vienna Convention on Diplomatic Relations make it clear that there are quite a number of questions in this connection that require a clear-cut solution commensurate with current conditions.

The Ministry of Foregin Affairs of the German Democratic Republic therefore welcomes the activities of the United Nations International Law Commission designed to draft an optional protocol on the 1961 Vienna Convention, and is in favour of expediting this matter.

With reference to the report of the Commission's working group,[7] the Ministry of Foreign Affairs believes that the list of problems it contains provides basic and effective guidelines for the further work in this field, defining, at the same time, the substance of the set of problems to be covered by a future protocol.

The Ministry of Foreign Affairs reserves the right to present its views on specific matters involved in greater detail at a later date.

It is the general understanding of the Ministry of Foreign Affairs that the unrestricted exercise of the right to free communication, in accordance with the basic principles of international law and on a basis of reciprocity, is indispensable for diplomatic missions to be able to perform their functions without hindrance. Any restriction of the freedom of communication, e.g. by hindering diplomatic couriers in the performance of their duties or by opening or detaining the diplomatic bag, is inconsistent with both the basic principles of international law and the letter and spirit of the 1961 Vienna Convention.

In the light of what has been stated above, the Ministry of Foreign Affairs of the German Democratic Republic considers it indispensable that a future additional protocol should proceed from the need to ensure that diplomatic missions can perform their functions without hindrance. Hence, the diplomatic courier must be accorded full diplomatic immunities and privileges in both the receiving State and the transit State, regardless of whether he carries a diplomatic bag or is under instructions to transmit oral communications. The questions that need to be regulated in concrete terms include, in particular, the courier's immunity from jurisdiction, exemption of his person from search and of his personal baggage from inspection, the inviolability of his residence and of the means of transport he uses, and other specific facilities.

Similar considerations apply to the legal regulations

* Comments distributed after the closure of the thirty-first session of the Commission.

[6] A/31/145, pp. 6–7.

[7] See *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, document A/33/10, paras. 137–144.

relating to the diplomatic bag, since the latter directly serves the implementation of government policies, even if it is not sent through diplomatic couriers. Consequently, an exact definition of the term "diplomatic bag" should form the basis of unambiguous regulations which would exclude any rejection of a diplomatic bag on the grounds of a purely subjective suspicion that misuse may be involved.

Moreover, the Ministry of Foreign Affairs is in favour of clear-cut provisions to govern the status of the courier and the diplomatic bag in the event of emergencies such as the breaking off or suspension of diplomatic relations, armed conflict, the death of a courier, his involvement in an accident, and any event of *force majeure*.

In conclusion, the Ministry of Foreign Affairs of the German Democratic Republic points out once again that it considers it desirable that a future additional protocol be extended also to other relevant multilateral normative acts.

Germany, Federal Republic of

[*Original: English*[8]]
[*14 May 1979*]

1. The Government of the Federal Republic of Germany welcomes the work of the International Law Commission on the status of the diplomatic courier and the diplomatic bag. As stated already in its reply to the related inquiry in 1976,[9] it discerns a special need to regulate in detail, by means of clear and generally acceptable international rules, the dispatch by land, air and sea of the diplomatic bag not accompanied by diplomatic courier. Consequently, the Government of the Federal Republic of Germany would welcome it if during its future work the Commission gave priority treatment to the subject of the diplomatic bag not accompanied by diplomatic courier, with a view to elaborating provisions for the safer, simpler and speedier dispatch of the diplomatic bag. In the past, the subject "Status of the diplomatic bag not accompanied by diplomatic courier" has been listed among the nineteen issues tentatively identified by the Commission as the issues to be covered by a possible protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.[10]

The Government of the Federal Republic of Germany comments as follows on a selection of those issues and on the relevant observations:

Privileges and immunities of the diplomatic courier

Privileges and immunities should be granted to the diplomatic courier only to the extent necessary for the performance of his functions.

Facilities accorded to the diplomatic courier

A provision should be elaborated concerning preferential treatment of the diplomatic courier with respect to passport and customs formalities.

Duration of privileges and immunities of the diplomatic courier

The privileges and immunities should apply for the entire duration of his stay in the receiving State, on the understanding that the diplomatic courier delivers a diplomatic bag to the diplomatic mission and also receives a diplomatic bag from the mission and that he performs these two acts without delay and subsequently departs immediately.

Granting of visas to the diplomatic courier

It does not appear necessary to give the courier the status of a diplomatic agent in the matter of visas.

Persons declared not acceptable

A provision should be elaborated analogous to article 9 of the 1961 Vienna Convention concerning the declaration of the diplomatic courier as *persona non grata*.

Status of the diplomatic courier ad hoc

The diplomatic courier *ad hoc* should have the same status as the ordinary diplomatic courier.

Status of the diplomatic bag not accompanied by diplomatic courier

It appears necessary that all the rights and obligations connected with the dispatch of the diplomatic bag not accompanied by diplomatic courier should be regulated in detail. In this connection, it is of paramount importance to ensure the inviolability of the diplomatic bag not accompanied by diplomatic courier. This could be accomplished, for example, by provisions guaranteeing the immediate delivery by the receiving State of the incoming diplomatic bag not accompanied by diplomatic courier and the instantaneous clearance of the outgoing diplomatic bag not accompanied by diplomatic courier immediately prior to the departure of the means of transport for the diplomatic bag. Regulations on the type and colour of the diplomatic bag not accompanied by diplomatic courier could also serve to ensure as direct and immediate a transfer as possible of the bag from the means of transport to the authorized member of the diplomatic mission, and vice versa.

Respect for the laws and regulations of the receiving State

A provision analogous to article 41, paragraph 1, of the 1961 Vienna Convention should be elaborated concerning the diplomatic courier's obligation to respect the laws and regulations of the receiving State.

Obligations of the receiving State, of the transit State and of the third State in cases of force majeure

A provision should be elaborated concerning the obligations of the receiving State, of the transit State and of the third State in cases of *force majeure*.

[8] The comments of the Government of the Federal Republic of Germany were submitted by that Government in German together with an English translation.

[9] A/31/145, p. 7.

[10] See *Yearbook ... 1978*, vol. II (Part Two), p. 139, document A/33/10, para. 143.

2. The Government of the Federal Republic of Germany confirms the observation it made in response to the Secretary-General's inquiry in 1976, that in its experience the rules on diplomatic relations codified in the 1961 Vienna Convention are observed and applied in the vast majority of cases.[11] The Federal Government attaches great importance to the universal observance and application of the rules governing diplomatic relations as prerequisite for trouble-free diplomatic intercourse.

It therefore regrets having to note, on the other hand, that in its experience the violations of the rules on diplomatic relations have increased in number and gravity since 1976. The Government of the Federal Republic of Germany has noticed that these violations concerned primarily the right to freedom of movement and travel (article 26), the right to freedom of communication (article 27), the right to inviolability of the diplomatic mission and of the diplomatic agent's private residence (articles 22 and 30), the right to respect for and protection of the diplomatic agent's dignity (article 29), the right to exemption from customs duties on imported articles (article 36) and the right to exemption from taxation (article 34). The Government of the Federal Republic of Germany considers the involvement of the United Nations General Assembly with the implementation of the 1961 Vienna Convention to be a means of countering such violations. It is therefore in favour of the General Assembly's discussion at intervals of this subject.

Hungary

[*Original: English*]
[*9 May 1979*]

As it has already expressed in a statement of its views of 4 June 1976,[12] the Government of the Hungarian People's Republic deems it necessary to elaborate, as soon as possible, an additional protocol on the status of the diplomatic courier to the 1961 Vienna Convention.

The report of the International Law Commission on the work of its thirtieth session rendered account of a study made by the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, on whether certain questions on the status of the diplomatic courier are duly regulated in the present valid multilateral international conventions.[13] From this very thorough examination, it becomes clear that several questions require solution. Thus, for instance, the concept and functioning of the diplomatic courier are not defined. The immunities of the courier are not duly regulated. Present conventions do not contain provisions on the immunity of jurisdiction, the inviolability of the residence, the exemption of the courier from personal examination and control or from the inspection of his personal baggage, nor on the facilities to be granted to the diplomatic courier. Many other questions—the duration of immunities, the status of the courier if diplomatic relations have broken off, etc.—also call for solution.

The Hungarian Government is of the opinion that, with a view to smooth performance of their important duties, the same immunities and privileges should be provided for diplomatic couriers as those diplomatic representatives enjoy.

The results of the examination of the Commission and its Working Group have confirmed the early belief of the Government of the Hungarian People's Republic that the elaboration of a protocol on the status of the diplomatic courier is absolutely desirable.

Kuwait

[*Original: English*]
[*1 June 1979*]

1. The competent authorities in the State of Kuwait do not believe there is a need for a special protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier because the 1961 Vienna Convention has already taken care of this matter. The Convention has provided protection for the diplomatic bag and the diplomatic courier.

There is no need to make specific provisions for the exemption of the diplomatic courier from personal examination or to provide for the inviolability of his residence because the task of the courier is of a correspondence rather than of a diplomatic representative character, and thus one should avoid causing undue difficulties to the host country.

2. The competent authorities have no objection to some of the issues defined in the Report of the International Law Commission on the work of its thirtieth session[14] designed to facilitate implementation of the 1961 Vienna Convention, such as: (1) end of functions of the diplomatic courier; (2) consequences of the severance or suspension of diplomatic relations, the recall of diplomatic missions or armed conflict; (3) obligations of the receiving State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions; (4) obligations of the transit State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions.

Switzerland

[*Original: French*]
[*30 April 1979*]

With regard to the status of the diplomatic courier, the Swiss Government considers that the provisions of

[11] A/31/145, p. 7.

[12] *Ibid.*, pp. 8–9.

[13] See *Yearbook ... 1978*, vol. II (Part Two), pp. 139 *et seq.*, document A/33/10, paras. 142 *et seq.*

[14] *Ibid.*

the 1961 Vienna Convention, if properly implemented, are sufficient and give the diplomatic courier adequate protection.

It should be noted, moreover, that States are using diplomatic couriers less and less frequently and that diplomatic bags are now usually sent overland, by air or by sea without being entrusted to a courier.

In many States, the packages and parcels constituting the diplomatic bag are sent by post. They are then treated in the same way as letters or parcels sent by ordinary or registered mail. It might be useful to envisage provisions ensuring that diplomatic bags sent by post arrive quickly and safely under all circumstances.

The possibility of entrusting a diplomatic bag to the captain of a commercial aircraft, in accordance with article 27, paragraph 7, of the 1961 Vienna Convention, usually arises only in the case of a diplomatic bag of the State to which the airline company belongs. The diplomatic bags of other States must therefore be sent as air freight, and are treated as such upon departure and arrival. In order to avoid the delays that generally result from such a situation, consideration should be given to provisions for swifter forwarding of diplomatic bags sent as air freight, particularly by exempting them from Customs formalities.

The provisions suggested above could, in addition, be accompanied by practical measures designed to facilitate the dispatch of diplomatic bags not accompanied by diplomatic courier and to guarantee their security. The Swiss Government is referring in particular to the possibility of harmonizing or standardizing the text of the laissez-passer which diplomatic couriers must carry, as well as the visible external markings of packages and parcels constituting the diplomatic bag.

Union of Soviet Socialist Republics

[*Original: Russian*]
[*8 May 1979*]

The Soviet Union is in favour of the elaboration and adoption, in the United Nations, of a protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier. It bases its position on the need to develop further and to set out in detail in such a protocol, the international legal rules concerning the status of the diplomatic courier as affirmed in the Vienna Convention on Diplomatic Relations of 1961 and other international conventions on questions of diplomatic and consular law. The practice of inter-State relations shows that normal and unhindered functioning of the institution of diplomatic couriers and the diplomatic bag not accompanied by courier, and free communication between Governments and their diplomatic representatives, are necessary conditions for the successful performance of their functions by diplomatic representatives.

The Soviet Union has already expressed its views on the possible content of a draft for the future protocol. These views are set forth most fully in the report of the Secretary-General to the thirty-third session of the General Assembly on the question of the "Implementation by States of the Provisions of the Vienna Convention on Diplomatic Relations of 1961".[15]

The preliminary study undertaken by the International Law Commission on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier confirms the need to elaborate the aforementioned protocol. The Commission's analysis of all international conventions that deal with the question of diplomatic couriers—the 1961 Vienna Convention, the 1963 Vienna Convention, the Convention on Special Missions, and the 1975 Vienna Convention—shows that the rules of international law on many questions of importance from the point of view of defining the legal status of the diplomatic courier and the diplomatic bag need to be developed further. In the future protocol, it is necessary *inter alia* to define the concept of the diplomatic courier and the diplomatic bag; to elaborate provisions concerning the granting to diplomatic couriers of the privileges and immunities of diplomatic agents, including immunity from arrest or detention, immunity from the jurisdiction of the receiving State, inviolability of domicile and means of transport, immunity from personal searches and exemption of personal baggage from inspection; and to formulate provisions concerning the inviolability of the diplomatic bag and measures to be taken by the receiving State or the transit State in connection with accidents involving the diplomatic courier or in connection with armed conflicts between States.

It should be noted that, in addition to its preliminary study, the Commission has at its disposal specific comments and observations by States concerning the content of a future draft protocol, as set out in their replies to the inquiry undertaken by the Secretary-General in pursuance of General Assembly resolution 31/76.

All this gives grounds for hoping that the Commission will be able to elaborate as quickly as possible a draft protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

United Kingdom of Great Britain and Northern Ireland

[*Original: English*]
[*7 June 1979*]

The Government of the United Kingdom of Great Britain and Northern Ireland note that the International Law Commission has identified 19 different issues concerning the status of the diplomatic courier and the bag not accompanied by courier.[16] Of these 19,

[15] A/33/224.

[16] See *Yearbook ... 1978*, vol. II (Part Two), pp. 137 *et seq.*, document A/33/10, paras. 137–144.

the Commission records that many are already covered by existing provisions of the 1961 Vienna Convention. Regarding those points on which the Convention is silent, the Government of the United Kingdom do not consider that there is any practical need for further legal regulation in the form of a Protocol additional to the Convention. The 1961 Vienna Convention already provides sufficient protection for the diplomatic courier and the diplomatic bag, accompanied or unaccompanied.

The Government of the United Kingdom also note that many of the delegations which expressed support for the elaboration of a Protocol during the Sixth Committee meetings on this item at the thirty-third session of the General Assembly were particularly concerned about the protection of the diplomatic bag not accompanied by courier. The Government of the United Kingdom agree that the unaccompanied bag should be given the same measure of protection by transit States and the receiving State as is accorded to the bag accompanied by diplomatic courier. But the provisions of paragraphs 1–4 of article 27 of the 1961 Vienna Convention apply to both accompanied and unaccompanied bags. Further provision for bags unaccompanied by courier is made by paragraph 7 of that article. It is the view of the Government of the United Kingdom that any problems there may be regarding protection of the bag unaccompanied by diplomatic courier can be solved by a more faithful compliance by all States with those legal provisions that already exist, rather than by further regulation.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 10]

DOCUMENT A/CN.4/323

Preliminary report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[*Original: English*]
[*18 June 1979*]

CONTENTS

Introduction

A. Purpose of the present report

1. It is proposed in this preliminary report to identify the various types of relevant materials available on the topic of jurisdictional immunities of States and their property. An examination of such materials will reveal the areas of interest to be covered by the study, and may help to determine with a reasonable measure of precision the appropriate aspects of the topic to be selected for further study to be undertaken in depth. This exercise is designed to ensure a systematic treatment of the body of customary and evolutionary rules of international law on the subject, which appear to be ripe and ready for codification and progressive development.

2. The selection of issues to be examined and the identification and determination of the material contents to be included in the treatment of the topic will require utmost care and circumspection. While flexibility of approach is recommended, a delicate balance should also be maintained so as to facilitate a successful search for a just and reasonable solution in each case, taking into account the divergent interests of all the parties involved in the application of the rules of international law regulating the granting of jurisdictional immunities of States and their property.

3. Codification efforts in the recent past will be briefly reviewed to provide an historical insight into earlier endeavours on the part of the international community,[1] leading up to the assumption of the current undertaking.

4. It is also proposed in this preliminary report to prepare an analytical outline of the general aspects of the topic, which to an appreciable extent may reflect on the future work of the Commission in this and other related areas.

5. Certain limits will have to be set to help to define with some accuracy and delimit with sufficient clarity the scope of the study to be made in the preparation and eventual elaboration of draft articles on jurisdictional immunities of States and their property. The scope, it is submitted, should be wide enough to allow all the principal and substantial questions to be treated in intelligible detail. On the other hand, it should be sufficiently narrow to permit a meaningful examination of the main core of the subject, with an assured prospect of timely completion.

6. The sources of international law on the topic offer an interesting variety of source materials, which can be found in abundance in the judicial and governmental practice of States, in national legislation and international conventions, as well as in recent and contemporary legal literature. A quick glance at these sources will serve to emphasize the unique and distinctive nature of the origin and source of the law of State immunity, which is in constant process of evolution and, occasionally, of crystallization.

7. A general survey of relevant materials and a brief review of legal developments and opinions on the topic are likely to indicate some tentative conclusions pointing to possible general trends which could serve as helpful guidance for the preparation and submission of further reports on the subject in the years ahead.

B. Basis of the current study

8. In the course of its twenty-ninth session, in 1977, the Commission took occasion to examine possible additional topics for study following the implementation of its existing programme of work. From five remaining topics of international law selected for codification in 1949 pursuant to article 18, paragraph 1, of its Statute, the Commission recommended the question entitled "Jurisdictional immunities of States and their property" for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.[2] Moreover, as indicated in the documents

[1] For a brief historical review of the activities of the Commission in this area, see the report submitted by the Working Group on jurisdictional immunities of States and their property (A/CN.4/L.279/Rev.1 of 31 July 1978), sect. II, paras. 4–10.

[2] See *Yearbook ... 1977*, vol. II (Part Two), p. 130, document A/32/10, para. 110.

prepared by the Secretary-General in 1948 and 1971, respectively entitled *Survey of international law and selection of topics for codification*[3] and "Survey of international law",[4] it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic.[5]

9. At its thirty-second session, the General Assembly considered the recommendation of the Commission and, after due deliberation in the Sixth Committee,[6] on 19 December 1977 adopted its resolution 32/151, paragraph 7 of which reads:

[*The General Assembly*]

Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

10. In response to this invitation, the Commission at its thirtieth session established a Working Group to consider the question of jurisdictional immunities. The Working Group submitted a report to the Commission containing an examination of some general aspects of the topic and an exploration of possible avenues and approaches to its study, as well as possible methods of work thereon.[7]

11. The Commission considered the report of the Working Group and, on the basis of the recommendations contained in paragraph 32 thereof, decided to:

(*a*) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(*b*) appoint a Special Rapporteur for this topic;

(*c*) invite the Special Rapporteur to prepare a preliminary report at an early juncture for consideration by the Commission;

(*d*) request the Secretary-General to address a circular letter to the Governments of Member States inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence;

(*e*) request the Secretariat to prepare working papers and materials on the topic, as the need arises and as requested by the Commission or the Special Rapporteur for the topic.[8]

12. The report of the Commission received extensive discussion in the Sixth Committee during the course of the thirty-third session of the General Assembly.[9] By its resolution 33/139, adopted on 19 December 1978, the General Assembly,

Taking note of the preliminary work done by the International Law Commission regarding the study of ... jurisdictional immunities of States and their property,

...

3. *Approves* the programme of work planned by the International Law Commission for 1979,

...

6. *Further recommends* that the International Law Commission should continue its work on the remaining topics in its current programme,[10] including notably the topic "Jurisdictional immunities of States and their property".

13. On the basis of the recommendation made by the General Assembly, the Special Rapporteur has been encouraged to prepare and submit the present preliminary report on the topic in the spirit in which the subject matter has been discussed in the Commission and the Sixth Committee and in the light of relevant materials hitherto made available by Member States.[11]

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[3] United Nations publication, Sales No. 1948.V.1 (I); hereinafter referred to as "1948 Survey".

[4] *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245; hereinafter referred to as "1971 Survey".

[5] 1971 Survey, para. 75.

[6] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 214–215.

[7] A/CN.4/L.279/Rev.1. See also *Yearbook ... 1978*, vol. II (Part Two), pp. 153–155, document A/33/10, chap. VIII, sect. D, annex.

[8] *Ibid.*, p. 153, para. 188.

[9] See *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 263–264.

[10] Paras. 4 and 5 of the resolution contain recommendations that the Commission should continue its work on State responsibility (4(*a*)), succession of States in respect of matters other than treaties (4(*b*)), treaties concluded between States and international organizations or between international organizations (4(*c*)), the law of the non-navigational uses of international watercourses (4(*d*)), and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (5).

[11] Pursuant to the request contained in para. 188(*d*) of the report of the Commission on the work of its thirtieth session, cited in para. 11 above, the Legal Counsel of the United Nations addressed a circular letter LE 113 (32), dated 18 January 1979, to Member States. By 30 June 1979, several important replies had been received from Member States.

CHAPTER I

Historical sketch of international efforts towards codification

A. League of Nations Committee of Experts

14. The question of jurisdictional immunities of States has attracted the attention of the international community from the early days of its organization. In 1928, the League of Nations Committee of Experts

was of the view that some aspects of the subject of State immunities were ripe for codification and should be considered by an international conference convened for that purpose. It was further noted that, in reply to the questionnaire sent to Governments by the Committee, 21 Governments had expressed themselves in favour of codification of this subject, while only three had answered in the negative.[12]

B. The International Law Commission

15. The 1948 Survey, prepared for the first session of the Commission, included a separate section on "Jurisdiction over foreign States" in which it was stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".[13]

16. At its first session, in 1949, the Commission drew up a provisional list of 14 topics selected for codification, including one entitled "Jurisdictional immunities of States and their property".[14]

17. In 1970, the Commission requested the Secretary-General to submit a new working paper as a basis for the selection by the Commission of another list of topics that might be included in its long-term programme of work.[15] The Secretary-General submitted the working paper requested ("1971 Survey"), which included a section on "Jurisdictional immunities of foreign States and their organs, agencies and property".[16]

18. In 1973, the Commission considered its long-term programme of work on the basis of the 1971 Survey. Among the topics repeatedly mentioned in the discussion was that of jurisdictional immunities of foreign States and of their organs, agencies and property. It was decided by the Commission to give further consideration to the various proposals or suggestions in the course of future sessions.[17] This the Commission eventually did in 1977,[18] and recommended that the topic should be given active consideration. In the same year, the General Assembly adopted its resolution 32/151, by which it invited the Commission to commence work on the topic.

C. Other international efforts

19. The practical problems involved in State immunities have attracted world-wide attention. In addition to the endeavours attributable to the League of Nations Committee of Experts and the Commission, other international efforts towards codification of international law on some aspects of State immunities also deserve mention. Contributions have been made by regional legal committees as well as by professional and academic societies of international repute.

1. Regional legal committees

20. The subject of State immunities has been considered by various legal committees set up by States on a regional basis. The interest shown by regional legal committees is indeed noteworthy.

(a) *Asian–African Legal Consultative Committee*

The first session of the Asian–African Committee, held in New Delhi in 1957, had on its agenda an item entitled "Restrictions on immunity of States in respect of commercial transactions entered into by or on behalf of States and by State Trading Corporations".[19]

(b) *European Committee on Legal Co-operation*

The European Committee has in some measure contributed to the conclusion of the European Conven-

[12] See 1948 Survey, para. 50.

[13] *Ibid.*

On the contemporary suitability of codifying the topic, the 1948 Survey indicated the following (para. 52):

"There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States . . .".

[14] *Yearbook . . . 1949*, p. 281, document A/925, para. 16.

[15] See *Yearbook . . . 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

[16] 1971 Survey, chap. I, sect. 5.

In para. 75 of that document the Secretary-General stated:

"Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development."

[17] See *Yearbook . . . 1973*, vol. II, pp. 230–231, document A/9010/Rev.1, paras. 173–174.

[18] See *Yearbook . . . 1977*, vol. II (Part Two), pp. 129–130, document A/32/10, paras. 107–111.

[19] Asian–African Legal Consultative Committee, *First Session, New Delhi, India, April 18 to 27, 1957* (New Delhi), p. 3, agenda item V. The item had been referred to the Committee by India.

tion on State Immunity of 1972,[20] and is actively interested in the outcome of its implementation.

(c) *The Inter-American Juridical Committee*

The Inter-American Juridical Committee also has on its current programme of work an item entitled "Immunity of States from jurisdiction".[21]

2. PROFESSIONAL AND ACADEMIC INSTITUTIONS

21. Learned and professional institutions competent in international legal affairs have also been keenly aware of the problems, and deeply interested in legal developments in respect of State immunities. Without giving an exhaustive list of such institutions, the following institutions may be noted:

(a) *Institut de droit international*

In 1891, the Institut, at its session held in Hamburg, adopted a resolution of which article III contains a provision limiting the application of State immunities in certain cases.[22] The Institut also adopted further resolutions on the topic of State immunities in 1951[23] and 1954.[24]

(b) *The International Law Association*

Strupp's draft code of 1926 prepared for the International Law Association enumerates certain exceptions to the doctrine of sovereign immunity.[25] The Association took occasion to restudy the problem at its 44th and 45th Conferences in 1950 and 1952.

(c) *Harvard Law School: "Research in International Law"*

The Harvard Law School "Research in International Law" has prepared a number of draft conventions with commentaries. The draft on competence of courts in regard to foreign States (1932)[26] has a direct bearing on the topic under review.

(d) *International Bar Association*

At the meeting of the International Bar Association at Cologne in 1958, a draft resolution was proposed incorporating the doctrine of restrictive or qualified immunity.[27] A resolution was adopted at its meeting at Salzburg in 1960 spelling out the circumstances in which State immunity might be withheld.

[20] Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

See the statement by Mr. Furrer at the thirtieth session of the Commission (*Yearbook ... 1978*, vol. I, p. 228, 1516th meeting, para. 33). He referred to the possibility of ratification of the Convention by the United Kingdom by the autumn of 1978.

[21] See the statement by Mr. López Maldonado at the thirtieth session of the Commission (*ibid.*, p. 231, 1517th meeting, para. 16).

[22] "Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers" (rapporteurs: L. de Bar and J. Westlake), *Annuaire de l'Institut de droit international, 1891–1892* (Brussels), vol. 11 (1892), pp. 436–437.

[23] *Annuaire de l'Institut de droit international, 1952* (Basel), vol. 44, No. I, pp. 36 *et seq.*

[24] *Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45, No. II, pp. 293–294.

[25] ILA, *Report of the Thirty-fourth Conference, held at Vienna, August 5th to August 11th, 1926* (London, 1927), p. 426; *Zeitschrift für Völkerrecht* (Breslau), Supplement to vol. XIII (1926).

[26] "Draft convention and comment on competence of courts in regard to foreign States, prepared by the Research in International Law of the Harvard Law School" (Reporter, P.C. Jessup), *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932).

[27] See *American Bar Association Journal* (Chicago, Ill.), vol. 44, No. 6 (June 1958), pp. 521–523.

CHAPTER II

Sources of international law of State immunities

22. The sources of international law on the subject of State immunities appear to be more widely scattered than normally expected in the search for rules of international law on any other topic. As the Working Group indicated in 1978:

> Evidence of rules of international law on State immunities appears to be eminently available primarily in the judicial and governmental practice of States, in the judicial decisions of national courts, in the opinions of legal advisers to Governments, and partially in the rules embodied in national legislation as well as international conventions of universal or regional character within the limits of the subject-matter concerned.[28]

23. As the question of jurisdiction of a municipal court or the extent of competence of a national tribunal is primarily determined by the court or the tribunal itself, at least in the first instance it is invariably the trial judge who is called upon to decide on the limits of

[28] *Yearbook ... 1978*, vol. II (Part Two), p. 154, document A/33/10, chap. VIII, sect. D, annex, para. 17.

his own jurisdiction. The judge may do so by referring to the relevant law on the competence of his own court. It follows therefore that international usage or customary international law on the subject of State immunities has grown principally and essentially out of the judicial practice of States on the matter, although in actual practice other branches of the government, namely, the executive and the legislature, have had their share in the progressive evolution of rules of international law. Sources other than the practice of States have also played a constructive part in the final crystallization of international law of State immunities. The types of relevant materials to be examined in the course of this study may therefore be grouped under four separate headings: State practice, international conventions, international adjudication, and opinions of writers.

A. State practice

1. National legislation

24. The jurisdiction of a municipal court is usually defined by the law establishing the court itself. Legislative enactments on the judicial system may be found in the law of the Constitution, the basic law, or the specific law on the organization of the courts, the establishment of the judicial hierarchy or of a particular court. National legislation on the competence of municipal courts may prescribe the possibilities for States or State agencies becoming parties in litigation before them, especially where foreign States have appeared as plaintiffs or have consented to the proceedings or otherwise voluntarily submitted to the territorial jurisdiction. In this manner, legislative pronouncements on the question of jurisdiction provide the legal foundation for the jurisdictional immunities of foreign States and at the same time furnish evidence of State practice in the formulation of norms of general international acceptance in the field of State immunities.

25. Instances of such legislative enactments are found in readily available public documents or official records, or in the materials furnished by member Governments in response to the request made by the Secretary-General of the United Nations. Thus, article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics[29] may be given as an appropriate example.

26. Of the more recent pieces of national legislation covering more or less wholly or in part the topic of State immunities, two significant Acts deserve particular mention, as they will require further investigation and comments with the closest attention. Without discussing their substance at this stage, the two national enactments are:

(*a*) The Foreign Sovereign Immunities Act, 1976, of the United States of America, which came into effect on 19 January 1977,[30] and

(*b*) The State Immunity Act, 1978, of the United Kingdom, which came into force on 22 November 1978.[31]

27. There are also several legislative texts in various countries dealing not exclusively and partially with certain aspects of State immunity, such as, for instance, the immunities extended to the premises of a foreign embassy or the residence of an accredited ambassador,[32] to the premises of a mission accredited to an international organization,[33] to warships and State-owned ships employed in governmental and non-commercial service,[34] to foreign princes,[35] or to the property of a foreign sovereign State.[36]

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[29] Approved by the law of 8 December 1961 of the USSR (USSR, *Vedomosti Verkhovnogo Soveta Soiuza Sovetskih Sotsialisticheskih Respublik* [Gazette of the Supreme Soviet of the Union of Soviet Socialist Republics] (Moscow), 24th year, No. 50 (15 December 1961). sect. 526, p. 1306). The first paragraph of art. 61 (*ibid.*, p. 1322) reads as follows:

"*Suits against foreign States: diplomatic immunity*

"The filing of a suit against a foreign State, the collection of a claim against it and the attachment of its property located in the USSR may be permitted only with the consent of the competent organs of the State concerned" [translation by the Secretariat].

[30] United States of America, *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, sect. 1330. The text of the Act is reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1388.

[31] United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), Part I, chap. 33, p. 715. The text of the Act is reproduced in: American Society of International Law, *op. cit.*, vol. XVII, No. 5 (September 1978), p. 1123.

[32] See for example Act No. 29–1964 of Jamaica, entitled *Diplomatic Immunities and Privileges Act, 1964* (Jamaica, *The Acts of Jamaica passed in the Year 1964* (Kingston, The Government Printer, n.d.)).

[33] See for example the relevant legislation of a number of States giving effect to the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15) and to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

[34] See for instance the Public Vessels Act of 1925 of the United States of America (United States of America, *The Statutes at Large of the United States of America from December, 1923, to March, 1925* (Washington, D.C., U.S. Government Printing Office, 1925), vol. 43, Part 1, chap. 428, p. 1112; *idem, United States Code Annotated, Title 46, Shipping, sects. 721–1100* (St. Paul, Minn., West Publishing [1975]), sects. 781–799); and various national legislations implementing the International Brussels Convention of 1926 for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its Additional Protocol of 1934 (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215), the 1958 Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the 1958 Convention on the High Seas (*ibid.*, vol. 450, p. 11).

[35] See for example the General Statute of 1793 Governing the Administration of Justice in the Prussian States (1793), para. 76, and the Prussian Order in Council of 1795, noted in S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), p. 11.

[36] See for example the law of 26 April 1917 and the Royal Decree of 29 May 1917 of the Netherlands (*ibid.*, pp. 85 and 226).

2. JUDICIAL DECISIONS OF MUNICIPAL COURTS

28. The jurisprudence or the case law of the principal legal systems provide an inexhaustible source of supplies for rules of international law on State immunities. The task of examining the judicial practice of all States, large and small, would appear to be virtually impossible, if not, indeed, undesirable. The main difficulties and obstacles encountered in an endeavour to codify rules of international practice on State immunity may be said to result from the diversity of legal procedures and the divergency of judicial practice, which varies from system to system and from time to time. Nevertheless, such difficulties are not really insuperable, nor are obstacles insurmountable, especially as municipal courts and national judges have recently started to acquaint themselves with the decisions of other national tribunals on the subject of State immunities. The process of unification or harmonization by municipal courts has already begun. In point of fact, the efforts towards uniformity and harmony in judicial developments have resulted in several notable judicial pronouncements expressly recalling precedents and decisions of other national courts, which are otherwise foreign to the legal system. Such utilization of comparative law techniques could become a healthy habit for municipal courts faced with difficult and delicate questions of international law.

29. To illustrate the application of the comparative technique, the Mixed Court of Appeal of Egypt in a case concerning the Turkish Tobacco Monopoly[37] identified its own case law as following the Italian and Belgian practice.

Another example highly illustrative of the use of a similar technique is furnished by a decision of the Supreme Court of Austria in 1950,[38] which reviewed the practice of Austria and other States on the subject before reaching the decision. In that decision, the Court observed:

> In the result, therefore, it cannot be said that there is any uniformity of case law in so far as concerns the extent to which foreign States are subject to Austrian jurisdiction. In view of the fact that we are here concerned with a question of international law we have to examine the practice of the courts of civilized countries and to find out whether from the practice we can deduce a uniform view; this is the only method of ascertaining whether there still exists a principle of international law to the effect that foreign States, even in so far as concerns claims belonging to the realm of private law, cannot be sued in the courts of a foreign State.[39]

30. Common law courts have also begun to cite decisions of foreign courts on matters concerning jurisdictional immunities of States. Thus, in 1940, the Appellate Division of the Supreme Court of New York, in *Hannes* v. *Kingdom of Roumania Monopolies Institute*[40] observed that questions of immunity were ordinarily determined under international law as matters of comity, involving therefore considerations of expendiency in friendly, international intercourse, rather than the principle of municipal law. The Appellate Court referred to the practice prevailing in Romania as quoted in a French decision concerning the Polish State.[41] An outstanding illustration is further furnished by a most recent English decision of the Court of Appeal in the *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* case in 1977,[42] which reflects a new approach to the methods of identifying rules of contemporary international law. A European Convention signed although not yet ratified by the United Kingdom was found to be persuasive, and reference was made in a progressive way to a wide variety of other sources, including decisions of foreign courts, as evidence of existing rules of international law.

31. Any serious study of international law of State immunities cannot fail to take into account the judicial practice of States. Surveys of case law hitherto conducted by private research are limited to accessible sources from which relevant materials are available, such as the United Kingdom, the United States of America, France, Italy, Belgium, Netherlands, Egypt, Austria, Germany and Switzerland.[43] Materials from the judicial practice of the countries whose reports are not publicly available may be further supplied by member Governments in reply to the request made by the Secretary-General.[44] In the ultimate analysis, the study will not be complete without a review of all the available case law across the breadth and length of the various legal systems, from *The schooner "Exchange"* v. *McFaddon and others* case (1812)[45] to the *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria*

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[37] See Monopole des Tabacs de Turquie and Another *v.* Régie co-intéressée des Tabacs de Turquie: *Annual Digest of Public International Law Cases, 1929–1930* (London, 1935), Case No. 79, pp. 123–125.

[38] Dralle *v.* Republic of Czechoslovakia: *International Law Reports* (London), vol. 17 (1956), Case No. 41, pp. 155 *et seq.*

[39] *Ibid.*, pp. 157–158 [translation by the Secretariat]. The Court reviewed a large number of Italian, Belgian, Swiss, Egyptian, English, American, German, French, Greek, Romanian and Brazilian decisions before reaching its own conclusion.

[40] *Annual Digest and Reports of Public International Law Cases, 1938–1940* (London, 1942), Case No. 72, pp. 198 *et seq.*

[41] Banque de crédit [of Prague] *v.* Etat polonais case (*ibid.*, pp. 202–203).

[42] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471.

[43] See, for instance, the cases reviewed by H. Lauterpacht in "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951* (London), vol. 28 (1952), pp. 220–272. See also a survey of decisions of various courts by the Special Rapporteur in *State Immunities ...* (*op. cit.*), *passim*, and in "Immunities of foreign States before national authorities", *Recueil des cours de l'Académie de droit international de La Haye, 1976-I* (Leyden, Sijthoff), No. 149 (1977), pp. 93–211.

[44] See footnote 11 above.

[45] W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States*, 3rd ed. (New York, Banks Law Publishing, 1911), vol. VII, p. 116.

case (1977),[46] from *the "Prins Frederik"* (1820),[47] *the "Parlement belge"* (1880),[48] *the "Porto Alexandre"* (1920),[49] *the "Cristina"* (1938)[50] cases to *the Comisaría General de Abastecimientos y Transportes* v. *Victory Transport Inc.* (1965)[51] and *the "Philippine Admiral"* (1975)[52] cases. Suits against foreign States and foreign Governments abound before the municipal courts of various countries. Instances of foreign States involved in municipal litigation include suits brought against the Danish Government (1882),[53] the Greek State (1951),[54] the USSR (1926),[55] the National Iranian Oil Company (1965),[56] the Government of Pakistan (1975),[57] the United Arab Emirates (1978),[58] the Federal Republic of Nigeria (1978),[59] and a host of other nations.

3. GOVERNMENTAL PRACTICE

32. The practice of the executive branch of the government constitutes another important source of rules of international law of State immunities, as opinions of the executive or governmental authorities regarding the question whether or not, in a given case, a particular foreign Government ought to be accorded State immunity, could be conclusive if not determinative of the issue. The policy followed by the executive with regard to the jurisdictional immunities of foreign States should also reflect the extent to which the State itself would wish to be accorded the same extent of immunities from foreign courts in like circumstances. It is within the primary responsibility of the executive itself not only to advise the State but also to take action in relation to its decision, in any given situation, to claim or disclaim sovereign immunities from the jurisdiction of another State.

33. Official opinions in the form of internal or inter-departmental advice given by the legal advisers or the attorneys-general, or as contained in diplomatic correspondence communicating the views of the State concerned, are useful evidence of State practice in both directions, as they reflect the positions of the State as grantor and as beneficiary or recipient of State immunity.

34. The executive branch of the government appears therefore to have at least three distinctive roles to play in its contribution to the evolution of State practice. In the first place, it can play a central role in initiating, introducing and assuring the passage of a legislative enactment on State immunities in line with the views and policy of the government in power.[60] Secondly, in many countries, it is interesting to note the increasing part the executive branch of the government is playing by giving advice to the judiciary on matters of State immunities,[61] or by issuing statements or certificates to its own courts confirming the status of an entity or the existence of statehood or any pertinent question of international law or a question of fact of international relevance, which could have a direct bearing on the claim of State immunity presented by the foreign State in a given case.[62] Thirdly, the views of the executive

[46] For reference, see footnote 42 above.

[47] J. Dodson, *Reports of Cases argued and determined in the High Court of the Admiralty* (London, Butterworth, 1811–1822), vol. II, p. 451.

[48] United Kingdon, *The Law Reports, Probate Division*, (London, Incorporated Council of Law Reporting for England and Wales. 1880), vol. V, p. 197.

[49] *Ibid.* (1920), p. 30.

[50] *Ibid., House of Lords, Judicial Committee of the Privy Council and Peerage Cases, 1938* (London, 1938), p. 485.

[51] United States of America, *Federal Reporter*, 2nd series, vol. 336 (St. Paul, Minn., West Publishing, 1965), p. 354. *Certiorari* denied: *United States Reports*, vol. 381 (Washington, D.C., U.S. Government Printing Office, 1965), p. 934.

[52] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 1 (January 1976), pp. 133–145.

[53] Morellet *v.* Governo Danese (1882): *Giurisprudenza Italiana* (Turin, Unione tipografico-editrice torinese, 1883), vol. I, p. 125.

[54] Socobelge et Etat belge *v.* Etat hellénique, Banque de Grèce et Banque de Bruxelles (1951): *Journal du droit international* (Clunet), (Paris), 79th year, No. 1 (January–March 1952), pp. 244–266.

[55] Société Le Gostorg et URSS *v.* Association France-Export (1926): France, *Recueil général des lois et des arrêts, année 1930* (Paris, Recueil Sirey), part 1, p. 49.

[56] N.V. Cabolent *v.* National Iranian Oil Company (1965–1968): American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. IX, No. 1 (January 1970), p. 152.

[57] Thai-Europe Tapioca Service Ltd. *v.* Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies (1975): United Kingdom, *The All England Law Reports, 1975* (London, Butterworth, 1976), vol. 3, p. 961.

[58] 40 D 6262 Realty Corp. *v.* United Arab Emirates (1978): United States of America, *Federal Supplement* (St. Paul, Minn. West Publishing, 1978), vol. 447, p. 710 (Southern District of New York, 1978).

[59] Ipitrade International S.A. *v.* Federal Republic of Nigeria (1978): *ibid.* (1979), vol. 465, p. 824 (District of Columbia District, 1978).

[60] For instance, in the United States of America, the revised bill (H.R. 11315) on foreign State immunities submitted to the House of Representatives on 19 December 1975 on behalf of the Department of State and the Department of Justice (see United States of America, *Congressional Record, Proceedings and Debates of the 94th Congress, First Session*, vol. 121—Part 32 (Washington, D.C., U.S. Government Printing Office, 1975), p. 42017).

[61] See for example the United States of Mexico *et al. v.* Schmuck *et al.* case (1943): *Annual Digest and Reports of Public International Law Cases, 1943–1945* (London, 1949), Case No. 21, p. 75. See also *Ex parte* Republic of Peru: United States of America, *United States Reports*, vol. 318 (Washington, D.C., U.S. Government Printing Office, 1943), p. 578. The Executive Branch may recognize or allow a claim of immunity. The courts are bound, in some legal systems, to abide by the decisions of the government. In the United States of America, for example, all questions connected with the claim of immunity cease to be judicial once the State Department has authoritatively recognized or allowed the claim.

[62] See for example Republic of Mexico *et al. v.* Hoffman (1945): *Annual Digest and Reports of Public International Law Cases, 1943–1945* (London, 1949), Case No. 39, p. 143. The State Department certified that it recognized ownership of the vessel by the Government of Mexico but did not state that ownership without possession would constitute a ground for immunity.

appear to be final if not decisive on the question whether the State should claim or waive its own sovereign immunities in a given set of circumstances.[63]

35. In addition to the three types of activities undertaken by the executive branch of the government, contributing to the formation of State practice on the question of immunities, the executive or the competent administrative authorities of the State are in reality the State agencies directly responsible for the allowance, refusal or suspension of certain types of immunities. If the term "jurisdictional immunities" refers mainly to the immunities of a sovereign State from the jurisdiction, or more especially immunity from the power of adjudication, of the court of another State without its consent, there appear to be several other types of immunities which belong more eminently to the domain of the executive power, such as immunities from search, arrest, detention and service of writs and immunities from execution. Accordingly, the exercise or non-exercise of such administrative power is tantamount to the recognition or explicit allowance of various types of immunity other than immunity from adjudication, or in the reverse case, to the denial or refusal of such immunity.

36. In the practice of States, the decisions of the national tribunals of a given country do not necessarily follow the same line as the conclusion or the views held by the executive branch of the government. Such lack of co-ordination within the same legal system may lead to political embarrassments in some instances.[64] To ensure a higher degree of co-ordination and harmonization, it is often necessary for the political branch of the government in some countries to take the lead by identifying certain areas of activities where immunities should be recognized and allowed, either for the general guidance of the courts[65] or on an *ad hoc* basis.[66]

37. It is not seldom that, when a suit is brought against a foreign Government, its official representatives accredited to the host country of the court are instructed to assert or present the claim of immunity. Thus a diplomatic agent may be instructed by his Government to claim State immunity in a case where the Government is being impleaded, or to present the relevant national laws confirming the official status of an entity or the official character of its activities or the fact of its constitution as a State agency or instrumentality entitled to sovereign immunity.[67] This task could also be performed by making representations to the political branch of the government, which may in turn communicate its views to the trial court.[68]

38. The relative scarcity or scantiness of materials in the form of official or diplomatic correspondence in readily accessible publications appears to present no major obstacle to the search for the views of Governments on matters of State immunities. Since the subject is of vital interest to States both as grantors and as recipients of immunity, the comparative shortage of known opinions of Governments could be effectively remedied by requesting States to give their official views on certain important issues. Answers to a questionnaire by Governments, with additional comments and suggestions, could help to compensate for the current lack of adequate expression of official views in existing governmental practice. Replies from Member States will clearly constitute a significant body of source materials for the purpose of the present inquiry.

B. International conventions

1. Relevant general conventions

39. As there appears to be no general treaty or agreement currently applicable to State immunities,

[63] See *Yearbook ... 1978*, vol. II (Part Two), pp. 153–154, document A/33/10, chap. VIII, sect. D, annex, paras. 13–14.

[64] In the Mexico *v.* Hoffman case (1945), Chief Justice Stone declared:

"It is not the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize." (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1946), vol. 324, p. 35.)

[65] See for example the famous "Tate letter" of 19 May 1952 from the Acting Legal Adviser to the Acting Attorney-General, declaring that:

"... it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." (United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), p. 985.)

[66] See for example the "Beaton Park" case (1946): *Annual Digest and Reports of Public International Law Cases, 1946* (London, 1951), Case No. 35, p. 83; and the "Martin Behrman" case (1947): *ibid., 1947* (London, 1951), Case No. 26, p. 75. The court rejected immunity in one case and sustained it in another, following the position taken by the political branch of the Government in each case.

[67] See for example the certificate of the Ambassador of the United States of America regarding the status of the United States Shipping Board in the Compañía Mercantil Argentina *v.* U.S.S.B. case (1924): United Kingdom, *Law Journal Reports, King's Bench, New Series*, vol. 93, p. 816; and the affidavits submitted by the Ambassador of Spain in the Baccus S.R.L. *v.* Servicio Nacional del Trigo case (1956): United Kingdom, *The Law Reports, 1957, Queen's Bench Division* (London, The Incorporated Council of Law Reporting for England and Wales), vol. 1, p. 438. Similarly, the assertion by the Ambassador of the USSR regarding the representative character of Tass as a State agency was accepted by the court (Krajina *v.* The Tass Agency and Another (1949): United Kingdom, *The All England Law Reports*, 1949 (London, The Law Journal, 1950), vol. 2, p. 274).

[68] See for example the E.W. Stone Engineering Co. *v.* Petróleos Mexicanos case (1945), where the court held that:

"A determination by the Secretary of State with respect to the status of such instrumentalities is as binding on the courts as is his determination with respect to [the] foreign Government itself." (*Annual Digest and Reports of Public International Law Cases, 1946* (London, 1951), Case No. 31, p. 78.)

and as the present study is designed to lead to the eventual codification of the applicable rules of customary international law on the subject, attention should be directed towards existing general conventions of a universal character that contain provisions directly concerning certain aspects of the topic or cover areas closely linked or related to, or even partially overlapping, the subject of State immunities.

40. Among such instruments, attention may be turned to the following conventions:

(a) *Geneva Conventions on the Law of the Sea (1958)* The immunities applicable to warships and State-owned ships employed in governmental and non-commercial service in certain circumstances have been included in the Convention on the Territorial Sea and the Contiguous Zone (1958),[69] and in the Convention on the High Seas (1958).[70]

(b) *Vienna Convention on Diplomatic Relations (1961)* The immunities of State property used in connection with diplomatic missions are partially included in this Convention.[71]

(c) *Vienna Convention on Consular Relations (1963)* The immunities of State property used in connection with consular missions are partially covered by this Convention.[72]

(d) *Convention on Special Missions (1969)* The immunities of State property used in connection with special missions are in part treated in this Convention.[73]

(e) *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975)*. The immunities of State property used in connection with the premises, offices or missions of the representation of States in their relations with international organizations are included in this Convention.[74]

41. The above general conventions were prepared and adopted by the Commission in the form of draft articles.[75] It is useful to note also that some of the aspects of the current study are closely related to other topics under examination by the Commission, such as the topic of relations between States and international organizations,[76] and succession of States in respect of matters other than treaties.[77]

42. Prior to the adoption of the 1958 Conventions of the Law of the Sea, there was already in force, mainly in Europe, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926),[78] and its Additional Protocol of 1934.[79] It is a general Convention, but with application limited to the 13 countries which ratified it and to the immunities of States in respect of State-owned or State-operated vessels employed exclusively in governmental and non-commercial service.

2. Regional conventions

43. Apart from bilateral arrangements which could have some bearing on the problem of State immunities, there is now currently in force the European Convention on State Immunity of 1972,[80] to which attention should be directed. This Convention covers several aspects of State immunity. It came into force on 11 June 1976, and its application is widening as more signatories ratify it. The Convention provides interesting evidence of the general trends towards which a group of States in Europe are prepared to see the practice develop. It is clearly a useful source material for the present study.

C. International adjudication

44. While municipal judicial decisions are numerous in the practice of States, there appears to have been no incident, no conflict, which has compelled States to seek international judicial settlement or even an advisory opinion of the International Court of Justice or the Permanent Court of International Justice on any question of State immunity. No known arbitration has been noted in any report, whether by the Permanent Court of Arbitration or by any international arbitral tribunal. This should not be taken to mean that the

[69] United Nations, *Treaty Series*, vol. 516, p. 205.

[70] *Ibid.*, vol. 450, p. 11.

[71] *Ibid.*, vol. 500, p. 95.

[72] *Ibid.*, vol. 596, p. 261.

[73] General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

[74] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

[75] The 1956 draft articles on the law of the sea: *Yearbook ... 1956*, vol. II, pp. 256 *et seq.*, document A/3159, chap. II, sect. II; the 1958 draft articles on diplomatic intercourse and immunities: *Yearbook ... 1958*, vol. II, pp. 89 *et seq.*, document A/3859, chap. III, sect. II; the 1961 draft articles on consular relations: *Yearbook ... 1961*, vol. II, pp. 92 *et seq.*, document A/4843, chap. II, sect. IV; the 1967 draft articles on special missions: *Yearbook ... 1967*, vol. II, pp. 347 *et seq.*, document A/6709/Rev.1, chap. II, sect. D; the 1971 draft articles on the representation of States in their relations with international organizations: *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

[76] See *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304; and *Yearbook ... 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

[77] See *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[78] League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

[79] *Ibid.*, p. 215. For a brief report on the Convention, see J.W. Garner, "Legal status of government ships employed in commerce", *American Journal of International Law* (Washington, D.C.), vol. 20, No. 4 (October 1926), p. 759.

[80] For reference, see footnote 20 above. See Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972). For an interesting article, see I.M. Sinclair, "The European Convention on State immunity", *International and Comparative Law Quarterly* (London), vol. 22, part 2 (April 1973), pp. 254 *et seq.*

matter of State immunities is not subject to regulation by international law. There have been no cases for international adjudication on subjects such as diplomatic immunities, which have been understood to fall indubitably within the province and function of international law. Thus the absence of international judicial decisions or pronouncements on the subject, while indicating that the search through this particular type of sources will not be fruitful, does not imply that there will be no case before the international tribunal shortly. An eye should therefore be kept open to examine relevant materials from this source which may become available in the near future.

D. Opinions of writers

45. There is a rich legal literature on the doctrine and practice of States on jurisdictional immunities of foreign sovereign States. Opinions of writers will be consulted as widely as possible in order to ascertain and verify the emerging trends of legal developments. Without at this stage given an exploratory bibliography or an index of selected authors on the subject of State immunities or on general treatises with important reference to the subject of immunities, it can be asserted with assurance that the *opinio doctorum*, varied and varying as it may be with time and place, will constitute a main source of materials to be consulted in the present and further studies. Legal analyses and systematic theorizations of State practice undertaken by recent and contemporary writers on the international law of State immunities offer an irresistible challenge to any serious attempt at codification and progressive development of existing rules of international law on jurisdictional immunities of States and their property.

CHAPTER III

Possible content of the law of State immunities

A. Initial questions

46. The main purpose of this preliminary report is to determine, even though provisionally, the possible content of the rules of international law applicable to the question of State immunities. The present chapter will contain the core of all the relevant questions and issues involved in each and every aspect of jurisdictional immunities of States and their property. Once the content of these questions is determined and identified with relative clarity, it is hoped that the scope of the draft articles to be prepared will be more distinctly delineated. With the scope of the study thus defined with reasonable precision and the substantive content of applicable norms ascertained and verified, it will be desirable to examine at a later stage the question of the structure and the order of presentation of the body of rules of international law in the form of draft articles. In the mean time, of no less significance and relevance to the question of determining the content of the law is the question of the extent of the application of each rule of law. In other words, for each item in the substantive content of the norms selected for codification it is essential to appreciate the limits of its practical applicability or the circumstances in which it may be actually invoked or applied. Another question of comparable material importance appears to suggest itself in regard to the types of grantors of State immunities on the one hand, and the beneficiaries or recipients of the right—or, more aptly, the privilege—of State immunities on the other.

47. The apparent dichotomy between States and their property poses certain queries, but a closer examination will reveal the true nature of the questions involved. Immunities belong in any event, and in each and every instance, to the State, and exclusively to the State, without exception. Thus it can be assumed that the special mention of the property of States in the title of this study is not designed to detract from the reality or the validity of the proposition of law that only the State is capable of rights and duties under international law, although its property may receive certain protection or be covered by certain benefits or privileges by virtue of the application of the rules of international law of State immunities. Property as such, whether owned by the State or by any other personality, is not capable of rights and duties as a subject of international law. State property can be viewed as an object rather than as a subject of international rights and liabilities. The dichotomy, although misleading and possibly unintended, is helpful in a different respect. It helps to explain that, in the consideration of the question of State immunities, there are several stages or phases of the application of the rules, involving notably immunities from the power or competence of the court to adjudicate, immunities from preliminary or provisional measures before trial which could be of an administrative character, such as immunities from seizure and attachment, and ultimately immunities from execution following final judgement of the court. The distinction between States and their property might also serve to indicate at an

early stage of the initial study that the pre-trial and post-trial types of immunities present certain basic differences in features and characteristics, and that the post-judgement phase may relate more to questions of immunities in respect of State property than to immunities in respect of State activities.

B. The question of definitions

48. For the purpose of the present study and also of the eventual draft articles, certain key words appear to require very precise definitions. Without at this stage excluding the possibility that other terms may require definition, it might be useful to clarify the notional concept of certain terms that seem basic to any treatment of the subject of State immunities.

1. Jurisdiction

49. The term "jurisdiction" or "competence", in its more frequent usage, applicable to the court, refers to the judicial competence or power of a tribunal to adjudicate or to settle disputes by adjudication. The expression *juris dictio* literally means the announcement or pronouncement or determination of the law or the rights of the parties in litigation. The same expression can also mean a particular legal system, or a country having a distinct legal system.

2. Jurisdictional immunities

50. The word "jurisdictional" is referable to the jurisdiction or competence of the tribunal or the judiciary as above noted, but it has also been used to cover other types of jurisdiction not necessarily judicial in nature, such as administrative and executive power sometimes exercised by the court and at other times by the administrative or police authorities.

51. The term "jurisdictional immunities" could therefore refer to the right of sovereign States to exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State. The concept covers the entire judicial process, including investigation, examination, rendering of judgement and also execution of the judgement rendered.

52. It is therefore clear that, while the expression "jurisdictional immunities" can include both types of immunities, namely, "immunity from jurisdiction" and "immunity from execution", the former is essentially different in kind as well as in stage from the latter. Thus waiver of "immunity from jurisdiction" does not imply submission to measures of execution. Similarly, the court may decide to exercise jurisdiction in a suit against a foreign State on various grounds, such as the commercial nature of the activities involved, the consent of the foreign State, or voluntary submission, but will have to reconsider or re-examine the question of its own jurisdiction when it comes to executing the judgement. It will be seen that not all types of property of the State will be susceptible to measures of execution.

53. Furthermore, it should be noted that "jurisdictional immunities" does not imply any exemption from the application of substantive law. States are not immune from each other's territorial laws. This absence of legal or substantive immunity is clearly manifested upon waiver of jurisdictional immunities or voluntary submission by one State to the jurisdiction of another State. Thereafter, the substantive and also the procedural rules of the local law, including the *lex fori*, which may be temporarily suspended on account of State immunities, will resume their normal application. On the other hand, "jurisdictional immunities" presupposes the existence of valid or competent jurisdiction in accordance with the ordinary rules of private international law.[81]

3. State

54. There will be no necessity to define the term "State" for all purposes, but for the purpose of the current study the need may arise to indicate with certainty, in regard to the question of recipients or beneficiaries of State immunities, whether the expression "State" should cover only the State as such, or also its sovereign head, its government, and all departments forming part of the central government, thereby excluding all other separate entities and national enterprises.[82] It is possible to envisage a treatment of this problem in separate provisions dealing with the forms of the structural organization of the State to be understood as forming an integral part of the State as a united whole, and those separate entities which, subject to certain limitations and conditions, could enjoy the benefits of State immunities, for instance when acting for or on behalf of the State, and in the exercise of sovereign and governmental functions. With adequate provisions on the extent of State immunities based on the criterion of the nature of the activities, there may be no need to incorporate the question of the form of the State organization or its structure in the definition section,

[81] A further distinction has been observed in French jurisprudence between *"immunité de juridiction"* and *"incompétence d'attribution"*. While the former has afforded a criterion for restricting immunity on the basis of the private capacity in which the State has acted, the latter bases the incompetence of the court on the nongovernmental nature of the State activities. See Epoux Martin *v.* Banque d'Espagne case (1952): *Journal de droit international privé* (Clunet) (Paris), 80th year, No. 3 (July–Sept. 1953), p. 654, with a note by J.-B. Sialelli; see also J.-P. Niboyet, "Immunité de juridiction et incompétence d'attribution", *Revue critique de droit international privé* (Paris), vol. XXXIX, No. 2 (April–June 1950), p. 139.

[82] See for example the United Kingdom *State Immunity Act 1978* (for reference, see footnote 31 above), art. 14, para. 1.

which could be exclusively devoted to clarifying each notional concept by defining its content.

4. STATE PROPERTY

55. The concept of "State property" or "biens d'Etat" has been made clear in earlier work of the Commission, especially in the context of the draft articles on succession of States in respect of matters other than treaties.[83] Accordingly, a new definition may be superfluous, and the meaning to be ascribed to it could remain as defined, viz., property, rights and interests which are owned by the State according to its internal law.[84] However, the problem of classification of the types of State property for purposes of immunities from jurisdiction and execution will require a fresh and close examination.

C. General rule of State immunity

56. In 1978, the Working Group on jurisdictional immunities of States and their property described the nature of the topic and its legal basis in this fashion:

> The doctrine of State immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty. Thus, State immunity is sometimes expressed in the maxim *par in parem imperium non habet*.[85]

57. It is of utmost importance to restate at the outset of the study the general rule of State immunity, which is the consequence of the concurrent application of two basic principles of international law that come into play whenever one sovereign entity is engaged in activities within the territorial jurisdiction of another. Without the coincidence of the two aspects of sovereignty, namely the State as a national sovereign and the State as a territorial sovereign, there would be no overlapping of sovereign powers. It will be necessary to trace the origin and the historical development of this doctrine of State immunity.

58. In tracing legal developments concerning State immunity through national experiences, it will be seen that certain analogous principles have been followed in the adoption of the principle of State immunity in the judicial practice of States.[86] Thus in common law jurisdictions the doctrine of immunity of foreign States has, to a large extent, been influenced by the traditional immunity of the local sovereign. The transition of the principle of the immunity of the local sovereign to that of a foreign sovereign[87] has been followed by a further transition from the attributes of a personal sovereign to the immunities of the very State he represents.[88] Earlier decisions of national courts appear to have linked State immunity to the principles of diplomatic immunities and the immunities of personal sovereigns.[89] All the three instances cited have been placed on the same footing.[90] The relation between these principles finds occasional expression in the theory that the immunities enjoyed by the sovereigns and ambassadors belong ultimately to the State they represent, which is further reflected, in the case of diplomatic agents, in the rule

[83] See *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

[84] See *Yearbook ... 1973*, vol. II, p. 205, document A/9010/Rev.1, chap. III, sect. B, art. 5.

[85] *Yearbook ... 1978*, vol. II (Part Two), p. 153, document A/33/10, chap. VIII, sect. D, annex, para. 11.

[86] See for example the case of the Schooner "Exchange" *v.* McFaddon and others (Cranch, *op. cit.*, p. 116), where Chief Justice Marshall stated the classic formulation of the doctrine of sovereign immunity. His dictum runs in part:

> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete interdiction within their respective territories which sovereignty confers." (*Ibid.*, p. 135)

See also the "Prins Frederik" case (1820) (Dobson, *op. cit.*, p. 451) and the case Gouvernement espagnol *v.* Casaux (1849) (Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, année 1849* (Paris, Bureau de la jurisprudence générale), part one, p. 6; *Recueil général des lois et des arrêts, année 1849* (Paris, Sirey), part one, p. 83).

[87] It was held in the "Prins Frederik" case that the foreign State as personified by the foreign sovereign is equally sovereign and independent, and that to implead him would insult his "regal dignity". (Dodson, *op. cit.*, p. 451). See also Lord Campbell C.J. in the case De Haber *v.* the Queen of Portugal (1851):

> "... it is quite certain, upon general principles ... that an action cannot be maintained in an English Court against a foreign potentate ... To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." (United Kingdom, *Queen's Bench Reports*, new series (London, Sweet, 1855), vol. XVII, pp. 206–207.)

[88] See for example the classic dictum of Lord Justice Brett in The "Parlement Belge" case (1880):

> "The principle ... is that, as a consequence of the absolute independence of every sovereign authority, ... each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use ...". (United Kingdom, *The Law Reports, Probate Division* (London, Incorporated Council of Law Reporting for England and Wales), vol. V (1880), pp. 214–215).

[89] See for example Société générale pour favoriser l'industrie nationale *v.* Syndicat d'amortissement, Gouvernement des Pays-Bas et Gouvernement belge case (1840): *Pasicrisie belge—Receuil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat belge* (Brussels, Bruylant, 1841), vol. II, pp. 33 *et seq.* The Brussels Court of Appeals said: "... the principles of human rights applicable to ambassadors are all the more applicable to the nations that they represent." (*Ibid.*, pp. 52–53.) [Translation by the Secretariat.]

[90] See Chief Justice Marshall in the case The Schooner "Exchange" *v.* McFaddon and others (Cranch, *op. cit.*, pp. 137–139). The three instances mentioned are: (1) the exemption of the person of the sovereign from arrest and detention within a foreign territory; (2) the immunity which all civilized nations allowed to foreign ministers; and (3) the implied cession of the portion of its territories where he (the sovereign or the State) allows the troops of a foreign prince to pass through his domain.

that diplomatic immunities can only be waived by an authorized representative of the foreign government and with the latter's authorization.[91]

59. Whatever the legal foundation of the doctrine of State immunity, whether historically it is based on the analogy with the immunity of the local sovereign, or is merely an inevitable extension of diplomatic immunities, or whether analytically it is founded on the principles of sovereignty, independence, equality and dignity of States, or additionally on reciprocity, comity of nations and avoidance of political embarrassment in international relations, the principle of State immunity should be taken as a point of departure in any logical treatment of the topic. State immunity should be the general rule. Further examination may disclose important conditions and elements which constitute the basis of the general rule.

60. In this connection, a number of factors or elements deserving closer attention may be noted, in particular:

(*a*) the existence of a sovereign State with valid territorial jurisdiction over the activities of another sovereign State; or, to put it differently,

(*b*) the exercise of sovereign authority by one State within the territorial jurisdiction of another; and

(*c*) the absence of consent of the foreign sovereign State to the exercise of territorial jurisdiction by the State authorities.

D. Consent, waiver and other incidental questions

61. It is often stated that consent of States is the basis of international obligation and the foundation of jurisdiction for international settlement of disputes as well as for the exercise of foreign territorial jurisdiction. It is in the ultimate analysis the source of the binding force of rules of international law. Consent is therefore an important element in the doctrine of State immunity. Once consent is given by the State entitled to immunity, the territorial authorities can exercise their normal jurisdiction. Some national laws restate the rule of jurisdiction over foreign States by making express reference to the existence of consent.[92] Many questions are connected with consent.

1. Consent and voluntary submission to jurisdiction

62. The consideration of the element of consent appears to entail an examination of a number of questions, such as the manner and circumstances in which consent is said to have been given, or communicated: expressly or by implication, verbally or in writing, or contained in a written agreement. Further questions concern the agencies or organs which are competent to give or express consent. Voluntary submission to the territorial jurisdiction, whether as claimant, plaintiff or otherwise, is another clear evidence of consent in respect of the case before the court.

2. Waiver of immunity

63. Closely connected with the expression or implication of consent is the question of waiver of immunity. Similar enquiries may be made as to the manner and methods of waiving immunity, explicitly or impliedly. The question of timing of waiver is also significant—whether it should be made before or after commencement of the proceedings, or during litigation. An interesting question concerns the expression of consent, which is sometimes said to be validly given only *in facie curiae*. Current practice appears to accept waiver also out of court or in a prior agreement.

64. It is important to note that several exceptions to the general rule of State immunity have been advanced on the basis of implied consent, or on the theory of implied waiver. Such theories are in turn based on other criteria which could justify the implication of consent or waiver.

3. Counter-claim

65. Related to the question of voluntary submission by a foreign State by becoming claimant or plaintiff in a suit before the court of another State is that of the possible extent of allowable counter-claim. It may be asked whether voluntary submission opens up all the possibilities of unlimited counter-claims, or whether counter-claims are limited as to the subject-matter involved or by the amount of the original claim, thus operating as a set-off only.

4. Incidence of costs

66. Consent to a legal proceeding or voluntary submission or indeed waiver of immunity constitutes in each case consent to be bound by the judgement of the court, including the judicial discretion to award costs in favour of either party in litigation.

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[91] See for example the Dessus *v.* Ricoy case (1907), where the court said:

"... the immunity of diplomatic agents not being personal, but rather an attribute and a guarantee of the State they represent ..., the waiver of such an agent is invalid, especially if no authorization from his government is produced in support of that waiver." (*Journal du droit international privé* (Clunet), (Paris), 34th year (1907), p. 1087 and 1086.) [Translation by the Secretariat.]

[92] See for example art. 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics (footnote 29 above).

5. THE QUESTION OF EXECUTION

67. Consent to the exercise of local jurisdiction is not consent to execution of judgement. Waiver of jurisdictional immunity does not constitute or automatically entail waiver of immunity from execution. A separate waiver will be needed at the time satisfaction of judgement is sought. The court will not normally issue an execution order, unless under prevailing practice it has other internationally recognized means of seizing the property belonging to the judgement debtor State, in satisfaction of its judgement.

E. Possible exceptions to the general rule of State immunity

68. In more ways than one, the treatment of the question of consent together with its ramifications represents an initial effort to delimit the areas of operation of the doctrine of State immunity on grounds of consent, waiver or voluntary submission. There are areas of activity where State immunity is applicable and others where the rule of State immunity does not apply. It is sometimes said that according to the prevailing practice of States, immunity is only recognized in respect of State activities which are official or sovereign in character, public in purpose, or governmental in nature. In other words, only *acta jure imperii*, as distinct from *acta jure gestionis* or *jure negotii*, are covered by the doctrine of State immunity. Such distinctions are said to be applicable also to the property of the State in connection with its immunity from jurisdiction, as well as from execution.

69. Two approaches are open for the determination of the precise limits of the application of the doctrine of State immunity. One possible solution is to state the circumstances in which a State is entitled to sovereign immunity by listing the types of activities covered by the doctrine, thereby leaving out the uncovered areas of activities as lying outside the province of its application. Another would be to specify the types of activities, or the private or commercial nature of the transactions, or the non-governmental functions or capacities assumed by the State which will be subject to the territorial jurisdiction of another State. Both approaches could be pursued simultaneously. However, the Special Rapporteur is more inclined towards a more convenient approach: stating the general rule of State immunity, followed by the suggestion and discussion of possible exceptions. An exploratory list of such exceptions could be ventured on a tentative basis. Possible exceptions could be grouped under more general headings.[93]

1. COMMERCIAL TRANSACTIONS

70. One possible exception to the rule of State immunity is the trading activity of a foreign State having a substantial connection with the country of the forum. An element to be emphasized is the commercial nature of the transaction, as opposed to the motivation or the aim and purpose of the contract.[94] For instance, purchase of boots would be commercial in nature regardless of the eventual use of the boots (or other commodities). What is required is the private or commercial character of the contract together with the connection with the country of the forum, such as performance in that country. This exception may be extended to all types of private-law contracts to be performed wholly or in part in the territory of the forum.

71. Under this heading of "commercial transactions" are included contracts for the supply of goods or services; loans or other transactions for the provision of finance and any guarantee, or of any other financial obligation; and other transactions or activity (whether of a commercial, industrial, financial, professional or other similar character) concluded by a State otherwise than in the exercise of sovereign authority.[95] A question may arise in regard to government-to-government transactions, which may belong to a separate category of international transactions by themselves, requiring further attention at a later stage.

2. CONTRACTS OF EMPLOYMENT

72. Disputes concerning the terms of contracts of employment constitute another possible exception to the rule of State immunity, although there is room for argument that the question of appointment, nomination or dismissal of a government employee is not subject to investigation by the authority of another State, being an exercise of sovereign authority. There is a distinction to be drawn between the act of appointment or dismissal and the consequences of a breach of contractual obligations. Labour disputes and relations are new fields which require a close attention, as the State of the forum has a vital interest in maintaining orderly developments in the field of labour relations.[96]

[93] See the European Convention on State Immunity (for reference, see footnote 20 above). Compare the *State Immunity Act of 1978* of the United Kingdom (see para. 26 and footnote 30 above) and the *Foreign Sovereign Immunities Act of 1976* of the United States of America (*ibid.*).

[94] See Trendtex Trading Corporation Ltd. *v.* Central Bank of Nigeria (for reference, see footnote 42 above). The purchase of cement for the construction of barracks for the army was held to be commercial in nature and therefore not covered by State immunity, irrespective of its purpose or motivation.

[95] For example, Nederlandse Rijnbank, Amsterdam, *v.* Mühlig Union, Teplitz-Schönau (1947), in which the rule of State immunity was held not to apply to "State-conducted undertakings in the commercial, industrial or financial fields" (*Annual Digest and Reports of Public International Law Cases, 1947* (London, 1951), case No. 27, p. 78).

[96] Compare De Ritis *v.* Governo degli Stati Uniti d'America (1971), *Rivista di diritto internazionale* (Milan), vol. LV, No. 3 (1972), p. 483 and Luna *v.* Repubblica Socialista di Romania (1974), *ibid.*, vol. 58, No. 3 (1975), p. 597. Immunity was upheld in both cases concerning appointment and dismissal of government employees, and the activities of the agencies were not considered of a commercial character.

3. Personal injuries and damage to property

73. Another possible exception to the rule of State immunity relates to an act or omission on the part of a foreign State in the territory of another State, causing death or personal injury, or damage to, or loss of tangible property within, the country where a suit is brought against the State. The purpose of this exception is to avoid the hardships incurred by individuals, who would otherwise have no relief. This exception will require further reflection, especially in connection with the more strict liability of the State.

4. Ownership, possession and use of property

74. A State is not immune in respect of activities connected with any interest of the State in, or its possession or use of, immovable property in the territory of another State; or any obligation of the State arising out of its interest in, or its possession or use of, any such property. The rationale of this exception lies in the fact that questions relating to immovable property are normally governed by the law of the *forum rei sitae*, and the territorial court is the proper forum.

75. This exception also covers activities of a State in relation to its interest in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia.*

76. The same exception applies to the claim of interest a State may have in any property relating to the estates of deceased persons or persons of unsound mind, or to insolvency, the winding up of companies or the administration of trusts within the territorial competence of the forum.

5. Patents, trade marks and other intellectual property

77. A State is not immune in regard to activities relating to any patent, trade mark, design or copyrights registered or protected in another State, nor from any suit for infringement of such rights by the State. Litigation concerning the right to use a trade name or business name in another State will not be an area in which a State can claim sovereign immunity. The niceties of international registration and national protection of intellectual properties as well as industrial property rights render imperative the non-application of the doctrine of State immunity for the ultimate benefit of the State concerned, as well as in the interest of fair competition in world trade.

6. Fiscal liabilities and customs duties

78. A significant exception has been recognized in the realm of fiscal jurisdiction. A State is not exempt from the fiscal competence of another in regard to value-added tax, any duty or customs or excise, or any agricultural levy. Nor is the State immune from proceedings relating to its liability to pay rates in respect of premises occupied by it for commercial purposes in the territory of another State. Whatever fiscal exemption a foreign State may have been accorded in practice, it has been based on courtesy rather than any compelling rule of international law. Reciprocal treatment might have afforded a ground for temporary relaxation of fiscal authority. In this field, States appear to be in a less privileged position than their diplomatic representatives in the country of accreditation.

7. Shareholdings and membership of bodies corporate

79. In respect of its membership of a body corporate, or an uncorporated entity or a partnership, a State is not immune from suits against it in the country where jurisdiction is being exercised, whether the subject matter relates to the dispute with that body or its other members or partners. Proceedings relating to the operation of a trading corporation or commercial enterprise in which the State has an interest as shareholder or stockholder, or to its interests in the shares or stock in that body, lie outside the scope of application of the rule of State immunity.

8. Ships employed in commercial service

80. A State is not immune in respect of actions *in rem* or in admiralty or *in personam* for enforcing a claim in connection with a ship owned or operated by it in commercial service. This exception, though relating especially to ships as a special category of State property, is a logical reflection of a more general exception of commercial activities of the State. National case law of State immunity has grown out of shipping cases. Several conventions of a universal character have been concluded dealing with sea-going vessels and the operation of State-owned ships in commercial service which are not covered by the immunity of State.[97]

9. Arbitration

81. Where a State has consented to submit a dispute to arbitration, there is no immunity in respect of proceedings relating to arbitration. Although this exception comes within the purview of the qualifications or conditions of consent as an element of State

[97] For example, the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 1926 and the Geneva Conventions of 1958 on the Law of the Sea (referred to in paras. 42 and 40 above). See also the cases cited in footnotes 86–90 above.

immunity itself, it does not concern the right to derogate from submission to arbitration. However, a suit may be brought against the State in respect of judicial approbation of an arbitral award or arbitration decision. In certain jurisdictions, an arbitration can take place either within the court or out of court. An exception to the application of State immunity in this connection at this juncture may be useful and timely.

F. Immunity from attachment and execution

82. The immunity of a State from attachment and execution in regard to its public property or property in governmental use forms part and parcel of the composite whole of the doctrine of the jurisdictional immunity of States. As has been seen in regard to waiver of immunity from jurisdiction, immunity from execution relates to the second, or post-judgement, stage of judicial process. Immunity from attachment could be involved at any stage, whenever attachment is sought against property of the foreign sovereign State.

83. The general rule appears to be that the property of a foreign State—especially property in its possession or control—is exempt from provisional measures of seizure or attachment, as well as from execution. An important question then to be considered is the extent to which this general rule applies in practice. The requirement of ownership, possession or control offers one criterion. The use of the property, or sometimes the purpose of its use, may be relevant to the determination of the question whether, in a particular case, a State property is immune from attachment and execution.

84. It is clear that when the State consents to an interim measure of seizure or attachment, or indeed, to execution of its property, such a measure could be implemented. But there appear to be clearly defined procedural rules requiring such consent to be given in writing by a competent organ of the State to which the property belongs.

85. Apart from consent, there appear to be other exceptions to the rule of immunity from execution—a question which arises only after final judgement of the competent territorial tribunal. Whereas execution is possible, it can only be levied against certain types of State property in commercial use. It is clearly confirmed by usage and recent practice that State property used in connections with its sovereign functions, such as diplomatic or consular or governmental representation, remains immune from attachment and execution.[98]

G. Other procedural questions

86. Several other procedural questions are involved in any examination of the application of State immunity. The service of judicial process is one that has to be overcome before the State can be served with a notice of a suit being brought against it.

87. There are also certain procedural privileges to which a State is entitled. For instance, no penalty by way of committal or fine is conceivable in respect of any failure or refusal by or on behalf of the State to disclose or produce any document or other information for the purposes of proceedings to which it is a party. Furthermore, it is not likely that relief will be given against a State by way of injunction, or order for specific performance, or for recovery of land or other property. The property of a State is not subject to any process for the enforcement of a judgement or arbitration award, or, in an action *in rem*, for its arrest, detention or sale without that State's written consent. The immunity of a State from attachment and execution will be further examined in future reports.

88. It is important to note that questions of procedure are of practical significance in any litigation, although each legal system has its own peculiar rules, which it will not be suitable to investigate in greater detail for the present purpose.

H. Other related questions

89. Countless questions are connected with or closely related to the topic of State immunity. Among these is that of the privileges and immunities enjoyed by ambassadors and other diplomatic agents, as well as those extended to international organizations (and to their staff) having headquarters in the territory of the State of the forum. A comparison might usefully be drawn to determine whether the extent or degree—or indeed, the quality and quantity—of privileges and immunities recognized and accorded by operation of international law in favour of States, their representatives and their intergovernmental organizations, are justified in practice and on legal grounds.

[98] See also the Vienna Conventions mentioned in para. 40 above.

CHAPTER IV

Conclusion

90. The preceding survey of the types of available source materials to be further examined and the relevant questions to be considered in the study of the topic of jurisdictional immunities of States and their property does not lend itself to any general statement by way of conclusion, even of a tentative and

provisional nature. Some concluding observations in connection with future treatment of the subject may nonetheless be warranted.

91. It appears to be desirable to continue the study of this topic, and not only possible but practicable eventually to prepare draft articles along the lines indicated in this preliminary report.

92. It would be useful if most, if not all, of the source material on the topic could be put at the disposal of the Special Rapporteur in the course of his research, so that he could be better prepared to assist the Commission in its task of codification and progressive development of relevant rules on the subject. A reasonable amount of legal opinion contained in the written works of jurists should be available. Although there is little to be expected on the topic from international judicial jurisprudence or arbitration, information on the practice of States in regard to case law, national legislation and governmental practice could be sought from Governments which are States Members of the United Nations. These materials would have practical relevance to current legal development, as they could be indicative of the position and the trend of contemporary State practice on the subject. They could provide clearer evidence of the present state of the law, and a persuasive indication of how the law is likely to develop in the foreseeable future.

93. The collection of comments and views of Governments of States Members of the United Nations appears to be indispensable to any future study of the topic because of its high value as authoritative source material. All States, without distinction, are now more than ever before in the history of international legal development in a position to influence the progressive development of international law through their active participation in the law-making process. The replies to a questionnaire requesting the views of Member Governments would indeed constitute invaluable source material for the planning of the topic and for the preparation of draft articles.

94. The structure of the draft articles could follow the usual pattern, with general definitions and statement of their purpose and their scope of application. Their contents could cover practically all the questions to which allusion has been made in this preliminary report. In particular, the draft articles should contain a provision on certain definitions, statement of the general rule of State immunity, its application, qualifications and constitutive elements. Exceptions to the general rule should also be examined in each separate category of cases in different areas where possibly no immunity will be needed. A section can be devoted to procedural questions, including procedural privileges. The treatment of each question would contain appropriate comments.

95. As the present report is only preliminary, it will not be necessary at this stage to suggest a solution to all of the problems involved in each of the items forming the content of the rule of State immunity and its possible exceptions.

96. One important question which will eventually need to be decided at least provisionally is the treatment of the immunity from attachment and execution of State property and its possible exceptions. The entire topic of State immunities could be included in one series of draft articles which may be composed of two parts: part one, relating to the jurisdictional immunity of the State, and part two, to the immunity from attachment and execution of State property. The two parts could conceivably be included in one composite set of draft articles. Such an arrangement might be practical, as it would correspond to the existence of two distinct phases of State immunity.

97. The proposed tentative plan of the structure and presentation of the subject-matter are subject to variation and modification upon closer investigation of its contents. Further reflection, after close examination of other materials, may lead to firmer recommendations as to the form the treatment of the topic should take. At this stage, suffice it to express the hope that with guidance from the International Law Commission through the views expressed by its members, and that of the comments and views of Member States, the final product will be based on a balanced approach and the draft articles it will contain will be able to accommodate and harmonize the views and interests of States and of all the parties involved.

98. Towards this end, it would be of considerable assistance to the Special Rapporteur in the performance of the task assigned to him if the Secretary-General of the United Nations could be requested to circulate a questionnaire inviting comments and the views of Member Governments on the various points outlined in this report as possible elements of the topic of jurisdictional immunities of States and their property.

CHECK LIST OF DOCUMENTS OF THE THIRTY-FIRST SESSION

Document	*Title*	*Observations and references*
A/CN.4/316	Provisional agenda	Mimeographed. For the agenda as adopted, see A/34/10, para. 15 (vol. II (Part Two), p. 8).
A/CN.4/317	Filling of casual vacancies: note by the Secretariat	Reproduced in the present volume (p. 1).
A/CN.4/317/Add.1 and Corr.1 and Add.2	*Idem*—addenda to the note by the Secretariat: list of candidates and *curricula vitae*	Mimeographed
A/CN.4/318 and Add.1–4	Eighth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur: the internationally wrongful act of the State, source of international responsibility (*continued*)	Reproduced in the present volume (p. 3).
A/CN.4/319	Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur: draft articles, with commentaries (*continued*)	*Idem* (p. 125).
A/CN.4/320 and Corr.1	First report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	*Idem* (p. 143).
A/CN.4/321 and Add.1–7	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: comments of States	*Idem* (p. 213).
A/CN.4/322 and Corr.1 and Add.1 and 2	Eleventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: draft articles on succession in respect of State archives, with commentaries	*Idem* (p. 67).
A/CN.4/323	Preliminary report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	*Idem* (p. 227).
A/CN.4/324	The law of the non-navigational uses of international watercourses: replies of Governments to the Commission's questionnaire	*Idem* (p. 178).
A/CN.4/325	Report of the Working Group on review of the multilateral treaty-making process	*Idem* (p. 183).
A/CN.4/L.289	Draft articles on State responsibility: text of article 28 proposed by Mr. Tsuruoka	Replaced by A/CN.4/L.289/Rev.1
A/CN.4/L.289/Rev.1	*Idem*	Reproduced in vol. I, p. 23 (1536th meeting, para. 2).
A/CN.4/L.290	*Idem*: text of article 28 proposed by Mr. Jagota	*Idem*, p. 21 (1535th meeting, para. 16).
A/CN.4/L.291	*Idem*: text of article 29 proposed by Mr. Tsuruoka	*Idem*, p. 39 (1540th meeting, para. 4).
A/CN.4/L.292	*Idem*: text of article 29 proposed by Mr. Jagota	*Idem*, pp. 47–48 (1542nd meeting, paras. 28 + 30–31).
A/CN.4/L.293	*Idem*: text of article 29 proposed by Mr. Ushakov	*Idem*, pp. 54–55 (1544th meeting, para. 5).
A/CN.4/L.294	*Idem*: text of article 30 proposed by Mr. Jagota	*Idem*, p. 61 (1545th meeting, para. 18).

Document	*Title*	*Observations and references*
A/CN.4/L.295	*Idem*: text of article 30 proposed by Mr. Yankov	*Idem*, p. 62 (*idem*, para. 24).
A/CN.4/L.296	Draft articles on treaties concluded between States and international organizations or between international organizations: text of article 46 proposed by Mr. Ushakov	*Idem*, p. 98 (1552nd meeting, para. 15).
A/CN.4/L.297 and Add.1	Draft articles on State responsibility—texts adopted by the Drafting Committee: articles 28–32 and title of chapter V of the draft	*Idem*, pp. 170–171 and 233–234 (1567th meeting, para. 1, and 1579th meeting, para. 1).
A/CN.4/L.298	Succession of States in respect of matters other than treaties—draft articles relating to succession to State archives: text of articles X, Y and Z proposed by Mr. Tsuruoka	*Idem*, p. 161 (1564th meeting, para. 30).
A/CN.4/L.299	Draft articles on succession of States in respect of matters other than treaties—Texts adopted by the Drafting Committee: articles 2–8, X and 12–25, and titles of the corresponding parts and sections of the draft	Replaced by A/CN.4/L.299/Rev.1
A/CN.4/L.299/Rev.1	*Idem*—Texts adopted by the Drafting Committee: articles 1–23 and titles of the corresponding parts and sections of the draft	Reproduced in vol. I, pp. 175–177 (1568th meeting, para. 3).
A/CN.4/L.299/Rev.1/Add.1	*Idem*—draft articles relating to succession to State archives: articles A and C adopted by the Drafting committee	*Idem*, p. 190 (1570th meeting, para. 3).
A/CN.4/L.300	Draft articles on treaties concluded between States and international organizations or between international organizations—texts adopted by the Drafting Committee: articles 39–60 and titles of the corresponding parts and sections of the draft	*Idem*, pp. 219–221 (1576th meeting, para. 2).
A/CN.4/L.301 and Corr.1	Draft report of the International Law Commission on the work of its thirty-first session: chap. I	Mimeographed. For the final text, see A/34/10 (vol. II (Part Two)).
A/CN.4/L.302 and Add.1–4	*Idem*: chap. II	*Idem*.
A/CN.4/L.303 and Add.1–6	*Idem*: chap. III	*Idem*.
A/CN.4/L.304	*Idem*: chap. IV	*Idem*.
A/CN.4/L.305	*Idem*: chap. V	*Idem*.
A/CN.4/L.306	*Idem*: chap. VI	*Idem*.
A/CN.4/L.307	*Idem*: chap. VII	*Idem*.
A/CN.4/L.308	*Idem*: chap. VIII	*Idem*.
A/CN.4/L.309 and Add.1	*Idem*: chap. IX	*Idem*.
A/CN.4/L.310	Report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	Text reproduced, as amended at the 1580th meeting (see vol. I, pp. 238–239), in A/34/10, chap. VI (vol. II (Part Two) pp. 171 *et seq.*)
A/CN.4/SR.1530–SR.1583	Provisional summary records of the 1530th to 1583rd meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.

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