

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1980

Volume II
Part Two

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

UNITED NATIONS



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New York, 1981



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*.

Volume II (Part One) of the *Yearbook* contains the reports of the Special Rapporteurs discussed at the session and certain other documents; volume II (Part Two) contains the Commission's report to the General Assembly. References 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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DOCUMENT A/35/10*

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ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
FAO	Food and Agriculture Organization
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
ILO	International Labour Office
IMCO	Intergovernmental Maritime Consultative Organization
OECD	Organisation for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i> [to 1930]
<i>P.C.I.J., Series B</i>	<i>P.C.I.J., Collection of Advisory Opinions</i> [to 1930]
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i> [from 1931]
<i>P.C.I.J., Series C</i>	
Nos. 1–19	<i>P.C.I.J., Acts and Documents relating to Judgments and Advisory Opinions</i> [to 1930]
Nos. 52–88	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i> [from 1931]
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-second session at its permanent seat at the United Nations Office at Geneva from 5 May to 25 July 1980.

2. The work of the Commission during that session is described in the present report. Chapter II of the report, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic together with the draft articles adopted on first reading and commentaries to four of those articles provisionally adopted at the thirty-second session. Chapter III, on State responsibility, contains a description of the Commission's work on that topic together with the draft articles of Part I adopted on first reading and commentaries to three of those articles provisionally adopted at the thirty-second session. Chapter IV, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on the topic, together with the 86 draft articles and annex adopted on first reading and the commentaries to 20 of those articles and the Annex provisionally adopted at the thirty-second session. Chapter V, on the law of the non-navigational uses of international watercourses, contains a description of the Commission's work on the topic, together with six draft articles and commentaries thereto provisionally adopted at the thirty-second session. Chapter VI, on jurisdictional immunities of States and their property, contains a description of the Commission's work on the topic, together with two draft articles and commentaries thereto provisionally adopted at the thirty-second session. Chapters VII and VIII relate, respectively, to the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Finally, Chapter IX deals with the programme and methods of work of the Commission, as well as a number of administrative and other questions.

A. Membership

3. The Commission consists of the following members:

Mr. Julio BARBOZA (Argentina);
Mr. Mohammed BEDJAOU (Algeria);
Mr. B. BOUTROS GHALI (Egypt);
Mr. Juan José CALLE Y CALLE (Peru);
Mr. Jorge CASTAÑEDA (Mexico);
Mr. Emmanuel Kodjoe DADZIE (Ghana);
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);
Mr. Jens EVENSEN (Norway);
Mr. Laurel B. FRANCIS (Jamaica);
Mr. S. P. JAGOTA (India);
Mr. Frank X. J. C. NJENGA (Kenya);
Mr. C. W. PINTO (Sri Lanka);
Mr. Robert Q. QUENTIN-BAXTER (New Zealand);
Mr. Paul REUTER (France);
Mr. Willem RIPHAGEN (Netherlands);
Mr. Milan ŠAHOVIĆ (Yugoslavia);
Mr. Stephen M. SCHWEBEL (United States of America);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Abdul Hakim TABIBI (Afghanistan);
Mr. Doudou THIAM (Senegal);
Mr. Senjin TSURUOKA (Japan);
Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);
Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);
Mr. Stephen VEROSTA (Austria);
Mr. Alexander YANKOV (Bulgaria).

B. Officers

4. At its 1584th meeting, on 5 May 1980, the Commission elected the following officers:

Chairman: Mr. C. W. Pinto

First Vice-Chairman: Mr. Juan José Calle y Calle

Second Vice-Chairman: Mr. Doudou Thiam

Chairman of the Drafting Committee: Mr. Stephen Verosta

Rapporteur: Mr. Alexander Yankov

5. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1604th meeting, on 4 June 1980, set up for the present 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 Enlarged Bureau appointed Mr. Doudou Thiam Chairman of the Planning Group, which was composed as follows: Mr. Juan José Calle y Calle, Mr. Leonardo Díaz González, Mr. Frank X. J. C. Njenga, Mr. Paul Reuter, Mr. Milan Šahović, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov and Sir Francis Vallat.

C. Drafting Committee

6. At its 1587th meeting, on 8 May 1980, the Commission appointed a Drafting Committee composed of the following members: Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Jens Evensen, Mr. S. P. Jagota, Mr. Frank X. J. C. Njenga, Mr. Paul Reuter, Mr. Stephen M. Schwebel, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, Sir Francis Vallat and Mr. Stephan Verosta. Mr. Verosta was elected by the Commission to serve as Chairman of the Committee. Mr. Alexander Yankov also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

7. Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, represented the Secretary-General at the session. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. John F. Scott, Director, Office of the Legal Counsel, represented the Secretary-General at some of the meetings of the Commission.

Mr. Santiago Torres-Bernárdez, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. Eduardo Valencia-Ospina, Senior Legal Officer, acted as Senior Assistant Secretary to the Commission. Mr. Andronico O. Adede and Mr. Larry D. Johnson, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

8. At its 1584th meeting, on 5 May 1980, the Commission adopted an agenda for its thirty-second session, consisting of the following items:

1. Succession of States in respect of matters other than treaties.
2. State responsibility.
3. Question of treaties concluded between States and international organizations or between two or more international organizations.
4. The law of the non-navigational uses of international watercourses.
5. Jurisdictional immunities of States and their property.
6. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme and methods of work.
10. Co-operation with other bodies.
11. Date and place of the thirty-third session.
12. Other business.

9. The Commission considered all the items on its agenda with the exception of item 8, Relations between States and international organizations. In the course of the session the Commission held 59 public meetings (1584th to 1642nd). In addition, the Drafting Committee held 27 meetings, the Enlarged Bureau of the Commission three meetings and the Planning Group four meetings.

Chapter II

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

10. The International Law Commission, at its thirty-first session in 1979,¹ completed the first reading of the draft articles on succession of States in respect of State property and State debts, by adopting a provisional draft of twenty-three articles. Also at that session, the Commission adopted on first reading draft articles A and B, on State archives, and decided to append them to the draft. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to the Governments of Member States for their observations.²

11. The General Assembly, in paragraph 4 (a) of resolution 34/141 of 17 December 1979, recommended that the Commission:

Continue its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-second session, the study of the question of State archives and, at its thirty-third session, the second reading of all of the draft articles on succession of States in respect of matters other than treaties, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly.

12. At the present session of the Commission, the Special Rapporteur, Mr. Mohammed Bedjaoui, submitted a twelfth report on succession of States in respect of matters other than treaties (A/CN.4/333),³ containing the texts of four additional articles (articles B', D, E and F) covering succession to State archives in cases of State succession other than decolonization, the latter case having been already dealt with in article B. The draft articles related respectively to succession to State archives in the case of the transfer of part of the territory of a State, a uniting of States, the separation of part or parts of the territory of a State, and the dissolution of a State. The report introduced a few changes and additions to the eleventh report, which the Special Rapporteur had submitted to the

Commission at its thirty-first session.⁴ This latter report, dealing with succession in respect of State archives, remained the basic document for the Commission's consideration of the question, in so far as the Commission had not completed its study at the previous session.

13. The Commission considered the question of State archives, on the basis of the Special Rapporteur's eleventh and twelfth reports, at its 1602nd to 1606th meetings and referred to the Drafting Committee draft articles B', D, E and F contained therein. The Committee, having examined the four draft articles, submitted to the Commission texts for articles C, D, E and F. At its 1627th meeting, the Commission adopted those texts on first reading, with minor changes.

14. With the adoption of those four additional articles the Commission has completed, at its thirty-second session, the first reading of the series of draft articles on succession in respect of State archives. In maintaining their alphabetical designation the Commission intends that the question of their ultimate place in the entire draft on succession of States in respect of matters other than treaties, whether as a separate part or as a separate chapter of Part II, dealing with succession to State property, shall be decided in the light of comments by Governments.

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

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

16. The texts of articles 1 to 23 and A to F, adopted by the Commission at its twenty-fifth and twenty-seventh to thirty-second sessions, together with the texts of articles C to F and the commentaries thereto, adopted by the Commission at its thirty-second session, are reproduced below for the information of the General Assembly.

¹ For the historical review of the work of the Commission on the topics of succession of States in respect of matters other than treaties up to 1979, see: *Yearbook ... 1979*, vol. II (Part Two), pp. 10 et seq., document A/34/10, paras. 17-45.

² For the text of the provisional draft articles and their commentaries: *ibid.*, pp. 15 et seq., document A/34/10, chap. II, sect. B.

³ Reproduced in *Yearbook ... 1980*, vol. II (Part One).

⁴ *Yearbook ... 1979*, vol. II (Part One), pp. 67 et seq., document A/CN.4/322 and Add. 1-2.

1. TEXT OF THE DRAFT ARTICLES ADOPTED BY THE COMMISSION ON FIRST READING

PART I

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. Use of terms

1. For the purposes of the present articles:

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

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

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

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

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

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

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

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

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

PART II

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 a 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, at 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 articles in the present Part.

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

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

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

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

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

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

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

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 11. Newly independent State

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

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

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

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

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

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

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

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

Article 12. Uniting of States

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

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

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

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

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

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

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

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

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

Article 14. Dissolution of a State

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

(a) immovable State property of the predecessor State 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. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART III

STATE DEBTS

SECTION 1. GENERAL PROVISIONS

Article 15. Scope of the articles in the present Part

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

Article 16. State debt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 20. Newly independent State

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

connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

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

Article 21. Uniting of States

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

2. Without prejudice to the provision of paragraph 1, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Article 22. Separation of part or parts of the territory of a State

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

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

Article 23. Dissolution of a State

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

ADDENDUM

STATE ARCHIVES

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Article B. Newly independent State

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

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

(b) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State

archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

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

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

2. In the absence of an agreement:

(a) the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory in question is transferred shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the transferred territory or its boundaries, or which are necessary to classify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. (a) The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.

(b) The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Article D. Uniting of States

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

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

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

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

(a) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession

of States relates, should be in that territory shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory to which the succession of States relates shall pass to the successor State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates shall be determined by agreement between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of documents of their State archives connected with the interests of their respective territories.

6. The provisions of paragraphs 1 to 5 apply when part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

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

(a) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory of a successor State shall pass to that successor State.

2. The passing of the parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, of interest to the respective territories of the successor States shall be determined by agreement between them in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. Each successor State shall provide the other successor State or States with the best available evidence of documents from its part of the State archives of the predecessor State which bear upon title to the territories or boundaries of that other successor State or States or which are necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and the expense of that State, appropriate reproductions of documents of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

6. The provisions of paragraphs 1 to 5 shall not prejudice any question that might arise by reason of the preservation of the unity of the State archives of the successor States in their reciprocal interest.

2. TEXT OF ARTICLES C–F, WITH COMMENTARIES THEREON, ADOPTED BY THE COMMISSION AT ITS THIRTY-SECOND SESSION

[STATE ARCHIVES (*continued*)⁵]

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

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

2. In the absence of an agreement:

(a) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be at the disposal of the State to which the territory in question is transferred shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the transferred territory or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. (a) The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.

(b) The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Commentary

(1) The present article concerns the passing of State archives in the case of transfer of part of the territory of a State to another. The practice of States in this case

⁵ For the historical review of the work of the Commission on the question of State archives see *Yearbook* ... 1979, vol. II (Part Two), pp. 77 *et seq.*, document A/34/10, paras. 53–55. For the general commentary on the draft articles on State archives and the commentaries on draft articles A and B, *ibid.*, pp. 86 *et seq.*

of succession to State archives is somewhat suspect, inasmuch as it has relied on peace treaties that were generally concerned with providing political solutions that reflected relationships of strength between victor and vanquished rather than equitable solutions. It had long been the traditional custom that the victors took archives of the territories conquered by them, and sometimes even removed the archives of the predecessor State.

(2) Without losing sight of the above-stated fact, the existing State practice may, nevertheless, be used in support of the proposals for more equitable solutions that are embodied in the text of this article. That practice is referred to in the present commentary under the following six general headings: (a) transfer to the successor State of all archives relating to the transferred territory; (b) archives removed from or constituted outside the territory of the transferred territory; (c) the "archives-territory" link; (d) special obligations of the successor State; (e) time-limits for handing over the archives; (f) State libraries.

Transfer to the successor State of all archives relating to the transferred territory

(3) Under this heading, it is possible to show the treatment of the sources of archives, archives as evidence, archives as instruments of administration, and archives as historical fund or cultural heritage.

(4) The practice on sources of archives, about which there seems to be no doubt, originated a long time ago in the territorial changes carried out as early as the Middle Ages. It is illustrated by examples taken from the history of France and Poland.⁶ 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 Philippe III 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 onward 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 will be seen, the reasons for invoking it varied.

(5) 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. This 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.⁷

(6) 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 any disruption of management and facilitate proper administration. Two possible cases may arise.

The first is the case of a single successor State. In this case, 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. For example, in the case of the cession of the provinces of Jämtland, Härjedalen, Gotland and Ösel, the Treaty of Brömsebro (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 Roskild (26 February 1658, article 10) and Copenhagen (27 May 1660, article 14).⁸ 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 ...".⁹ Under the Treaty of Utrecht (11 April 1713), Louis XIV ceded Luxembourg, Namur and Charleroi to the (Netherlands) States General "with all papers, letters, documents and archives relating to the said Low Countries".¹⁰ 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

⁷ 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.

⁸ France, *Les archives dans la vie internationale* (op. cit.), p. 16.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 17.

⁶ See France, Direction des archives de France, *Actes de la sixième conférence internationale de la Table ronde des archives, Les archives dans la vie internationale* (Paris, 1963), pp. 12 et seq.

accompanied by a separate convention dealing solely with this matter. Thus, the Convention between Hungary and Romania signed at Bucharest on 16 April 1924,¹¹ 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 and specified how the exchange was to be carried out.

(7) The second case is one in which there is more than one successor State. The examples given below concern old and isolated cases and cannot be taken to indicate the existence of a custom, but it is useful to mention them because the approach adopted would today be rendered very straightforward through the use of modern reproduction techniques. 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.¹² Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815 refers to "deeds and papers which ... are of common interest to both parties".¹³ The solution adopted was that Saxony would keep the originals and provide Prussia with certified copies. Thus, regardless of the number of successors the entire body of archives remained intact in pursuance of the principle of the conservation of archival collections for the sake of facilitating administrative continuity. However, this same principle and this same concern were to give rise to many disputes in modern times as a result of a distinction made between administrative archives and historical archives.

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 territory being transferred through the normal functioning of its own institutions. This argument, although not without merit, is not altogether supported by practice: history has seen many cases of transfers of archives, historical documents included. For example, the Treaty of Vienna (3 October 1866) by which Austria ceded Venezia to Italy provides, in article XVIII, 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".¹⁴ Other examples of this are not difficult to find. Article 29, paragraph 1 of the Peace Treaty between Finland and the FRSR 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".¹⁵

Archives removed from or constituted outside the transferred territory

(8) 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 to the transferred territory, even if these archives have been removed from or are situated outside this territory. 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.¹⁶ 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").¹⁷ In the same way, Poland recovered the central archives of the former Polish State, 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.¹⁸ Reference can also be made 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 XX of the said treaty provided as follows:

The deeds of property, documents of the administration and civil justice, concerning the ceded territory which are in the

¹¹ League of Nations, *Treaty Series*, vol. XLV, p. 331.

¹² France, *Les archives dans la vie internationale* (op. cit.), pp. 17–18.

¹³ G. F. de Martens, ed., *Nouveau Recueil de traités* repr. (Gottingen, Dieterich, 1887), vol. II (1814–1815), p. 276.

¹⁴ France, *Les archives dans la vie internationale* (op. cit.), p. 27.

¹⁵ League of Nations, *Treaty Series*, vol. III, p. 35.

¹⁶ France, *Les archives dans la vie internationale* (op. cit.), paras. 19–20. See also *Yearbook . . . 1979*, vol. II (Part One), document A/CN.4/322 and Add. 1–2, paras. 27–29.

¹⁷ France, *Les archives dans la vie internationale* (op. cit.), p. 20.

¹⁸ *Ibid.*, pp. 35–36.

archives of the Kingdom of Denmark shall be dispatched to the Commissioners of the new Government of the Duchies as soon as possible.¹⁹

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.

(9) 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 III of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows:

Should any of the Documents [archives, documents, and registers] be found missing, they shall be restored by the French Government on the demand of the German Government.²⁰

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.²¹ 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 relating to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.²² The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery 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".²³ 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".²⁴ Fauchille did not go so far as to support this contrary rule, but implied that distinction 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?²⁵

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 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.²⁶

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 relating to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.²⁷ 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.

(10) This isolated school of thought is mentioned because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If credence is to be given to at least one interpretation of

¹⁹ *The Great European Treaties of the Nineteenth Century*, eds. A. Oakes and R.B. Mowat (Oxford, Clarendon Press, 1921), p. 208.

²⁰ *Ibid.*, p. 280.

²¹ Part III, sect. V, art. 52, concerning Alsace-Lorraine (*ibid.* (Leipzig, Weicher, 1923), 3rd series, vol. XI, pp. 380-381).

²² 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.

²³ United Nations, *Treaty Series*, vol. 171, p. 293.

²⁴ F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, Recueil Sirey, 1910), p. 128, para. 99.

²⁵ P. Fauchille, *Traité de droit international public*, 8th ed. of *Manuel de droit international* by H. Bonfils (Paris, Rousseau, 1922), vol. I, part 1, p. 360, para. 219.

²⁶ Judgement of the Court of Nancy of 16 May 1896, *Dufresne vs. the State* (M. Dalloz et al., *Recueil périodique et critique de jurisprudence, de législation et de doctrine* (Paris, Bureau de la Jurisprudence générale, 1896), part 2, p. 412).

²⁷ 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.

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 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.²⁸ 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 not affected.²⁹ Article 2 of the Treaty of the same date between France and Sardinia³⁰ refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia also on the same date reproduces them word for word.³¹ 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.³²

(11) It is only with some hesitation that it may be concluded 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 mementos, and so forth, are excluded from the transfer.³³ 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 1947 Treaty of Peace with Italy 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 by the Convention of 23 August 1860.³⁴

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 exclusively or principally to the territory affected by the succession of States, even if those archives have been removed or are situated outside that territory.

(12) There are also examples of the treatment of items and documents that relate to the territory involved in the succession of States but that have been

²⁸ 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.

²⁹ 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*, vol. XVIII, 1911, p. 35, and *idem*, *Le Traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, foot-note 2.

³⁰ 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; de Clercq, *op. cit.*, p. 652).

³¹ 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).

³² de Clercq, *op. cit.*, vol. VIII, p. 83; de Martens, ed., *Nouveau Recueil* . . . (Göttingen, Dieterich, 1869), vol. XVII, part II, p. 25.

³³ Art. 10 of the Convention of 23 August 1860 between France and Sardinia (see note 32 above) provided that France 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, art. 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills or other papers".

³⁴ For reference, see foot-note 22 above.

established and have always been kept outside this territory. Many treaties include this category among the archives that must pass to the successor State. As mentioned above,³⁵ under the 1947 Treaty of Peace 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.³⁶ 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.

(13) 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.³⁷

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".³⁸

³⁵ See para. (11) above.

³⁶ Art. 11 of the Peace Treaty with Hungary of 10 February 1947 (United Nations, *Treaty Series*, vol. 41, p. 178).

³⁷ *Ibid.*, vol. 171, p. 292.

³⁸ 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 (Gottingen, Dieterich, 1879), vol. IV, p. 368)).

In sect. VIII of the Treaty of Versailles, concerning Shantung, art. 158 obliges Germany to hand over to Japan the archives and documents relating to the Kiaochow territory "wherever they may be" (*British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 81).

Art. 1 of the Convention between the United States of America 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 (*Supplement to the American Journal of International Law* (New York), vol. 11 (1917), p. 61), just as art. VIII of the Peace Treaty between Spain and the United States of 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

(14) 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 it 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.³⁹

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".⁴⁰

The "archives-territory" link

(15) 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. 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. In order to determine which those archives are it should be taken into account that there are archives that 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.⁴¹ From this standpoint, such archives must follow the destiny of the territory on the succession of States. Furthermore, the organic link between the territory and the archives relating to it must be taken into account.⁴² 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 only incidentally to

and the island of Guam (W. M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., Government Printing Office, 1910), vol. II, p. 1693).

³⁹ L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* (Paris, Giard et Brière, 1915) (thesis), p. 11.

⁴⁰ *Ibid.*

⁴¹ Art. 11 of the 1947 Treaty of Peace with Hungary (see foot-note 36 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".

⁴² By the Treaty of Peace of 1947 (see foot-note 36 above), art. 11, para. 1, Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [and] which originated in those territories . . .".

the ceded territory", they "remain the property of the predecessor State, [but] it is generally agreed that copies will be furnished to the annexing State at its request".⁴³ The "archives-territory" link was specifically taken into account in the aforementioned Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.⁴⁴

(16) 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.⁴⁵ As was mentioned in an earlier context,⁴⁶ 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 in the case of documents considered to be "of secondary interest to the German Government".⁴⁷

Special obligations of the successor State

(17) 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 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 is understood that 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 judicial 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. 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.⁴⁸

Time-limits for handing over the archives

(18) 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 records ... shall be handed over to the new authorities at the same time as the territories themselves.⁴⁹

State libraries

(19) In earlier discussion on this topic it was explained how difficult it has been to find information about the transfer of libraries.⁵⁰ 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 between the FRSR and Latvia

⁴³ C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 384. See also D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967), vol. I: *Internal Relations*, pp. 232-233.

⁴⁴ Art. 6 of the Agreement (see foot-note 23 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".

⁴⁵ Decision No. 163 rendered on 9 October 1953 (*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 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).

⁴⁶ Para. (9).

⁴⁷ Convention of 26 April 1872, signed at Strasbourg (de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1875), vol. XX, p. 875).

⁴⁸ For reference, see foot-note 38, fourth para.

⁴⁹ G. F. de Martens, ed., *Nouveau recueil de traités*, vol. III (1808-1818), repr. (Göttingen, Dieterich 1877), p. 41.

⁵⁰ *Yearbook* ... 1970, vol. II, p. 161, document A/CN.4/226, paras. (47) *et seq.* of the commentary to art. 7.

(11 August 1920), article,⁵¹ the Treaty of Moscow between the FRSR and Lithuania (12 July 1920) article 9,⁵² and the Treaty of Riga between the FRSR, Poland and the Ukraine (18 March 1921), article 11, paragraph 1.⁵³ 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.

(20) The conclusions and solutions to which a review 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 a 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 own 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, the provisions of the articles already adopted should be borne in mind, lest the solutions chosen conflict, without good reason, with those provisions.

(21) In this connection, reference is made to draft article 10, paragraph 1 of which places the emphasis

on the agreements 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.

(22) 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: State archives of every kind that have a direct and necessary link with the management and administration 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 so as to leave to the successor State as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration. In this connection, it may happen 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. Parts of the State archives that pass, 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 micro-filming, 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. 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 relate exclusively or principally to 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 integral part of the historic and cultural heritage of the transferred territory. In logic and equity, this property should pass to the successor State.

It follows from the comments in the preceding paragraphs 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

⁵¹ League of Nations, *Treaty Series*, vol. II, p. 221.

⁵² *Ibid.*, vol. III, p. 129.

⁵³ *Ibid.*, vol. VI, p. 139.

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.

(23) 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.

(b) State archives which relate exclusively or principally to the part of territory transferred pass to the successor 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, priority should be given, over all the solutions put forward, 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.

(24) The Commission, in the light of the foregoing considerations and inspiring itself from the text of articles 10 and B already adopted, prepared the present text for article C, which concerns the case of succession of States corresponding to that covered by article 10, namely, transfer of part of the territory of a State. The cases of transfer of territory envisaged have been explained in paragraph (6) of the commentary to article 10.⁵⁴ *Paragraph 1* of article C repeats, for the case of State archives, the rule contained in paragraph 1 of article 10, which establishes the primacy of agreement.

(25) In the absence of an agreement between the predecessor and successor States, the provisions of

paragraph 2, of article C apply. *Sub-paragraph (a)* of *paragraph 2* deals with what is sometimes called "administrative" archives, providing that they shall pass to the successor State. To avoid using such an expression, which is not legally precise, the Commission, borrowing from the terminology used in the corresponding provision of article B (*paragraph 1(b)*) referred to that category of archives as "the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be at the disposal of the State to which the territory in question is transferred". The Commission preferred to use the phrase "should be at the disposal of the State to which the territory in question is transferred" instead of that found in article B, "should be in that territory" as being more appropriate to take account of the specific characteristics of the case of succession of States covered by article C. *Subparagraph (b)* of *paragraph 2* embodies the rule according to which the part of the State archives of the predecessor State other than the part referred to in *subparagraph (a)* shall pass to the successor State if it relates exclusively or principally to the territory to which the succession of States relates. The words "exclusively or principally" were likewise regarded as being the most appropriate to delimit the rule, bearing in mind the basic characteristic of the case of succession of States dealt with in the article, namely, the transfer of small areas of territory.

(26) *Paragraph 3* repeats, for the case of a succession of States arising from the transfer of part of the territory of a State, the rule embodied in *paragraph 3* of article B. The relevant paragraphs of the commentary to that provision (*paragraphs (20) to (24)*) are also applicable to *paragraph 3* of the present article.

(27) *Paragraph 4* establishes the duty for the State to which State archives pass or with which they remain to make available to the other State, at the request and at the expense of that other State, appropriate reproductions of documents of its State archives. *Sub-paragraph (a)* deals with the situation where the requesting State is the successor State, in which case the documents of State archives to be reproduced are those connected with the interests of the transferred territory, a qualification already made in *paragraph 2* of article B. *Subparagraph (b)* of *paragraph 4* covers the situation where the requesting State is the predecessor State. In such a case, the documents of State archives to be reproduced are those which have passed to the successor State in accordance with the provisions of *paragraph 1* or *2* of article C.

Article D. Uniting of States

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

2. Without prejudice to the provision of *paragraph 1*, the allocation of the State archives of the pre-

⁵⁴ See foot-note 2 above.

decessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

Commentary

(1) The present article deals with succession to State archives in the case of uniting of States. The agreement of the parties has a decisive place in the matter of State succession in matters other than treaties, 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.

(2) It is the law in force in each component part at the time of the uniting of States that initially prevails. However, pending the uniting, such law can only give expression to the component part'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 part do not pass automatically to the successor State, because the internal law of the component part 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.

(3) 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 part 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 predecessor States cease to exist completely, and their State archives can only pass to the successor State, in international law at least.

(4) 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 or 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.

(5) Referring to the case of a uniting of States leading to a federation, Fauchille has said:

The State ... ceasing to exist not as a State but only as a *unitary* State, should retain its own patrimony, for the existence of this patrimony is in no way incompatible with the new regime 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 ...⁵⁵

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."⁵⁶ 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.

(6) 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 administration. Thus, State property, particularly State archives, are normally transferred 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 predecessor States does not, however, seem to be necessary to the union, which will in time establish its own archives. The archives of the component parts will continue to be more useful to those parts than to the union itself, for the reasons already given.⁵⁷

(7) 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. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.

(8) The text of article D repeats that of the corresponding article in Part II, namely, article 12,⁵⁸ also entitled "Uniting of States", except for the substitution of the word "archives" for the word "property" in both paragraphs of the article. The parallel between article D and 12 is obvious, and the Commission therefore refers to the commentary to the latter article as being equally applicable to the present text.

⁵⁵ Fauchille, *op. cit.*, p. 390, para. 233.

⁵⁶ 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.

⁵⁷ See para. (4) above.

⁵⁸ See foot-note 2 above.

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

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

(a) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory to which the succession of States relates shall pass to the successor State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates shall be determined by agreement between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. Agreements between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

5. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of documents of their State archives connected with the interests of their respective territories.

6. The provisions of paragraphs 1 to 5 apply when part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

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

(a) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory of a successor State shall pass to that successor State.

2. The passing of the parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the respective territories of the successor States shall be determined by agreement between them in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. Each successor State shall provide the other successor State or States with the best available evidence of documents from its part of the State archives of the predecessor State which bear upon title to the territories or boundaries of that other successor State or States or which are necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of documents of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

6. The provisions of paragraphs 1 to 5 shall not prejudice any question that might arise by reason of the preservation of the unity of the State archives of the successor States in their reciprocal interest.

Commentary

(1) Articles E and F concern, respectively, succession to State archives in the cases of separation of part or parts of the territory of a State and of dissolution of a State. These cases are dealt with in separate draft articles, with respect both to State property and State debts,⁵⁹ but in a combined commentary. A similar presentation is therefore followed in the present commentary. 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.

(2) An important and multiple dispute concerning archives arose among Scandinavian countries, par-

⁵⁹ See *Yearbook* . . . 1979, vol. II (Part Two), pp. 37 *et seq.* and 71 *et seq.*, document A/34/10, chap. II, sect. B, arts. 13 and 14 and arts. 22 and 23.

ticularly 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.⁶⁰

Later, pursuant to a protocol of agreement between the two countries dated 25 April 1952, Norway arranged for Sweden to transfer certain central archives which had been common archives.

(3) 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 of 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 Iceland, Arne Magnussen 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.

(4) 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 Magnussen's 2,855 manuscript 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 Magnussen's 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 1966.⁶¹ The foundation having appealed against this ruling, the Danish Supreme Court upheld the ruling by its decision of 18 March 1971.⁶² Both Governments had agreed on the restitution of the originals to Iceland,⁶³ which was to house them in a foundation similar to and having the same objects as those set forth in the statutes of the Arne Magnussen's 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 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 following twenty-five years, the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute.⁶⁴

(5) 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 are 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.

(6) 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 that were detached from the Austro-Hungarian Empire to form new States, such as

⁶¹ *Revue générale de droit international public* vol. LXXXI, (1967) pp. 401-402.

⁶² See Danish text: Højesteretsdomme (Supreme Court decision), 18 March 1971, Case No. 68/1970, Arne Magnussen's Bequest, "Arnamagnæ" Foundation v. Ministry of National Education, in Højesteretsdomme (March 1971), *Ugeskrift for Retsvæsen*, (8 May 1971), pp. 299-305.

⁶³ See 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.

⁶⁴ A. E. Pederson: "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

⁶⁰ Baron Descamps et L. Renault, *Recueil international des traités du XXe siècle, année 1906* (Paris, Rousseau, n.d.), p. 1050.

Czechoslovakia after the First World War, arranged for the archives concerning them to be handed over to them.⁶⁵ The treaty concluded on 10 August 1920 at Sèvres 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 . . .⁶⁶

(7) 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 preconstituted) States.⁶⁷ A convention concluded between Austria and various States attempted to settle the difficulties which had arisen as a result of the implementation of the provision of the Treaty of Saint-Germain-en-Laye in the matter of archives.⁶⁸ 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 Romania⁶⁹ 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, the convention concluded between Austria and the Kingdom of the Serbs, Croats and Slovenes,⁷⁰ 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 archives⁷¹ settled, so far as the two signatory countries were concerned, the dispute concerning archives which had resulted from the dissolution of the Austro-Hungarian monarchy. In the same year the same two countries, Hungary and Romania, signed another convention, also in Bucharest, providing for exchanges of administrative archives.⁷² A treaty of conciliation and arbitration was concluded on 23 April 1925 between Czechoslovakia and Poland⁷³ for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy.

(8) 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.⁷⁴ Article 11, paragraph 1, of the same treaty specifically states that the detached territories which had formed a State (Czechoslovakia, Yugoslavia) were entitled to the objects "constituting [their] cultural heritage . . . which originated in those territories"; thus, the article was based on the link existing between the archives and the 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.⁷⁵

(9) 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 timetable within a maximum time-limit of 18 months.

(10) This simple enumeration of only some of the many agreements reached on the subject of archives upon the dismemberment of the Austro-Hungarian monarchy gives some idea of the complexity of the problem to be solved in the matter of the archives of the Austro-Hungarian monarchy. 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", as has been indicated in the commentary to article C.

⁶⁵ Art. 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).

⁶⁶ *Ibid.* (1924), vol. XII, pp. 810–811.

⁶⁷ See 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.*).

⁶⁸ See arts. 1–6 of the Convention of 6 April 1922 concluded 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).

⁶⁹ League of Nations, *Treaty Series*, vol. XXV, p. 163.

⁷⁰ Kingdom of the Serbs, Croats and Slovenes, *Sluzbene Novine* (Official Journal) (Belgrade), 6th year, No. 54–VII (7 March 1924), p. 1.

⁷¹ League of Nations, *Treaty Series*, vol. XLV, p. 330.

⁷² See 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.

⁷³ League of Nations, *Treaty Series*, vol. XLVIII, p. 383.

⁷⁴ Art. 11 of the Treaty of Peace with Hungary (for reference, see foot-note 36 above).

⁷⁵ The provisions of the same art. 11 (para. 2) were reproduced for the case of Yugoslavia.

(11) 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 Habsburg 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.⁷⁶

(12) The convention concluded at Baden on 28 May 1926 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.)⁷⁷

(13) 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. This controversy adds a justification for the joint commentaries on the cases of separation and dissolution. The following provision appears in the Treaty of Lausanne:

⁷⁶ 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 (art. 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.

⁷⁷ See the statements by Mr. Szedő at the sixth International Conference of the Archives Round Table (France, *Les archives dans la vie internationale* (op. cit.), p. 137).

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 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 therefor.

....⁷⁸

(14) 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 German States, 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.

(15) In adopting the present text for articles E and F, the Commission maintained the approach previously followed as regards the articles dealing with similar cases of succession of States—that is, separation of part or parts of the territory of a State and dissolution of a State—in the contexts of State property and of State debts.⁷⁹ Articles E and F therefore each embody in their first five paragraphs the rules concerning succession to State archives that are common to both cases of succession of States. Those rules find inspiration in the text of article B, which concerns succession to State archives in the case of newly independent States.⁸⁰ In reflecting in articles E and F the applicable rules contained in article B, the Commission has attempted to preserve as much as possible the terminological consistency while taking due account of the characteristics that distinguish the case of succession of States covered in the latter article from those dealt with in articles E and F.

(16) Paragraph 1 of articles E and F reaffirms the primacy of the agreement between the States con-

⁷⁸ Treaty of Peace between the British Empire, France, Greece, Italy, Japan, Romania, 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).

⁷⁹ See foot-note 59 above.

⁸⁰ See sub-sect. 1 above.

cerned by the succession of States, whether predecessor and successor States or successor States among themselves, in governing succession to State archives. In the absence of agreement, *paragraph 1 (a)* of those two articles embodies the rule contained in paragraph 1 (b) of article B, providing for the passing to the successor State of the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in the territory of the successor State. The use of the expression "normal administration of ... territory"—also found in paragraph 2 (a) of article C—has been explained in paragraph (11) of the commentary to article B⁸¹ and in paragraph (25) of the commentary to article C. In addition, under *paragraph 1 (b)* of articles E and F, the part of State archives of the predecessor State, other than the part referred to in subparagraph 1 (a), that relates directly to the territory of the successor State or to a successor State also passes to that successor State. A similar rule is contained in paragraph 2 (b) of article C, the commentary to which explains the use in that article of the words "exclusively or principally", instead of the word "directly" employed in articles E and F.

(17) According to *paragraph 2* of articles E and F, in the cases of succession envisaged therein, the passing of the parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, which are of interest to the territory or territories to which the succession of States relates, is to be determined by agreement between the States concerned in such a manner that each of those States can benefit as widely and as equitably as possible from those parts of state archives. A similar rule is contained in paragraph 2 of article B.

(18) *Paragraph 3* of articles E and F embodies the rule, already incorporated in paragraph 3 of articles B and C, according to which the successor State or States shall be provided, in the case of article E by the predecessor State and in the case of article F by each successor State, with the best available evidence of documents from State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries, or which are

necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the article concerned. The Commission refers, in this connection, to the paragraphs of the commentary to article B relating to the foregoing provision (paras. (20)–(24)).

(19) *Paragraph 4* of articles E and F includes the safeguard clause found in paragraph 6 of article B regarding the rights of the peoples of the States concerned in each of the cases of succession of States envisaged in those articles to development, to information about their history and to their cultural heritage. Reference is made in this regard to the relevant paragraphs of the commentary to article B (paras. (27)–(35)).

(20) *Paragraph 5* of articles E and F embodies, with the adaptations required by each case of succession of States covered, the rule relating to the provision, at the request and at the expense of any of the States concerned, of appropriate reproductions of documents of State archives connected with the interests of the territory of the requesting State. The Commission may revise, in second reading, the drafting of this paragraph in article E to make it conform with the text of the corresponding provision (para. 4) in article C.

(21) *Paragraph 6 of article E* reproduces the provision of paragraph 2 of articles 13 and 22. Paragraph (16) of the commentary to articles 13 and 14⁸² is also of relevance in the context of article E.

(22) *Paragraph 6 of article F* provides for a safeguard in the application of the substantive rules stated in the first five paragraphs of the article regarding the succession to State archives in the case of dissolution of a State. The reference to the preservation of the unity of State archives reflects the principle of indivisibility of archives which underlies the questions of succession to the collection of documents of all kinds which constitute such State archives. It is a concept whose inclusion in article F has been found particularly appropriate since problems are more likely to arise in the case of dissolution of a State regarding, for example, the central archives of the predecessor State, which disappears.

⁸¹ See foot-note 2 above.

⁸² *Ibid.*

Chapter III

STATE RESPONSIBILITY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK

17. The object of the current work of the International Law Commission on State responsibility is to codify the rules governing State responsibility as a general and independent topic. The work is proceeding on the basis of two decisions of the Commission: (a) not to limit its study of the topic to a particular area, such as responsibility for injuries to the person or property of aliens, or indeed to any other area; (b) in codifying the rules governing international responsibility, not to engage in the definition and codification of the "primary" rules whose breach entails responsibility for an internationally wrongful act.

18. The historical aspects of the circumstances in which the Commission came to resume the study of the topic of "State responsibility" from this new standpoint have been described in previous reports of the Commission.⁸³ Following the work of the Sub-Committee on State Responsibility, the members of the Commission expressed agreement, in 1963, on the following general conclusions: (a) that for the purposes of codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there could nevertheless be no question of neglecting the experience and material gathered in certain particular sectors, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which recent developments in international law might have had on State responsibility.

19. These conclusions having been approved by the Sixth Committee, the Commission gave fresh impetus to the work of codifying the topic, in accordance with the recommendations of the General Assembly. In 1967, having before it a note on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur,⁸⁴ the Commission, as newly constituted, confirmed the instructions given him in 1963.⁸⁵ In 1969 and 1970, the

Commission discussed the Special Rapporteur's first⁸⁶ and second⁸⁷ reports in detail. That general examination enabled the Commission to lay down a plan for the study of the topic, as well as the criteria to be adopted for the different parts of the draft, and to reach a series of conclusions regarding the method, substance and terminology essential for the continuation of its work on State responsibility.⁸⁸

20. It is on the basis of these directives, which were generally approved by the members of the Sixth Committee, that the Commission has prepared, and is preparing, the draft articles under consideration on a high priority basis, as recommended by the General Assembly.⁸⁹ In its resolution 34/141 of 17 December 1979, the General Assembly recommended that the Commission should continue its work on State responsibility with the aim of completing, at its thirty-second session, the first reading of the set of articles constituting Part I of the draft on responsibility of States for internationally wrongful acts, and proceed to the study of the further part or parts of the draft with a view to making as much progress as possible in the elaboration of draft articles within the present term of office of the members of the Commission.

2. SCOPE OF THE DRAFT

21. The draft articles under study—which are cast in a form that will permit them to be used as the basis for the conclusion of a convention if so decided⁹⁰ thus

⁸³ See in particular *Yearbook . . . 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev. 1, chap. IV.

⁸⁴ *Yearbook . . . 1967*, vol. II, p. 325, document A/CN.4/196.

⁸⁵ *Ibid.*, p. 368, document A/6709/Rev.1, para. 42.

⁸⁶ *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1. In 1971 the Special Rapporteur submitted an addendum (A/CN.4/217/Add.2) to his first report (*Yearbook . . . 1971*, vol. II (Part One), p. 193).

⁸⁷ *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

⁸⁸ See *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80–84 and *Yearbook . . . 1970*, vol. II, pp. 307–309, document A/8010/Rev.1, paras. 70–83.

⁸⁹ See resolutions 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975, 31/97 of 15 December 1976, 32/151 of 19 December 1977 and 33/139 of 19 December 1978.

⁹⁰ The question of the final form to be given to the codification of State responsibility will obviously have to be settled at a later stage. The Commission will then formulate, in accordance with its Statute, the recommendation it considers appropriate.

relate solely to the responsibility of States⁹¹ for internationally wrongful acts. The Commission fully recognizes the importance not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any injurious consequences arising out of certain activities not prohibited by international law (especially those which, because of their nature, present certain risks). The Commission takes the view, however, that the latter category of questions cannot be treated jointly with the former. A joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to bear any injurious consequences of an activity which is itself lawful, and being obliged to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations. It is only because of the relative poverty of legal language that the same term is sometimes used to designate both.

22. The limitation of the present draft articles to responsibility of States for internationally wrongful acts does not of course mean that the Commission can neglect the study, recommended by the General Assembly, of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law.⁹² It merely means that the Commission intends to study this topic separately from that of responsibility for internationally wrongful acts, so that two matters which, in spite of certain appearances, are quite distinct will not be dealt with in one and the same draft. The Commission nevertheless thought it appropriate, in defining the principle stated in article 1 of the present draft on responsibility of States for internationally wrongful acts, to adopt a formulation which, while indicating that the internationally wrongful act is a source of international

responsibility, cannot possibly be interpreted as automatically ruling out the existence of another possible source of "responsibility". At the same time, while reserving the question of the final title of the present draft for later consideration, the Commission wishes to emphasize that the expression "State responsibility", which appears in the title of the draft, is to be understood as meaning only "responsibility of States for internationally wrongful acts".

23. It should also be pointed out once again that the purpose of the present draft articles is not to define the rules imposing on States, in one sector or another of inter-State relations, obligations whose breach can be a source of responsibility and which, in a certain sense, may be described as "primary". In preparing the present draft the Commission is undertaking solely to define those rules which, in contradistinction to the primary rules, may be described as "secondary", inasmuch as they are aimed at determining the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the actual sphere of responsibility for internationally wrongful acts. A strict distinction in this respect is essential if the topic of international responsibility for internationally wrongful acts is to be placed in its proper perspective and viewed as a whole.

24. This does not mean, of course, that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility for internationally wrongful acts. As the Commission has had occasion to note, it is certainly necessary to establish a distinction on these bases between different categories of international obligations when studying the objective element of the internationally wrongful act. To be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it is unquestionably necessary to take into consideration the fact that the importance which the international community attaches to the fulfilment of some obligations—for example, those concerning the maintenance of peace and security—will be of quite a different order from the importance it attaches to the fulfilment of other obligations, precisely because of the content of the former. Some obligations must also be distinguished from others according to their nature if it is to be possible to determine in each case whether or not an international obligation has actually been breached and, if so, the moment when the breach occurred (and when the resulting international responsibility can therefore be invoked) and the duration of commission of the breach. The present draft will therefore bring out these different aspects of international obligations whenever necessary for the purpose of codifying the rules governing international responsibility for internationally wrongful acts. The essential fact nevertheless remains that it is one thing to state a rule and the content of the obligation it imposes, and another to determine whether that obligation has been

⁹¹ The Commission does not underestimate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need for clarity in the examination of the topic, and the organic nature of the draft, clearly make it necessary to defer consideration of these other questions.

⁹² In 1974 the Commission did in fact place the subject "International liability for injurious consequences arising out of acts not prohibited by international law" on its general programme of work as a separate topic, as recommended in paragraph 3(c) of General Assembly resolution 3071 (XXVIII) of 30 November 1973. Furthermore, bearing in mind the recommendations contained in subsequent General Assembly resolutions, the Commission considered in 1977 that the topic in question should be placed on its active programme at the earliest possible time. Following the recommendation made by the General Assembly in paragraph 7 of its resolution 32/151 of 19 December 1977, the Commission took a series of steps at its thirtieth session, including the appointment of a special rapporteur, with a view to beginning consideration of the issues raised by the study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Having been requested in resolution 34/141 of 17 December 1979 to continue its work on that topic, the Commission had an initial general discussion at its thirty-second session of the subject on the basis of a preliminary report (A/CN.4/334 and Add.1-2) submitted by Mr. Robert Q. Quentin-Baxter, Special Rapporteur (see chap. VII) below.

breached and what the consequences of the breach must be. Only this second aspect comes within the actual sphere of the international responsibility that is the subject-matter of the present draft. To foster any confusion on this point would be to erect an obstacle that might once again frustrate the hope of successfully codifying the topic.

25. The draft articles are thus concerned only with the determination of the rules governing the international responsibility of the State for internationally wrongful acts, that is to say, the rules that govern all the new legal relationships to which an internationally wrongful act on the part of a State may give rise in different cases. The draft codifies the rules governing the responsibility of States for internationally wrongful acts "in general", not simply in certain particular sectors. The international responsibility of the State is made up of a set of legal situations which result from the breach of any international obligation, whether imposed by the rules governing one particular matter or by those governing another.

26. The Commission wishes to emphasize that international responsibility is one of the topics in which progressive development of the law can play a particularly important part, especially as regards the distinction between different categories of international offences and the content and degrees of responsibility. The roles to be assigned, respectively, to progressive development and to the codification of already accepted principles cannot, however, be planned in advance. They must depend on the specific solutions adopted for the various problems.

3. GENERAL STRUCTURE OF THE DRAFT

27. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session.⁹³ Under the general plan adopted by the Commission, the origin of international responsibility forms the subject of Part 1 of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. Part 2 will deal with the content, forms and degrees of international responsibility, that is to say, with determining the consequences which an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a Part 3 concerning the "implementation" ("*mise en oeuvre*") of international responsibility and the settlement of

disputes. The Commission considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility for internationally wrongful acts should begin with an article giving definitions or an article enumerating the matters excluded from the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. It is always advisable to avoid definitions or initial formulations which may prejudice solutions that are to be adopted later.

4. PROGRESS OF THE WORK

(a) *Completion of the first reading of part 1 of the draft (The origin of international responsibility)*

28. At its present session, in accordance with the decision taken at the previous session,⁹⁴ the Commission dealt with the circumstances precluding wrongfulness discussed in the eighth report of Mr. Robert Ago, the former Special Rapporteur, which were still outstanding, namely, state of necessity (A/CN.4/318/Add.5-7,⁹⁵ sect. 5) and self-defence (*ibid.*, sect. 6). It added to these a concluding provision preserving questions that might arise in regard to any compensation for damage caused by acts the wrongfulness of which is precluded under the articles of the chapter in question. Proposals on this subject were examined by the Commission at its 1612th to 1621st, 1627th to 1629th, and 1635th meetings. At its 1635th meeting, the Commission considered the texts of articles 33, 34 and 35 proposed by the Drafting Committee and adopted the text of these draft articles on first reading. It thus completed its first reading of Part 1 of the draft, as recommended by the General Assembly in resolution 34/141 of 17 December 1979.

29. Hence Part 1 of the draft is divided into five chapters. Chapter I (General principles) is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements, subjective and objective, of an internationally wrongful act. Chapter II (The "act of the State" under international law) is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. Chapter III (Breach of an international obligation) deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. Chapter IV (Implication of a State in the internationally wrongful act of another State) covers the cases in which a State participates in

⁹³ See *Yearbook ... 1975*, vol. II, pp. 55 *et seq.*, document A/10010/Rev.1, paras. 38-51.

⁹⁴ *Yearbook ... 1979*, vol. II (Part Two), p. 90, document A/34/10, para. 71.

⁹⁵ Reproduced in *Yearbook ... 1980*, vol. II (Part One).

the commission by another State of an international offence and the cases in which responsibility is placed on a State other than the State which committed the internationally wrongful act. Lastly, chapter V (Circumstances precluding wrongfulness) defines the circumstances which may have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation: prior consent of the injured State; legitimate application of counter-measures in respect of an internationally wrongful act; *force majeure* and fortuitous event; distress; state of necessity; and self-defence.

30. In 1973, at its twenty-fifth session, the Commission adopted articles 1 to 4 of chapter I (General principles) and the first two articles (articles 5 and 6) of chapter II (The "act of the State" under international law) of Part 1 of the draft,⁹⁶ on the basis of proposals made by Mr. Roberto Ago, the former Special Rapporteur, in the relevant sections of his third report.⁹⁷ In 1974, at its twenty-sixth session, on the basis of proposals contained in other sections of the former Special Rapporteur's third report,⁹⁸ the Commission adopted articles 7 to 9 of chapter II.⁹⁹ At its twenty-seventh session, in 1975, the Commission completed its examination of chapter II by adopting, on the basis of the proposals made by the former Special Rapporteur in his fourth report,¹⁰⁰ articles 10 to 15.¹⁰¹ In 1976, at its twenty-eighth session, the Commission began consideration of chapter III (Breach of an international obligation) and, on the basis of the proposals contained in the former Special Rapporteur's fifth report,¹⁰² adopted articles 16 to 19

of the draft.¹⁰³ At its twenty-ninth session, in 1977, the Commission continued its examination of the provisions of chapter III and, on the basis of proposals contained in the former Special Rapporteur's sixth report,¹⁰⁴ adopted articles 20 to 22.¹⁰⁵ In 1978, at its thirtieth session, the Commission completed its consideration of the questions forming chapter III and then took up the first group of questions relating to chapter IV, (Implication of a State in the internationally wrongful act of another State). At that stage it adopted, on the basis of proposals made in the former Special Rapporteur's seventh report,¹⁰⁶ articles 23 to 26 (chapter III) and article 27 (chapter IV).¹⁰⁷ At its thirty-first session, in 1979, on the basis of the proposals made by the former Special Rapporteur in his eighth report,¹⁰⁸ the Commission completed chapter IV and began its consideration of chapter V (Circumstances precluding wrongfulness), adopting articles 28 to 32 of Part 1 of the draft.¹⁰⁹ At the present session, the Commission completed chapter V.¹¹⁰

31. In 1978, in conformity with the pertinent provisions of its Statute, the Commission requested the Governments of Member States to transmit their

⁹⁶ *Yearbook ... 1973*, vol. II, pp. 173 *et seq.*, document A/9010/Rev.1, chap. II, sect. B. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1225th and 1226th meetings (*ibid.*, vol. I, pp. 117–121).

⁹⁷ *Yearbook ... 1971*, vol. II (Part One) p. 199, document A/CN.4/246 and Add.1–3. The sections of chapter I and sections 1 to 3 of chapter II of the third report were considered by the Commission at its 1202nd to 1213th and 1215th meetings (*Yearbook ... 1973*, vol. I, pp. 5–59 and 65–66).

⁹⁸ Sections 4 to 6 of chapter II of the third report (see foot-note 97 above). These sections were considered by the Commission at its 1251st to 1253rd and 1255th to 1263rd meetings (*Yearbook ... 1974*, vol. I, pp. 5–61).

⁹⁹ See *Yearbook ... 1974*, vol. II (Part One), p. 277, document A/9610/Rev.1, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1278th meeting (*ibid.*, vol. I, pp. 151–154).

¹⁰⁰ *Yearbook ... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1. The Commission considered the sections comprising this report at its 1303rd to 1317th meetings (*Yearbook ... 1975*, vol. I, pp. 3–72).

¹⁰¹ *Yearbook ... 1975*, vol. II, pp. 61 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1345th meeting (*ibid.*, vol. I, pp. 214–218).

¹⁰² Chapter III, sections 1 to 4 of the fifth report (*Yearbook ... 1976*, vol. II (Part One), pp. 3 *et seq.*, document A/CN.4/291 and Add.1–2). The Commission considered these sections at its 1361st to 1376th meetings (*ibid.*, vol. I, pp. 6–91).

¹⁰³ *Ibid.*, vol. II (Part Two), pp. 75 *et seq.*, document A/31/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1401st to 1403rd meetings (*ibid.*, vol. I, pp. 235–253).

¹⁰⁴ Chapter III, sections 5 to 7 of the sixth report (*Yearbook ... 1977*, vol. II (Part One) pp. 4 *et seq.*, document A/CN.4/302 and Add.1–3). The Commission considered these sections at its 1454th to 1457th, 1460th–1461st, 1463rd, and 1465th to 1468th meetings (*ibid.*, vol. I, pp. 215–233, 240–248, 250–255 and 259–277).

¹⁰⁵ *Ibid.*, vol. II (Part Two) pp. 11 *et seq.*, document A/32/10, chap. II, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1462nd and 1469th meetings (*ibid.*, vol. I, pp. 249–250 and 278–282).

¹⁰⁶ Chapter III, sections 8 and 9 and chapter IV, section 1 of the seventh report (*Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1–2). The Commission considered these sections at its 1476th to 1482nd and 1516th to 1519th meetings (*ibid.*, vol. I, pp. 4–38 and 223–241).

¹⁰⁷ *Ibid.*, vol. II (Part Two), pp. 99 *et seq.*, document A/33/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1513th and 1524th meetings (*ibid.*, vol. I, pp. 206–209 and 269–270).

¹⁰⁸ Chapter IV, section 2 and chapter V, sections 1–4 of the eighth report (*Yearbook ... 1979*, vol. II (Part One), pp. 4 *et seq.* and 27 *et seq.* document A/CN.4/318 and Add. 1–4). These sections were considered by the Commission at its 1532nd to 1538th, 1540th, 1542nd to 1545th, and 1569th to 1573rd meetings (*ibid.*, vol. I, pp. 4–38, 39–44, 44–63, and 184–208). The Commission also had before it a study by the Secretariat entitled "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", prepared at the request of the Commission and the former Special Rapporteur (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315)—hereinafter referred to as "Secretariat Survey".

¹⁰⁹ *Yearbook ... 1979*, vol. II (Part Two), pp. 94 *et seq.*, document A/34/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1567th and 1579th meetings (*ibid.*, vol. I, pp. 169–175 and 233–236).

¹¹⁰ See para. 28 above.

observations and comments on the provisions of chapters I, II and III of Part 1 of the draft articles on State responsibility for internationally wrongful acts. The General Assembly, in section I, paragraph 8, of resolution 33/139 of 19 December 1978, endorsed this decision of the Commission. The observations and comments received in response to that request have been reproduced in document A/CN.4/328 and Add.1-4.¹¹¹

Having completed the first reading of the whole of Part I of the draft, the Commission decided at the present session to renew its request to Governments to transmit their observations and comments on the provisions of chapters I, II and III, and to ask them to do so before 1 March 1981. At the same time the Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate the provisions of chapters IV and V to the Governments of Member States, through the Secretary-General, and to request them to transmit their observations and comments on those provisions by 1 March 1982.

The observations and comments of Governments on the provisions appearing in the various chapters of Part 1 of the draft will, when the time comes, enable the Commission to embark on the second reading of that part of the draft without undue delay.

(b) *Commencement of the consideration of Part 2 of the draft (The content, forms and degrees of international responsibility)*

32. In order to pursue its consideration of "State responsibility", in view of the former Special Rapporteur's election as a Judge of the International Court of Justice, the Commission, at its thirty-first session in 1979, appointed Mr. Willem Riphagen as Special Rapporteur for the topic.

At the present session, the Special Rapporteur submitted a preliminary report (A/CN.4/330)¹¹² on the basis of which the Commission reviewed a broad range of general and preliminary questions raised by the study of Part 2 of the draft, dealing with the content, forms and degrees of international responsibility. The views expressed in this connection by the members of the Commission are reproduced in the summary records of its 1597th to 1601st meetings.¹¹³ A summary of these views and of the contents of the preliminary report submitted by the Special Rapporteur is given below¹¹⁴ for the information of the General Assembly.

B. Resolution adopted by the Commission

33. The Commission, at its 1642nd meeting, on 25

July 1980, adopted by acclamation the following resolution:

The International Law Commission,

Having adopted provisionally the draft articles on the origin of international responsibility constituting Part 1 of the draft on the responsibility of States for internationally wrongful acts,

Desires to express to the former Special Rapporteur, Judge Roberto Ago, its deep appreciation for the extraordinarily valuable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring the first reading of these draft articles to a successful conclusion.

C. Draft articles on State responsibility¹¹⁵

Part 1. *The origin of international responsibility*

34. The texts of all the articles of Part 1 of the draft, concerning the origin of international responsibility, adopted by the Commission on first reading at its twenty-fifth to thirty-first sessions and at the present session, and the texts of articles 33 to 35 and the commentaries thereto, adopted by the Commission at the present session, are reproduced below.

1. TEXTS OF THE ARTICLES OF PART 1 OF THE DRAFT ADOPTED BY THE COMMISSION ON FIRST READING

CHAPTER I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

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

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

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

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

Article 4. Characterization of an act of a State as internationally wrongful

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

¹¹¹ Reproduced in *Yearbook* . . . 1980, vol. II (Part One).

¹¹² *Idem*.

¹¹³ See *Yearbook* . . . 1980, vol. I, pp. 73 *et seq.*

¹¹⁴ See paras. 35-48.

¹¹⁵ As stated above (para. 21), the draft articles relate solely to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be considered by the Commission at a later stage.

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

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

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

- (a) it is established that such persons or group of persons was in fact acting on behalf of that State; or
- (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ

exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 15. Existence of a breach of an international obligation

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

Article 17. Irrelevance of the origin of the international obligation breached

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

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18. Requirement that the international obligation be in force for the State

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

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

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

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

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

Article 19. International crimes and international delicts

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

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

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

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

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

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 35. Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

2. TEXT OF ARTICLES 33 TO 35, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-SECOND SESSION

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Commentary

(1) The term "state of necessity" is used by the Commission to denote the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.

(2) A state of necessity is a situation which is particularly clearly distinguishable from other concepts. It differs from the circumstances precluding wrongfulness contemplated in articles 29 (Consent), 30 (Countermeasures in respect of an internationally wrongful act) and 34 (Self-defence) by the fact that, contrary to what happens in those other circumstances, the wrongfulness of an act committed in a state of necessity is not precluded by the pre-existence, in the case concerned, of a particular course of conduct by the State acted against. In the case envisaged in article 29, for example, the existence of such prior conduct is the *sine qua non* whereby the act

of the State is rid of its wrongfulness. The conduct in question is represented by the expression of consent to the commission by the latter State of an act not in conformity with an obligation binding it to the "consenting State". In the case provided for in article 30, the conduct in question is represented by the prior commission, by the State acted against, of an internationally wrongful act. In the case envisaged in article 34, it consists in the commission, once again by the State acted against, of the particularly serious offence of wrongful recourse to armed force. In the case provided for in the present article, on the other hand, the preclusion of the wrongfulness of an act of a State not in conformity with an international obligation to another State is totally independent of the conduct adopted by the latter. In determining whether the wrongfulness is precluded by a state of necessity, there is no need to ascertain whether the State in question had consented to or previously committed an internationally wrongful act, or engaged in aggression. This last possibility will be especially important in distinguishing the circumstance precluding wrongfulness dealt with in the present article from the one to be dealt with in article 34, namely self-defence. In both cases the act which in other circumstances would be wrongful is an act dictated by the need to meet a grave and imminent danger which threatens an essential interest of the State; for self-defence to be invocable, however, this danger must have been caused by the State acted against and be represented by that State's use of armed force.

(3) Conversely, the irrelevance of the prior conduct of the State which has suffered the act it is sought to justify is a feature common to a state of necessity and to the circumstances dealt with in articles 31 (*Force majeure* and fortuitous event) and 32 (Distress). A further shared feature is therefore that the State must have been induced by an external factor to adopt conduct not in conformity with the international obligation. In the case contemplated in article 31, however, the factor is one making it materially impossible for the persons whose conduct is attributed to the State either to adopt conduct in conformity with the international obligation or to know that his conduct conflicts with the conduct required by the international obligation. The conduct adopted by the State is therefore either unintentional *per se* or unintentionally in breach of the obligation. In the case of a state of necessity, on the other hand, the deliberate nature of the conduct, the intentional aspect of its failure to conform with the international obligation are not only undeniable but in some sense logically inherent in the justification alleged; invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation. The case provided for in article 32 lies somewhere between the two. The persons acting on behalf of the State are admittedly not obliged materially to adopt, quite unintentionally, a course of conduct not in conformity with what is required by an

international obligation of that State; nevertheless, an external factor intervenes to place them in a situation of distress such that, unless they act in a manner not in conformity with an international obligation of their State, they themselves (and whoever may be entrusted to their care) cannot escape a tragic fate. Theoretically, it could be said that a choice always exists, so that the conduct is not entirely unintentional, but the choice is not a "real choice", with freedom of decision, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he and the persons entrusted to his care will almost certainly perish. In such circumstances, therefore, the possibility of acting in conformity with the international obligation is purely superficial. The situation is different when States invoke a state of necessity to justify their acts. This "necessity" is then a "necessity of State": the situation of extreme peril alleged by the State consists not in danger to the lives of the individuals whose conduct is attributed to the State, but in a grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or some of its territory, and so on. The State organs which then have to decide on the conduct which the State will adopt are in no way in a situation that deprives them of their free will. It is certainly they who decide on the conduct to be adopted in the abnormal conditions of peril facing the State of which they are the organs, but their personal freedom of choice remains intact. The conduct adopted will therefore result from a considered, fully conscious and deliberate choice.

(4) Traditionally, so-called "justifications" have been sought for the situation described here by the term "state of necessity". According to some writers, particularly the earlier ones, this situation is characterized by the existence of a conflict between two "subjective rights", one of which must inevitably be sacrificed to the other: on the one hand, the right of State X, which State Y must respect under an international obligation binding it to State X, and on the other, a right of State Y, which the latter can in turn adduce against State X. This idea had its origin in the nineteenth century in the widespread belief that there were certain "fundamental rights" and that they necessarily prevailed over the State's other rights. The so-called "right" defined as the "right of existence", or more often as the "right of self-preservation" ("*droit à la conservation de soi-même*", "*droit à l'autoconservation*", "*Recht auf Selbsterhaltung*") was, it was held, the subjective right that should take precedence over the subjective rights of another State. Subsequently, jurists having rejected the existence of a "right of self-preservation", the right in question was said to be embodied in a no less theoretical "right of necessity". Most writers, however, consider it incorrect to speak of a "subjective right" of the State which

invokes the state of necessity. The term "subjective right" denotes the possibility at law of requiring a particular service or course of conduct from another subject of law, but a person who invokes a situation of necessity as justification for his act makes no "claim" on others for service or conduct. The situation might therefore be better described as a conflict between an interest, however essential, on the one hand and a subjective right on the other. A third view, advanced in the Commission in the course of discussion, is that the situation should be described as a conflict between two separate abstract norms which, owing to a fortuitous set of circumstances, cannot be observed simultaneously, and that one of these norms governs the state of necessity. The Commission noted the various explanations given, but did not feel that it had to take a stand on them, since acceptance of one or other of the explanations was of no relevance in determining the content of the rule which it had to formulate.

(5) In this connection the Commission decided that, as with the preceding articles, its task was to examine State practice and international judicial decisions, having regard also to the views of learned writers, in order to ascertain whether it should include among the circumstances excluding wrongfulness the situation it has called a "state of necessity" and, if so, upon what conditions and to what extent.

(6) In international practice, there are numerous cases in which a State has invoked a situation of necessity (regardless of whether it has used precisely that or some other term, e.g. *force majeure* or "self-defence", to describe it) to justify conduct different from that required of it in the circumstances under an international obligation incumbent on it.¹¹⁶ The Commission considered it sufficient, however, for the purposes of this commentary, to mention and examine only those cases which, in one way or another, may appear conclusive for the purpose of determining the content of the rule to be codified. For this reason, the cases cited will be mainly those relating to matters in regard to which the applicability of the

¹¹⁶ The preparatory work of the Conference for the Codification of International Law (The Hague, 1930) is not, however, of great interest on this point, contrary to what may be said of many other articles of the present draft. The request for information submitted to States by the Preparatory Committee of the Conference did not ask whether or not a state of necessity should be regarded as a circumstance excluding wrongfulness. Denmark nevertheless mentioned the point in its reply on self-defence:

"Self-defence and necessity should as a matter of principle be an admissible plea in international law; but, as in private law, they should be subject to certain limitations which have not yet been fixed with sufficient clearness. . . ."

Denmark added, as regards necessity, that it should be pleadable only in those cases in which the municipal legal order allowed private individuals to plead it. (League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929 V), p. 126).

plea of necessity does not seem to have been really challenged in principle, even though there were reservations and strong opposition to its application in the cases in point. The cases in which a state of necessity was pleaded to justify non-fulfilment of an obligation "to act" and those in which the same situation was invoked to justify conduct not in conformity with an obligation "not to act", will be examined separately. Within each of these two categories, the cases have been arranged according to the specific matters to which they relate.

(7) Although some members of the Commission expressed hesitation about the pertinence of citing cases of non-fulfilment of international financial obligations in support of their conception of state of necessity, most of the others acknowledged the importance in this connection of cases in which, for reasons of necessity, States adopted conduct not in conformity with obligations "to act" in regard to the repudiation or suspension of payment of international debts. An interesting example is the *Russian Indemnity* case, considered earlier from another aspect in regard to article 29.¹¹⁷ The Ottoman Government, in order to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as "*force majeure*", but which was much more like a state of necessity.¹¹⁸ The Permanent Court of Arbitration, to which the dispute was referred, made its award on 11 November 1912. It stated as follows in regard to the argument advanced by the Ottoman Government:

*The exception of force majeure, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... self-destructive".*¹¹⁹

The Court considered, however, that:

It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation. ...¹²⁰

In the case in point, therefore, the Court rejected the plea put forward by the Ottoman Government. It based its decision on the finding that, in this particular case, the conditions under which that plea could be

allowed were not met. The Court thus recognized the existence in international law of an "excuse of necessity", but only within very strict limits. In the view of the Court, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.¹²¹

(8) A majority of the Commission also found it relevant that in another connection, that of debts contracted by the State not directly with another State but with foreign banks or other foreign financial institutions, there has often been discussion as to whether it is permissible to invoke very serious financial difficulties—and hence a situation which might fulfil the conditions for the existence of a state of necessity—as justification for repudiating or suspending payment of a State debt. Although it is disputed whether an obligation exists under international customary law to honour debts contracted by the State with foreign private individuals, some of the statements of position made in the discussion referred to above are of interest not only because such an obligation can be imposed in any case by conventional instruments, but also because the statements in question were often put in broad terms whose implications went beyond the case involved.

(9) One question in the request for information submitted to States by the Preparatory Committee of the Hague Codification Conference was whether the State incurred international responsibility if, by a legislative act (point III, 4) or by an executive act (point V, 1 (b)), it repudiated debts contracted with foreigners. A number of Governments maintained that the answer to that question depended on the circumstances involved; some of them expressly mentioned the defence of "necessity". For instance, the South African Government expressed the following view:

Such action would *prima facie* constitute a breach of [the State's] international duties and give rise to an international claim

... The Union Government would not, however, exclude the possibility of such repudiation being a justifiable act. ... If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provision for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what may

¹¹⁷ See *Yearbook ... 1979*, vol. II (Part Two), p. 111, document A/34/10, chap. III, sect. B.2, para. (9) of the commentary to art. 9.

¹¹⁸ The Commission stated earlier, in the commentary to art. 31 (*ibid.*, p. 128, foot-note 646) that the situation was not one of "material impossibility" of paying the debt but of a state of "necessity".

¹¹⁹ United Nations, *Reports of International Arbitral Awards*, vol. XI, (United Nations publication, Sales No. 61.V.4), p. 443. Reproduced in Secretariat Survey (see foot-note 108 above), para. 394.

¹²⁰ *Ibid.*

¹²¹ A case in which the parties to the dispute agreed that a situation of necessity such as the existence of very serious financial difficulties could justify, if not the repudiation by a State of an international debt, at least recourse to means of discharging the obligation other than those actually envisaged by the obligation, arose in connection with the enforcement of the arbitral award made by Ö. Undén on 29 March 1933 in the case of *the Forests of Central Rhodope* (Merits) (see League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934) p. 1432).

be reasonably expected of a State in the same manner as with an individual.¹²²

In the light of the replies received, the Preparatory Committee made a distinction, in the Bases of discussion drawn up for the Conference, between repudiation of debts and suspension or modification of debt servicing. It stated with regard to the latter:

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity. (Basis of discussion No. 4, second para.)¹²³

(10) This same question has also been considered repeatedly in connection with disputes referred to international tribunals. The most interesting example is the dispute between Belgium and Greece in the *Société Commerciale de Belgique* case. Here, there had been two arbitral awards requiring the Greek Government to pay a sum of money to the Belgian company in repayment of a debt contracted with the company in question. As the Greek Government was slow in complying with the award, the Belgian Government applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government, while not contesting the existence of the obligations, stated in its defence that its failure thus far to comply with the arbitral awards was due not to any unwillingness but to the country's serious budgetary and monetary situation.¹²⁴

(11) In its counter-memorial of 14 September 1938, the Greek Government had already argued that it had been under an "imperative necessity" to "suspend compliance with the awards having the force of *res judicata*". "A State has a duty to do so", it observed, "if public order and social tranquillity, which it is responsible for protecting, might be disturbed as a result of the carrying out of the award, or if the normal functioning of public services might thereby be jeopardized or seriously hindered".¹²⁵ It therefore denied having "committed a wrongful act contrary to international law" as alleged by the plaintiff, and concluded that:

The Government of Greece, anxious for the vital interests of the Hellenic people and for the administration, economic life,

¹²² Secretariat Survey, para. 64.

¹²³ Yearbook ... 1956, vol. II, p. 223, document A/CN.4/96, annex 2. See also, to the same effect, Basis No. 9, concerning the repudiation or modification of debts by the executive power (*ibid.*).

¹²⁴ In line with the idea already expressed by the Commission in connection with art. 31 (see foot-note 98 above), although the Greek Government referred on occasions to "*force majeure*" and the "impossibility" of adopting the conduct required by the obligation, what it had in mind was not so much a "material impossibility" as the impossibility of paying the required sum without thereby injuring a fundamental interest of the State, that is to say, a situation which might be considered as a case of state of necessity. (*P.C.I.J., Series C, No. 87*, pp. 141 and 190. See also Secretariat Survey, para. 278).

¹²⁵ Secretariat Survey, para. 276.

health situation and security, both internal and external, of the country, could not take any other course of action; any Government in its place would do the same.¹²⁶

This argument is taken up again in the Greek Government's rejoinder of 15 December 1938. Having regard to the country's serious budgetary and monetary situation, the Government stated:

In these circumstances, it is evident that it is impossible for the Hellenic Government, without jeopardizing the country's economic existence and the normal operation of public services, to make the payments and effect the transfer of currency that would be entailed by the full execution of the award ...¹²⁷

But the most extensive development of the issue of excuse of necessity is to be found in the oral statement made by the counsel for the Greek Government, Mr. Youpis, on 16 and 17 May 1939. After reaffirming the principle that contractual commitments and judicial decisions must be executed in good faith, Mr. Youpis went on to say:

Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. The painful problem arises of making a choice between the two duties; one of them must give way to the other in some measure: which?

Doctrine and the decisions of the courts have therefore had occasion to concern themselves with the question ...

Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration, the Government is, in the opinion of authors, authorized to suspend or even to reduce the service of debt.¹²⁸

The counsel for the Greek Government then proceeded to a detailed analysis of the doctrine and judicial decisions, in which he found full confirmation of the principle he had stated. In the hope of making that principle more easily acceptable—although he may also have had other intentions—he first referred to it as "the theory of *force majeure*", but he added that "various schools and writers express the same idea in the term 'state of necessity'". He continued:

Although the terminology differs, everyone agrees on the significance and scope of the theory: everyone considers that the debtor State does not incur responsibility if it is in such a situation.¹²⁹

The respondent Government was thus enunciating, in a particularly well-documented manner and as being absolutely general in scope, the principle that a duly established state of "necessity" constituted, in inter-

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 278.

¹²⁸ *Ibid.*, para. 281.

¹²⁹ *Ibid.*

national law, a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation and the responsibility which it would otherwise engender. It is important to note that so far as recognition of that principle is concerned, the applicant Government declared itself fully in agreement. In his statement of 17 May 1939, the counsel for the Belgian Government, Mr. Sand, stated as follows:

In a learned survey ... Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services.

So far as the principle is concerned, the Belgian Government would no doubt be in agreement.¹³⁰

Indeed, the Belgian counsel was not contesting even factually the point that the financial situation in which the Greek Government found itself at the time might have justified the tragic account given by its pleader. The points on which he sought reassurance were the following: (a) that that Government's default on its debt was solely on factual grounds involving inability to pay, and that no other reasons involving contestation of the right of the creditor entered into the matter; and (b) that inability to pay could be recognized as justifying total or partial "suspension" of payment, but not a final discharge of even part of the debt. In other words, it had to be recognized that the wrongfulness of the conduct of the debtor State not in conformity with its international obligation would cease to be precluded once the situation of necessity no longer existed, at which time the obligation would again take effect in respect of the entire debt. From that standpoint, the position of the Belgian Government is particularly valuable for the purpose of determining the limit to the admissibility of the excuse of necessity.

(12) The Court itself noted in its judgment of 15 June 1939¹³¹ that it was not within its mandate to declare whether, in that specific case, the Greek Government was justified in not executing the arbitral awards. However, by observing that in any event it could only make such a declaration after having itself verified the financial situation alleged by the Greek Government and after having ascertained the effect which the execution of the awards would have, the Court showed that it implicitly accepted the basic principle on which the two parties were in agreement.¹³²

(13) On this subject of international obligations "to act", it should be noted that obligations relating to the repayment of international debts are not, in international practice, the only obligations in connection with which circumstances bearing the marks of a "state of necessity" have been invoked to justify State conduct not in conformity with what was required. The case of *Properties of the Bulgarian minorities in Greece* is a quite typical example. Under articles 3 and 4 of the Treaty of Sèvres, the Bulgarian minorities residing in the territories of the Ottoman Empire ceded to Greece were entitled to choose Bulgarian nationality. In that case, they had to leave Greek territory, but remained the owners of any immovable property they possessed in Greece and were entitled to return there. At one time, many persons who had departed to Bulgaria exercised their right to re-enter Greece and return to their properties. In the meantime, however, large numbers of Greek refugees arrived in Greece from Turkey, and the Greek Government had no other possibility than to settle them on the lands of those who had left Greece when they took Bulgarian nationality. There were incidents on the frontier between the two countries, and a League of Nations commission of enquiry was set up. In its report it expressed the opinion that:

... under the pressure of circumstances, the Greek Government employed this land [the ex-Bulgarian district] to settle refugees from Turkey. To oust these refugees now in order to permit the return of the former owners would be impossible.¹³³

The Commission of Enquiry therefore proposed that the Greek Government should compensate the Bulgarian nationals who had been deprived of their property,¹³⁴ and the Bulgarian representative to the Council of the League of Nations endorsed the Commission's proposal and recognized that the application of articles 3 and 4 of the Treaty of Sèvres had been rendered impossible by events.¹³⁵ In the opinion of the Commission, the Greek Government (despite the use, in French, of the expression "*force majeure*" by the League of Nations Commission of Enquiry) had not been in a situation in which it was materially impossible for it to fulfil the obligation to respect the Bulgarian property on its territory, but in a situation of necessity. What had led the Greek Government to act in a manner not in conformity with its international obligations to Bulgaria was the need to safeguard an interest which it deemed essential, namely, the pro-

¹³⁰ *Ibid.*, para. 284.

¹³¹ *Ibid.*, para. 288.

¹³² In a case referred some years earlier to the Permanent Court of International Justice, the case between France and the Serb-Croat-Slovene State concerning the payment of various Serbian loans issued in France, judgement in which was given by the Court on 12 July 1929, the positions of the parties and the Court on the point at present under discussion were very close to those just described. (See Secretariat Survey, paras. 263-268.)

Cases in which an arbitral tribunal accepted the plea of grave financial difficulties as relieving the State of payment of a debt contracted with a private foreign company include the French

Company of Venezuela Railroads case, referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 27 February 1902 (United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 353; Secretariat Survey, paras. 385-386).

¹³³ 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, p. 209; Secretariat Survey, paras. 124-125.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, p. 111; Secretariat Survey, para. 126.

vision of immediate shelter for its nationals who were pouring into its territory in search of refuge. This conduct could thus be purged of the imputation of international wrongfulness which would otherwise have attached to it. From another standpoint, however, it still entailed the obligation to compensate the individuals whom the act committed in a state of necessity had deprived of their properties.

(14) Regarding cases in which the existence of a state of necessity was invoked by a State to justify conduct not in conformity with an obligation "not to act", particularly relevant are those cases where the "essential interest" of the State threatened by a "grave and imminent danger" and safeguardable only through the adoption of conduct which in principle was prohibited by an international obligation was to ensure the survival of the fauna or vegetation of certain areas on land or at sea, to maintain the normal use of those areas or, more generally, to ensure the ecological balance of a region. It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States. Consequently, most statements of position proposing to preclude on that basis the wrongfulness of conduct not in conformity with an international obligation will be found to be contemporary ones. But there are also a few precedents. In this respect, references can be made to the position adopted in 1893 by the Russian Government in the case of *Fur seal fisheries off the Russian coast*. In view of the alarming increase in sealing by British and United States fishermen near Russian territorial waters, and in view of the imminent opening of the hunting season, the Russian Government, in order to avert the danger of extermination of the seals, issued a decree prohibiting sealing in an area that was contiguous to its coast but was at the time indisputably part of the high sea and therefore outside Russian jurisdiction. In a letter to the British Ambassador dated 12 (24) February 1893, the Russian Minister for Foreign Affairs, Chickline, explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He added that he considered it necessary to:

emphasize the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances¹³⁶

and declared his willingness to conclude an agreement with the British Government with a view to a permanent settlement of the question of sealing in the area. This position is therefore interesting as an affirmation of the validity of the plea of necessity in international law and also because it brings out several of the conditions that must in any case be fulfilled before one can even consider whether a situation of "necessity" justifies action by a State which is not in conformity with an international obligation, namely: the absolutely exceptional nature of the alleged situa-

tion, the imminent character of the danger threatening a major interest of the State, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this "justification", depending on the continuance of the danger feared.

(15) A case that has occurred in our own times and may be regarded as typical is *The "Torrey Canyon"* incident. On 18 March 1967, the Liberian tanker *Torrey Canyon*, with a cargo of 117,000 tons of crude oil, went aground on submerged rocks off the coast of Cornwall, but outside British territorial waters. A hole was torn in the hull, and after only two days nearly 30,000 tons of oil had spilt into the sea. This was the first time that so serious an incident had occurred, and no one knew how to avert the threatened disastrous effect on the English coast and its population. The British Government tried several means, beginning with the use of detergents to disperse the oil which had spread over the surface of the sea, but without appreciable results. In any event, the main problem was the oil remaining on board. In order to deal with that, it was first decided to assist a salvage firm engaged by the shipowner in its efforts to refloat the tanker, but on 26 and 27 March the *Torrey Canyon* broke into three pieces and 30,000 more tons of oil spilt into the sea. The salvage firm gave up, and the British Government then decided to bomb the ship in order to burn up the oil remaining on board. The bombing began on 28 March and succeeded in burning nearly all the oil. It should be noted that the British Government's action did not evoke any protests either from the private parties concerned or from their Governments. It is true that the bombing did not take place until after the ship had been reduced to a wreck and the owner seemed implicitly to have abandoned it; but even before that, when the action to be taken was under discussion, there was no adverse reaction to the idea of destroying the ship, which the Government was prepared to do against the wishes of the owner if necessary. The British Government did not advance any legal justification for its conduct, but on several occasions it stressed the existence of a situation of extreme danger and the fact that the decision to bomb the ship had been taken only after all the other means employed had failed.¹³⁷ Whatever other possible justifications there may have been for the British Government's action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.

(16) As a result of the *Torrey Canyon* incident, conventional instruments were prepared to enable a coastal State to take necessary measures on the high seas to protect its coastline and related interests from a

¹³⁶ Secretariat Survey, para. 155.

¹³⁷ On this case, see the White Paper issued by the United Kingdom Government: *The "Torrey Canyon"*, Cmnd. 3246 (London, H.M. Stationery Office, 1967).

grave and imminent danger of pollution following upon a maritime casualty.¹³⁸ Despite this trend at the treaty level, a state of necessity can still be invoked, in areas not covered by these rules, as a ground for State conduct not in conformity with international obligations in cases where such conduct proves necessary, by way of exception, in order to avert a serious and imminent danger which, even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or—even this is not ruled out—in an area subject to the sovereignty of another State. The latter would apply, for example, if extremely urgent action beyond its frontiers were the only means for a State to protect from fire a forest covering both sides of the frontier and time and means were lacking for the organs of the neighbouring State to take the necessary measures to extinguish the fire which had started to spread on its territory. Other examples of the same kind can well be imagined.

(17) Another area in which States have frequently pleaded a situation of necessity in order to justify the adoption of conduct not in conformity with an international obligation incumbent on them is that of obligations concerning the treatment of foreigners. In these cases, the obligation at issue is more often a conventional one, since customary obligations in this respect are relatively few and there are differences of opinion as to their very existence and their scope. There is, however, one case, already old, in which the parties to the dispute do seem to have taken for granted the existence of an obligation on the State, under general international law, to honour prospecting and exploitation concession contracts concluded with foreigners. In the *Company General of the Orinoco* case, a French company had obtained from the Venezuelan Government concessions to exploit minerals and develop a transport network in a large area over which Venezuela believed it had sovereignty. However, much of the area covered by the concession contracts was claimed by Colombia, which in fact had grounds for considering it part of its territory. Colombia therefore strongly protested against the granting of the concessions by the Venezuelan Government and demanded the return of the area concerned. Venezuela, wishing to avert the danger of armed conflict with the neighbouring republic, which was becoming imminent, felt obliged to rescind the concessions it had granted and return to Colombia the areas over which it had mistakenly exercised sovereign powers. This led to a dispute between the Venezuelan Government and the Company General of the Orinoco. The French Government having sided with

the company, the case was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. The Commission, however, accepted the argument advanced by Venezuela, which had been forced to annul the concessions granted to the French company because of the real danger of war they had created. Umpire Plumley therefore ruled that, in the exceptional circumstances of the case, it was lawful under international law for the Venezuelan Government to rescind the concessions, although he agreed that the company was entitled to compensation for the consequences of an act which had been internationally lawful but severely detrimental to its interests.¹³⁹

(18) As regards cases in which the obligation arose out of an international convention and the party concerned sought to justify non-compliance with the obligation on the ground that it had acted in a state of necessity, there are three that the Commission considers important enough to be cited. The first is a very old case; it concerns an Anglo-Portuguese dispute dating from 1832. The Portuguese Government, which was bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects. Upon receiving that answer to its protests, the British Government consulted its Law Officers on the matter. On 22 November 1832, Mr. Jenner replied with the following opinion:

... whether the Privileges and Immunities so granted [to the British subjects] are, under all circumstances, and at whatever risk, to be respected, ... the proposition cannot be maintained to that extent. Cases may be easily imagined in which the strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself. When such a case occurs, Vattel, Book 2, C. 12, Sect. 170 observes that it is "tacitly and necessarily expected in the Treaty".

In a case, therefore, of pressing necessity, I think that it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be requisite for its subsistence, even against the will of the Owners, whether British or Portuguese; for I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.

The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.¹⁴⁰

Despite its age, this case is therefore a particularly sound precedent, mainly because the two parties were

¹³⁸ See, for example, art. 1 of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (*United Nations, Juridical Yearbook, 1969* (United Nations publication, Sales No.: E.71.V.4), p. 166) and art. 221 of the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2 and Corr. 2, 3 and 4).

¹³⁹ United Nations, *Reports of International Arbitral Awards*, vol. X (*op. cit.*), pp. 280–281.

¹⁴⁰ A. D. McNair, ed., *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 231.

agreed on the principles enunciated and hence on express recognition of the validity of the plea of necessity where the conditions for it are fulfilled. But the case is also of interest because of the terminology used, which is unusually apt for those times, and because of its contribution to the definition of the two conditions—that the danger to be averted be “imminent” and “urgent”.

(19) The second case, a century later and well known, is the *Oscar Chinn* case. In 1931, the Government of Belgium adopted measures concerning fluvial transport, designed to benefit the Belgian company Unatra, in what was then the Belgian Congo. According to the United Kingdom, one of whose subjects, Oscar Chinn, had been harmed by the measures in question, the latter had created a “*de facto* monopoly” of fluvial transport in the Congo, which in its view was contrary to the principles of “freedom of navigation”, “freedom of trade” and “equality of treatment” provided for in articles 1 and 5 of the Convention of Saint-Germain-en-Laye of 10 September 1919.¹⁴¹ The question was submitted to the Permanent Court of International Justice, which gave its judgment on 12 December 1934. The Court held that the “*de facto* monopoly” of which the United Kingdom complained was not prohibited by the Convention of Saint-Germain-en-Laye.¹⁴² Having thus found that the conduct of the Belgian Government was not in conflict with its international obligations towards the United Kingdom, the majority of the Court saw no reason to consider whether any wrongfulness in the conduct in question might have been precluded because the Belgian Government had perhaps acted in a state of necessity. The question was, however, considered in depth in the individual opinion of Judge Anzilotti, who stated:

6. If, assuming the facts alleged by the Government of the United Kingdom to have been duly established, the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements.

7. The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.

The question whether the Belgian Government was acting, as the saying is, under the law of necessity is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that the Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in prices.

It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with a plea of necessity.

To begin with, there is the fact that, when the Belgian Government took the decision of June 20th 1931, it chose, from among several possible measures—and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of Commerce—that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the plea of necessity which, by definition, implies the impossibility of proceeding by any other method than the one contrary to law.

Another undisputed fact which seems irreconcilable with the plea of necessity is the offer made by the Government to transporters other than Unatra on October 3rd, 1932. Whatever its practical value, that offer showed that it was possible to concede advantages to all enterprises, similar to those granted to Unatra, and hence to avoid creating that *de facto* monopoly which, in the submission of the Government of the United Kingdom, was the necessary consequence of the decision of June 20th, 1931.¹⁴³

The admissibility of the “plea of necessity” as a principle in international law is evident from this opinion. At the same time, the concept of “necessity” accepted in international legal relations is very restrictive. It is restrictive as regards the determination of the essential importance of the interest of the State which must be in jeopardy in order for the plea to be effective: it is also restrictive as regards the requirement that the conduct not in conformity with an international obligation of the State must really be, in the case in question, the only means of safeguarding the essential interest which is threatened.

(20) The third case is the one involving the United States of America and France that came before the International Court of Justice in 1952 under the title case concerning *Rights of Nationals of the United States of America in Morocco*. One of the points at issue was whether or not it was lawful to apply to United States nationals a 1948 decree by the Resident General of France in Morocco establishing a régime of import restrictions in the French zone of Morocco in a manner that the United States did not consider to be in conformity with obligations arising out of treaties concluded between the United States and Morocco. The treaties in question guaranteed to the United States the right freely to engage in trade in Morocco without any import restrictions save those that were specified in the treaties themselves. In its defence the French Government asserted, *inter alia*, that the import restrictions imposed by the decree were necessary for the enforcement of exchange controls, such controls being essential to safeguard the country's economic balance. It argued that that balance would have been seriously jeopardized by the removal of exchange controls in a situation which had been rendered critical by the fluctuation of the franc on the Paris black market and by the “dollar gap” of

¹⁴¹ League of Nations, *Treaty Series*, vol. VIII, p. 25.

¹⁴² *P.C.I.J., Series A/B*, No. 63, p. 89.

¹⁴³ *Ibid.*, pp. 112–114.

Morocco.¹⁴⁴ The United States Government, for its part, denied that the danger feared by the other party actually existed or that, in any event, there was a connection of the kind established by that party between the necessity of averting such a danger and the restrictions imposed on American imports without the consent of the United States Government.¹⁴⁵ It did not, however, challenge outright the validity of the “ground” described by the French Government and its possible applicability to situations other than that involved in the particular case in question. The Court did not have occasion to rule on the issue. But in the opinion of the Commission, this case too provides support for the recognition of the applicability of the plea of necessity in international law. It is true that, in describing the situation characterized by the “necessity” of taking measures to avert the grave danger which would otherwise have jeopardized an essential interest of the country, the French Government used the term “*force majeure*”, but the characteristics of the situation invoked were not those of “material impossibility”; rather, they were those of a situation that the Commission has termed a “state of necessity”.

(21) Worthy of mention in an area related to that of the treatment accorded to foreigners within the territory of the State, namely, the obligations imposed on a State to refrain from placing restrictions on or impediments to the free passage of foreign vessels through certain areas of its maritime territory, is the “*Wimbledon*” case. During the Russo-Polish war of 1920–1921, the British vessel *Wimbledon*, chartered by a French company and carrying a cargo of munitions and other military material destined for Poland, was refused passage through the Kiel Canal by the German authorities on the ground that, in view of the nature of the cargo, its passage through German waters would be contrary to the position of neutrality adopted by Germany in connection with the war between Poland and Russia. The French Government protested, on the ground that Germany’s conduct was not in conformity with article 380 of the Treaty of Versailles.¹⁴⁶ The ensuing dispute was referred to the Permanent Court of International Justice, with the United Kingdom, Italy and Japan, as co-signatories to the Treaty, intervening before the Court on the side of France. The issue debated during the proceedings was essentially whether or not the action taken by the German authorities with regard to the *Wimbledon* was prohibited by article 380 of the Treaty of Versailles. In its judgment of 17 August 1923, the Court ruled that it was, and that such a prohibition in no way conflicted with the obligations of Germany as a neutral State. Consequently, the Court did not have occasion to rule

on any “plea of necessity” that Germany might have made. However, the question was mentioned by the agents of the two parties during the oral proceedings. For instance, the Agent of the French Government, Mr. Basdevant, said:

Will not the principles of international law, the general rules of the law of nations, furnish some grounds for frustrating the rule of free passage through the Kiel Canal in the case of a vessel carrying military material destined for a neutral State? First, let me say without otherwise dwelling on this point that no arguments against the application of the rule of free passage have been advanced on the ground of impossibility of compliance, nor that of the danger which compliance with the provision might have created for Germany; the plea of necessity was not made at all. Indeed, any such arguments seem inconceivable in this case.¹⁴⁷

Again, the Agent of the Italian Government, Mr. Pilotti, observed that:

Neither would it be possible to speak of *force majeure*, or more particularly of that concept which had been expressly sanctioned in the first book of the German Civil Code relating to the exercise of rights in general (§227), and which, besides, lends itself to controversy; I mean the *status necessitatis*.

Indeed, there is no proof to show that the war between Poland and Russia, in consequence of the acts accomplished by the two belligerents, constituted for Germany that immediate and imminent danger, against which she would have had no other means of protection but the general prohibition of the transit of arms through her territory, and particularly that such a danger should have continued to exist at the time when the “*Wimbledon*” presented herself at the entrance of the Canal.¹⁴⁸

Finally, the German Agent, Mr. Schiffer, said:

The representative of one of the applicant parties argued that Germany claimed that she acted under the *jus necessitatis*. This is not the case. There was no impossibility whatever for Germany to carry out the Treaty; nor has Germany contravened the Treaty.

...
I repeat that it is not the intention of the German Government to claim any *jus necessitatis*. On the contrary, Germany claims that she has remained true to her conventional obligations resulting from the Treaty. . . .¹⁴⁹

The *Wimbledon* case therefore shows a significant concurrence of views as to the admissibility in general international law of state of necessity as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation, and a no less significant contribution by some of the protagonists to the definition of the conditions to be fulfilled in order for the existence of such a circumstance to be recognized.

(22) The Commission then went on to examine cases in which a state of necessity has been invoked to justify

¹⁴⁷ P.C.I.J., Series C, No. 3, vol. I, pp. 178–179. [Translation by the Secretariat.]

¹⁴⁸ *Ibid.*, pp. 284–285.

After responding to some of the other arguments put forward by Germany, Mr. Pilotti returned to the subject, concluding:

“... the discussion is brought back to the simpler and safer ground of looking for some juridical reason justifying the voluntary non-execution on the part of Germany of her obligations, which reason could only be a material impossibility or the *status necessitatis*. Now surely from that standpoint it is not sufficient to invoke merely general ideas of sovereignty and neutrality.” (*Ibid.*, p. 288).

¹⁴⁹ *Ibid.*, p. 314.

¹⁴⁴ See Secretariat Survey, para. 311.

¹⁴⁵ *Ibid.*, para. 312.

¹⁴⁶ *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 189.

conduct not in conformity with international obligations relating to respect by a State of the territorial sovereignty of other States. History shows that on many occasions Governments have tried to give necessity a leading role as justification for acts committed in breach of an obligation of that kind. And it is mainly these cases which have been the focal point of the argument concerning the general admissibility of the plea of necessity; it is they which have done most to mobilize a large section of learned opinion against the very principle of such a plea. In the opinion of the Commission, however, the interest of these cases is now much more limited. They are, indeed, mainly cases in which the existence—usually spurious—of a “state of necessity” was alleged in order to justify either the annexation by a State of the territory or part of the territory of another State,¹⁵⁰ or the occupation and use, for purposes of war, of the territory of a State which had been neutralized by a treaty concluded before the outbreak of war between some of the parties to the treaty,¹⁵¹ or of the territory of a State which had declared its neutrality in a war between other States:¹⁵²

¹⁵⁰ Mention may be made of the cases of the Free City of Krakow, annexed by Austria in 1846 (E. Hertslet, *Map of Europe by Treaty* (London, Butterworth, 1875), vol. 2, pp. 1061 *et seq.*; G. F. de Martens, *Nouveau Recueil général de traités*, vol. X, pp. 111 and 125); the annexation of Rome by Italy in 1870 (S.I.O.I.-CNR, *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861–1887), vol. II, pp. 871 *et seq.*); the annexation of Bosnia-Herzegovina by Austria-Hungary in 1908 (*British Documents on the Origins of the War, 1898–1914* (London, H.M. Stationery Office, 1928), vol. V, pp. 398 *et seq.*); and the annexation of Ethiopia by Italy in 1936 (League of Nations, *Official Journal*, 16th year, No. 11 (November 1935), p. 1137).

¹⁵¹ What may be considered the “classic” case was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity of forestalling an attack on its territory by France through Luxembourg and Belgium. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs (J. B. Scott, ed., *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), Part I, pp. 749–750) and the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words “wir sind jetzt in der Notwehr; und Not kennt kein Gebot!” (*Jahrbuch des Völkerrechts* (Munich), vol. III (Special No.): *Politische Urkunden zur Vorgeschichte des Weltkrieges* (1916), p. 728).

¹⁵² Such cases are very numerous; mention may be made of the occupation of Korea by Japanese troops during the Russo-Japanese war of 1904 (see the documents cited by E. T. Hazan in *L'état de nécessité en droit pénal interétatique et international* (Paris, Pedone, 1949), p. 53); the occupation of certain Greek territories or islands by the Entente Powers during the First World War for use as bases for their military operations against Turkey (see the documents cited by T. P. Ion in “The Hellenic crisis from the point of view of constitutional and international law—Part IV”, *The American Journal of International Law* (New York), Vol. 12, No. 3 (July, 1918), pp. 564 *et seq.*); the occupation by Germany, during the Second World War, of Denmark, Norway, Belgium and Luxembourg and by Germany and Italy of Yugoslavia and Greece (see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nuremberg, 1949), vol. XXII, pp. 446 *et seq.*); and the occupation, during the same war,

in short, actions all of which consist, in one way or another, of an assault on the very existence of another State or on the integrity of its territory or the independent exercise of its sovereignty. Whatever the situation in international law may have been at the time of these actions, what is in no doubt at all is that, at the present time, any use by a State of armed force for an assault of the kind mentioned against the sovereignty of another State, indisputably comes within the meaning of the term “aggression” and, as such, is subject to a prohibition of *jus cogens*—the most typical and incontrovertible prohibition of *jus cogens*. In the opinion of the Commission, as explained below,¹⁵³ no invocation of a “state of necessity” can have the effect of precluding the international wrongfulness of conduct not in conformity with an obligation of *jus cogens*. It would be particularly absurd if the obligation prohibiting any use of force which constitutes aggression had the power, because of its peremptory nature, to render void any agreement to the contrary concluded between two States, so that prior consent by the State subjected to the use of force could not have the effect of “justification” but such an effect could be attributed to the assertion of a state of necessity, if genuine, by the State using force. It may be added that article 5, para. 1, of the Definition of Aggression adopted on 14 December 1974, by the General Assembly,¹⁵⁴ provides that:

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

The Commission has no doubt that, whatever the extent of the effect of justification claimed for a state of necessity, it can never constitute a circumstance precluding the wrongfulness of State conduct not in conformity with the obligation to refrain from any use of force constituting an act of aggression against another State.

(23) It remained to consider the problem of the existence of conduct which, although infringing the territorial sovereignty of a State, need not necessarily be considered as an act of aggression, or not, in any case, as a breach of an international obligation of *jus cogens*. If that were so, the question might arise whether a state of necessity could be invoked to justify an act of the State not in conformity with an obligation

of Iceland by the United Kingdom (*ibid.*, vol. XVII, p. 415); of Iran by the United Kingdom and the Soviet Union (G. E. Kirk, “The Middle East”, in *Survey of International Affairs, 1939–1946: The World in March 1939*, ed. A. Toynbee and F. T. Ashton-Gwatkin (London, Oxford University Press, 1952), pp. 133 *et seq.*; M. M. Whiteman, ed., *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, pp. 1042 *et seq.*; of Portuguese Timor by the Netherlands and Australia (*Keessing's Contemporary Archives, 1940–1943* (Bristol), vol. IV, pp. 4943 *et seq.*). In so far as any “justification” of these actions was sought, “necessity” was always invoked, with varying degrees of candour.

¹⁵³ See para. (37) below.

¹⁵⁴ Resolution 3314 (XXIX), annex.

of that kind. The Commission is referring in particular to certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is, first, the existence of grave and imminent danger to the State, to some of its nationals or simply to human beings—a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of the actions in question, as regards both duration and the means employed, in keeping with their purpose, which is restricted to eliminating the perceived danger.

(24) In the past, there has been no lack of actual cases in which necessity was invoked precisely to preclude the wrongfulness of an armed incursion into foreign territory for the purpose of carrying out one or another of the operations referred to above. To cite only one example of the many involving situations of this kind, there was the celebrated “*Caroline*” case, in which British armed forces entered United States territory and attacked and destroyed (also causing loss of life) a vessel owned by American citizens, which was carrying recruits and military and other material to the Canadian insurgents.¹⁵⁵ For the State organs and for

the writers of the time, it made no difference, with regard to the possibility of invoking a state of necessity, whether the obligation with which the act of the State was not in conformity was or was not an obligation relating to respect for territorial sovereignty. But can the same be said today? Apart from doubt on the question whether all international obligations concerning respect for the territorial sovereignty of States have really become obligations of *jus cogens*, it must be borne in mind that Article 2, paragraph 4, of the Charter of the United Nations requires Member States to refrain from the use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”. Now this requirement raises another question, namely, that of the possible effect of treaty provisions which explicitly, or even implicitly, exclude the possibility of invoking a state of necessity as a circumstance precluding the wrongfulness of an act of the State not in conformity with one of its international obligations. As can be seen from what is said below,¹⁵⁶ the Commission considered that the possibility of invoking this exception should be excluded not only when such exclusion is provided for by an express treaty obligation, but also when it follows implicitly from the text of the treaty. That being so, the problem is reduced to knowing whether the Charter, by Article 2, paragraph 4, is or is not intended to impose an obligation which cannot be avoided by invoking a state of necessity. It has been observed in this connection that Article 51 of the Charter mentions only self-defence as an admissible form of the use of armed force. Should it be inferred from this that the drafters of the Charter might have had the intention of implicitly excluding the applicability of the plea of “necessity”, however well

that the American Secretary of State was referring, for he did not make the preclusion of wrongfulness depend on the existence of a prior or threatened aggression by the State whose territory had been violated, or on any kind of wrongful act on its part. In his message to Congress of 7 December 1841, the President of the United States of America reiterated that:

“This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government . . .” (*ibid.*, 1841–1842 (1858), vol. 30, p. 194).

Thus, eliminated on the plane of principle, the divergence of views shifted to that of fact. The incident was not closed until 1842, with an exchange of letters in which the two Governments found themselves in agreement, both on the basic principle that the territory of an independent nation is inviolable and on the fact that “a strong overpowering necessity may arise when this great principle may and must be suspended.” “It must be so”, added Lord Ashburton, the British Government’s *ad hoc* envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.” (*ibid.*, pp. 195 *et seq.*). See Secretary of State Webster’s reply: *ibid.*, pp. 201 *et seq.* Thus, the applicability in principle of the plea of necessity in the area under discussion here was expressly recognized by the two Powers between which the dispute had arisen.

¹⁵⁶ See para. (38) below.

¹⁵⁵ The action occurred during the night of 29 December 1837. Necessity was first mentioned as a ground, in response to the American protests, by the British Minister in Washington, Fox, who referred in that connection to the “necessity of self-defence and self-preservation”; the same point was made by the counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution” (see respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, pp. 422 *et seq.*, and McNair, *op. cit.*, pp. 22 *et seq.* On the American side, Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”, (*British and Foreign State Papers, 1840–1841* (London, Ridgeway, 1857), vol. 29, pp. 1129 *et seq.*). Although he used the term “self-defence”, it was to a state of necessity—in the sense in which that expression is used by the Commission—

founded it might be in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force? The Commission considered that it was not called upon to take a position on this question. The task of interpreting the provisions of the Charter devolves on other organs of the United Nations.

(25) The Commission will here only point out that after the Second World War, and hence after the adoption of the Charter, there is only one known case in which a State invoked a state of necessity—and then not exclusively—to justify violation of the territory of a foreign State: this is the case of the despatch of parachutists to the Congo by the Belgian Government in 1960. According to the Belgian Government the parachutists were sent to the Congo to protect the lives of Belgian nationals and other Europeans who, it claimed, were being held as hostages by army mutineers and by the Congolese insurgents. According to one author, Mr. Eyskens, the Belgian Prime Minister, told the Senate that the Government had found itself “in a situation of absolute necessity”.¹⁵⁷ In a statement before the Security Council, the Belgian Minister for Foreign Affairs, Mr. Wigny, said that Belgium had been forced “by necessity” to send troops to the Congo, and that the action undertaken had been “purely humanitarian”, had been limited in scope by its objective, and had been conceived as a purely temporary action, pending an official intervention by the United Nations.¹⁵⁸ The Congolese Government, in its reply, maintained that the justification asserted by Belgium was a pretext, that its real objective was the secession of Katanga and that, consequently, an act of aggression had taken place.¹⁵⁹ The views expressed in the Security Council were divided between two opposing positions; both sides, however, concentrated on determination and evaluation of the facts.¹⁶⁰ No one took any position of principle with regard to the possible validity of a “state of necessity” as a circumstance which, if the conditions for its existence were fulfilled, could preclude the wrongfulness of an act not in conformity with an international obligation. Hence all that can be said is that there was no denial of the principle of a plea of necessity as such.

(26) In other cases in which armed operations have been undertaken on foreign territory for purposes said to be “humanitarian”, the State which undertook them has relied on other justifications, such as the consent of the State in whose territory the operations took

place¹⁶¹ or self-defence.¹⁶² The concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence.

It may, however, be that the preference for other “justifications” than that of necessity was due, in these cases, to an intention of bringing out more clearly certain alleged aspects of the case, such as the non-innocence of the State against which the act was committed, or to a belief that it was not possible to prove that all the particularly strict conditions for the existence of a genuine state of necessity were fulfilled. It must, in any case, be concluded that the practice of States is of no great help in answering the question specifically raised above.¹⁶³

(27) The Commission finally came to consider the cases in which a State has invoked a situation of necessity to justify actions not in conformity with an international obligation under the law of war and, more particularly, has pleaded a situation coming within the scope of the special concept described as “necessity of war”. There has been much discussion, mainly in the past, on the question whether or not “necessity of war” or “military necessity” can be invoked to justify conduct not in conformity with that required by obligations of the kind here considered. On this point a preliminary clarification is required. The principal role of “military necessity” is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity with an obligation under international law. Military necessity appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality, namely, those rules which, by derogation from the principles of the law of peace, confer on a belligerent State the legal faculty of resorting, against the enemy and against neutral States (and against their nationals), to actions

¹⁵⁷ D. W. McNemar, “The postindependence war in the Congo”, in *The International Law of Civil War*, ed. R. A. Falk (Baltimore, Md., Johns Hopkins Press, 1971), p. 273.

¹⁵⁸ See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, paras. 182 *et seq.*, 192 *et seq.*; 877th meeting, para. 142; 879th meeting, para. 151.

¹⁵⁹ *Ibid.*, 877th meeting, paras. 31 *et seq.*

¹⁶⁰ *Ibid.*, 873rd meeting, para. 144; 878th meeting, paras. 23, 65, 118; 879th meeting, paras. 80 *et seq.*

¹⁶¹ At the time of the second Belgian intervention in the Congo—also defined as an “emergency rescue operation” (see *Official Records of the Security Council, Nineteenth Year, Supplement for October, November and December 1964*, document S/6062)—which took place in 1964, the Belgian Government invoked as its justification the consent of the Congolese Government, which the latter contested (*ibid.*, documents S/6055 and S/6063).

The same justification has sometimes been invoked for *raids* carried out by organs of a State in foreign territory to liberate the hostages of terrorists who have diverted aircraft. This was the case of the Federal Republic of Germany in the raid on Mogadishu (Somalia) in 1977, and of Egypt in the raid on Larnaca (Cyprus) in 1978.

¹⁶² This was the case of the raid on Entebbe (Uganda) undertaken by Israel in 1976. (For the various positions taken on the subject of the raid and the draft resolutions, none of which were adopted, see *Official Records of the Security Council, Thirty-first year, Supplement for July, August and September 1976*, documents S/12123, 12124, 12126, 12132, 12136 and 12139, and *ibid.*, 1939th, 1941st and 1942nd meetings).

¹⁶³ See para. (23) above.

which meet the needs of the conduct of hostilities. In relation to those rules, therefore, what is involved is certainly not the effect of "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when this "necessity of war", the recognition of which is the basis of the rule and its applicability, is seen to be absent in the case in point, that this rule of the special law of war and neutrality must not apply and the general rule of the law of peace prohibiting certain actions again prevails. It follows that all the—very numerous—positions taken on this question are without relevance for the purposes of determining the content of the rule which the Commission is here called upon to codify.

(28) Having clarified this point, the Commission must, however, note that some writers have referred to the concept of "military necessity" with a purpose which is really the same as that pursued by the Commission in the present article, namely, to determine whether there are circumstances connected with the idea of necessity which are capable as such of precluding, exceptionally, the wrongfulness of conduct not in conformity with an international obligation. What these writers were studying is the question whether this particular kind of necessity, the object of which is to safeguard the vital interest of the success of military operations against the enemy and, in the last resort, of victory over the enemy, can have the effect of precluding the wrongfulness of State conduct not in conformity with one of the rules of the law of war, which impose limitations on the belligerents regarding the means and methods of conducting hostilities between them, the general purpose being to attenuate the rigours of war.¹⁶⁴ These are what are called the

rules of humanitarian law applicable to armed conflicts; most of them, moreover, are codified rules. The Commission does not believe that the existence of a situation of necessity of the kind indicated can permit a State to disobey one of the abovementioned rules of humanitarian law. In the first place, some of these rules are, in the opinion of the Commission, rules which impose obligations of *jus cogens*, and as stated below,¹⁶⁵ a state of necessity cannot be invoked to justify non-fulfilment of one of these obligations. In the second place, even in regard to obligations of humanitarian law which are not obligations of *jus cogens*, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with the purposes of the legal instruments drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that "military necessity" was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States and to provide for some restrictions on the almost total freedom of action of which belligerents take advantage in their reciprocal relations by virtue of this criterion. And they surely did not intend to allow necessity of war to destroy retrospectively what they had achieved with such difficulty. They were also fully aware that compliance with the restrictions they were providing for might hinder the success of a military operation, but if they had wished to allow those restrictions only in cases where they would not hinder the success of a military operation, they would have said so expressly—or, more probably, would have abandoned their task as being of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest; States signing the Conventions undertook to accept that subordination and not to try to find pretexts for evading it. It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all. It is true that some of these conventions on the humanitarian law of war contain clauses providing for an explicit exception to the duty to fulfil the obligations they impose: this is in the case of "urgent military necessity". But these are provisions which apply only to the cases expressly provided for. Apart from these cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose. And as will be seen

¹⁶⁴ Attention may be drawn in this connection to the following works: E. Lüder, "Krieg und Kriegsrecht im allgemeinen", *Handbuch des Völkerrechts*, ed. F. von Holtzendorff (Hamburg, Verlagsanstalt und Druckerei 1889), vol. 4, pp. 253 *et seq.*; M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht* (Breslau), vol. VII (1913), pp. 351 *et seq.*; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, pp. 207 *et seq.*; U. Borsi, "Ragione di guerra e stato di necessità nel diritto internazionale", *Rivista di diritto internazionale* (Rome), series II, vol. V, No. 2 (1916), pp. 157 *et seq.*; C. de Visscher, "Les lois de la guerre et la théorie de la nécessité", *Revue générale de droit international public* (Paris), vol. XXIV (1917), pp. 74 *et seq.*; P. Weiden, "Necessity in international law", *Transactions of the Grotius Society*, vol. 24, *Problems of Peace and War* (London, Sweet and Maxwell, 1939), pp. 105 *et seq.*; N. C. H. Dunbar, "Military necessity war crimes trials", *The British Year Book of International Law*, 1952 (London), vol. 29 (1952), pp. 442 *et seq.*; W. G. Downey, Jr., "The law of war and military necessity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 2 (April 1953), pp. 251 *et seq.*; W. V. O'Brien, "The meaning of 'military necessity' in international law", *World Polity* (Utrecht, Spectrum, 1957), vol. I, pp. 109 *et seq.*; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1965), vol. IV, pp. 1927 *et seq.*; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (London, Stevens, 1968), vol. II, pp. 128 *et seq.*

¹⁶⁵ Para. 37.

below,¹⁶⁶ the Commission took the view that a State cannot invoke a state of necessity if that is expressly or implicitly prohibited by a conventional instrument.

(29) With regard to the positions taken on the admissibility or non-admissibility of state of necessity as a circumstance which can preclude the wrongfulness of an act of the State not in conformity with an international obligation, the Commission first noted that the idea that necessity can, exceptionally, justify State conduct contrary to an international obligation is explicitly accepted—although in the context of research in which analysis of internal law is mixed with that of international law—by classical writers in our discipline, such as Ayala, Gentili and, especially Grotius, in the sixteenth and seventeenth centuries, and Pufendorf, Wolff and de Vattel in the eighteenth century.¹⁶⁷ Although it was not contested, this acceptance was accompanied by very restrictive conditions. During the nineteenth century there appeared the first efforts of certain supporters of this position¹⁶⁸ to clothe the recognition of the pretext of necessity with a principle of “justification”. At the same time, there appeared the first opposition by certain writers¹⁶⁹ to the hitherto unchallenged idea. However, the Commission considers it useful to emphasize that the arguments advanced by these first opponents, which were taken up by nearly all their successors having the same position, do not in fact

amount to a real rejection of the idea of necessity itself as an exceptional justification of certain State conduct. They rather represent a twofold reaction: (a) on the theoretical level, to the cumbersome apparatus of “foundations” and “justifications” with which the advocates of the idea of necessity now wished to accompany it, and (b) on the practical level, to the entirely abusive application of the idea by certain Governments.¹⁷⁰ During the twentieth century, the number of writers opposed to the applicability of the concept of state of necessity in international law gradually increased,¹⁷¹ although it remained smaller

¹⁷⁰ To put it plainly, it is, first, the idea of the existence of a “fundamental” and “natural” right of “self-preservation” that is the target of those making this critical revision, and it is, secondly, the concern caused by the quite inadmissible use of the idea of self-preservation or of “*Not*”, made by States for purposes of expansion and domination, which leads these writers to take an attitude that is in principle hostile to recognition of the concept of state of necessity in the international legal order. On the other hand, it must be said that certain writers more particularly aware of the realities of international life, such as Westlake (*op. cit.*, p. 115), while expressing their opposition to general recognition of a justification based on state of necessity, do not think it necessary to carry their opposition so far as to deny the applicability of that justification to conduct not in conformity with certain kinds of obligation. In cases where the obligation not fulfilled relates to matters less essential than respect for the sovereignty of others, which are thus less dangerous to international life, it is felt that opposition to the idea of state of necessity as a circumstance which can preclude the wrongfulness of the conduct in question has no *raison d'être* and is not maintained.

¹⁷¹ Among the writers opposed to making state of necessity a circumstance precluding wrongfulness in international law are P. Fauchille, *Traité de droit international public*, 8th ed. of *Manuel de droit international public* by M. H. Bonfils (Paris, Rousseau, 1922), vol. I, part I, pp. 418 *et seq.*; Borsi, *loc. cit.*, pp. 172 *et seq.*, 181 *et seq.*; A. Cavaglieri, “Lo stato di necessità nel diritto internazionale”, *Rivista italiana per le scienze giuridiche* (Rome), vol. LX (1917), No. 1, pp. 89 *et seq.*, and No. 2, pp. 171 *et seq.*, and “Règles générales du droit de la paix”, *Recueil des cours . . .*, 1929-I (Paris, Hachette, 1930), vol. 26, pp. 558 *et seq.*; de Visscher, “Les lois de la guerre . . .” (*loc. cit.*), pp. 75 *et seq.*, and “La responsabilité des Etats”, *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 111 *et seq.*, and *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), pp. 314 *et seq.*; B. C. Rodick, *The Doctrine of Necessity in International Law* (New York, Columbia University Press, 1928); A. Verdross, “Règles générales du droit international de la paix”, *Recueil des cours . . .*, 1929-V (Paris, Hachette, 1931), vol. 30, pp. 489–490; H. Kelsen, “Unrecht und Unrechtsfolgen im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 568 *et seq.*; J. Basdevant, “Règles générales du droit de la paix”, *Recueil des cours . . .*, 1936-IV (Paris, Sirey, 1937), vol. 58, pp. 551 *et seq.*; A. Vonlanthen, *Die völkerrechtliche Selbstbehauptung des Staates* (Fribourg (Switzerland), Paulusdruckerei, 1944), pp. 175 *et seq.*; Hazan, *op. cit.*; S. Glaser, “Quelques remarques sur l'état de nécessité en droit international”, *Revue de droit pénal et de criminologie* (Brussels), No. 6 (March 1952), pp. 599 *et seq.*; P. Guggenheim, *Traité de droit international public* (Geneva, Goerg, 1954), vol. II, pp. 60 *et seq.*; D. W. Bowett, *Self-defence in International Law* (Manchester, Manchester University Press, 1958), p. 10; J. L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963), pp. 403 *et seq.*; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1960), vol. II, pp. 438 *et seq.*; I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) pp. 428 *et seq.*; L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris,

¹⁶⁶ Para. (38).

¹⁶⁷ See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582), repr. in *The Classics of International Law* (Washington, D.C., Carnegie Institution, 1912), vol. II (trans.), p. 135; A. Gentili *De iure belli, libri tres* (1612), *The Classics of International Law* (Oxford, Clarendon Press, 1933), vol. II (trans.), p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646), *The Classics of International Law* (Oxford, Clarendon Press, 1925), vol. II (trans.), pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (trans.), pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (trans.), pp. 173–174; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758), *The Classics of International Law* (Washington, D.C., Carnegie Institution, 1916), vol. III: *The law of nations or the principles of natural law* (trans.), p. 149.

¹⁶⁸ Among others, J. L. Klüber, *Droit des gens moderne de l'Europe* (Paris, Alliaud, 1831), pp. 41, 75 *et seq.*; W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), pp. 65, 322 *et seq.*; H. Wheaton, *Elements of International Law*, 8th ed. (1866), *The Classics of International Law* (Oxford, Clarendon Press, 1936), pp. 75–76; A. W. Heffter, *Das europäische Völkerrecht der Gegenwart*, 7th ed. (Berlin, Schroeder, 1882), p. 68; A. Rivier, *Principes du droit des gens* (Paris, Rousseau, 1896), vol. I, pp. 277–278; T. Twiss, *The Law of Nations (Considered as Independent Political Communities)*, rev. ed. (Oxford, Clarendon Press, 1884), pp. 178 *et seq.*, 184–185.

¹⁶⁹ Among others, P. Fiore, *Droit international public*, French trans. by P. Pradier-Fodéré (Paris, Durand, 1868), pp. 344 *et seq.*; P. Pradier-Fodéré, *Traité de droit international public européen et américain* (Paris, Pedone-Lauriel, 1885), vol. I, pp. 374 and 381; J. Westlake, *Chapters on the Principles of International Law* (Cambridge, University Press, 1894), pp. 113–114, and p. 257.

than the number who supported the applicability of that concept.¹⁷² Apart from a few differences in the

(Foot-note 171 continued.)

Librairie générale de droit et de jurisprudence, 1964), pp. 371–372; E. Jiménez de Aréchaga, “International responsibility”, *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), pp. 542–543; R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 226 *et seq.*; P. Lamberti Zanardi, “Necessità (Diritto internazionale)”, *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 898 *et seq.*; R. Taoka, *The Right of Self-Defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 82 *et seq.*

¹⁷² Among the writers in favour of accepting state of necessity as one of the circumstances precluding wrongfulness in international law are D. Anzilotti, “La responsabilité internationale des États à raison des dommages soufferts par des étrangers”, *Revue générale de droit international public* (Paris), vol. XIII, No. 3 (1906), pp. 303–304, and *Cours de droit international*, French trans. by G. Gidel of the 3rd Italian ed. [1928] (Paris, Sirey, 1929), pp. 508 *et seq.*; F. von Liszt, *Le droit international*, French trans. by G. Gidel of the 9th German ed. [1913] (Paris, Pedone, 1927), pp. 201–202; J. Kohler, *Not kennt kein Gebot—Die Theorie des Notrechtes und Ereignisse unserer Zeit* (Berlin, Rotschild, 1915); P. Schoen, “Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen”, *Zeitschrift für Völkerrecht* (Breslau, Kern’s, 1917), supplement 2 to vol. X, pp. 110 *et seq.*; A. Faatz, “Notwehr und Notstand” im *Völkerrecht* (Greifswald, 1919) [thesis]; K. Strupp, “Das völkerrechtliche Delikt”, *Handbuch des Völkerrechts*, ed. F. Stier-Somló (Stuttgart, Kohlhammer, 1920), vol. III, part 3, pp. 122 *et seq.*, and “Les règles générales du droit de la paix”, *Recueil des cours* . . . , 1934–I (Paris, Sirey, 1934), vol. 47, pp. 567–568; C. G. Fenwick, *International Law* (New York, Century, 1924), pp. 142–143; A. S. Hershey, *The Essentials of International Public Law and Organization*, 2nd ed. (New York, Macmillan, 1927), pp. 230 *et seq.*; T. Baty, *The Canons of International Law* (London, Murray, 1930), pp. 95 *et seq.*; K. Wolff, “Les principes généraux du droit applicables dans les rapports internationaux”, *Recueil des cours* . . . , 1931–II (Paris, Sirey, 1932), vol. 36, pp. 519 *et seq.*; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), pp. 287–288; E. Vitta, “La necessità nel diritto internazionale”, *Rivista italiana per le scienze giuridiche* (Rome), new series, vol. XI (1936), pp. 288 *et seq.*; R. Ago, “Le délit international”, *Recueil des cours* . . . , 1939–II, (Paris, Sirey, 1947), vol. 68, pp. 540 *et seq.*; G. Cohn, “La théorie de la responsabilité internationale”, *ibid.*, p. 318; Weiden, *loc. cit.*, pp. 131–132; G. Sperduti, “Introduzione allo studio delle funzioni della necessità nel diritto internazionale”, *Rivista di diritto internazionale* (Padua), 35th year, 4th series, vol. XXII, Nos. 1–2 (1943), pp. 54 *et seq.*; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 247 *et seq.*; R. Redslob, *Traité de droit des gens* (Paris, Sirey, 1950) pp. 248 *et seq.*; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 31 and 69 *et seq.*; G. Schwarzenberger, “The fundamental principles of international law”, *Recueil des cours* . . . , 1955–I (Leyden, Sijthoff, 1956), vol. 87, p. 343; L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I, pp. 297 *et seq.*; F. A. von der Heydte, *Völkerrecht, Ein Lehrbuch* (Cologne, Verlag für Politik und Wirtschaft, 1958), vol. I, pp. 297 *et seq.*; F. V. Garcia Amador, “Third report on State responsibility”, in *Yearbook* . . . 1958, vol. II, pp. 47 *et seq.*, document A/CN.4/111, chap. VI (see also art. 13, para. 1, of the draft prepared by Garcia Amador (*ibid.*, p. 72, document A/CN.4/311, annex) and art. 17, para. 2, of the revised draft by the same author (*Yearbook* . . . 1961, vol. II, p. 48, document A/CN.4/134 and Add. 1, addendum); L. Buza, “The state of necessity in international law”, *Acta juridica academiae scientiarum hungaricae* (Budapest, Akadémiai Kiadó, 1959), vol. I,

interpretation of State practice, it is mainly the old fear of abuses that determines the opposition of the first group of writers, as is confirmed by the fact that some of them are willing to accept a state of necessity in cases where the possibilities of abuse are less frequent and less serious, and particularly where it is necessary to protect a humanitarian interest of the population. Nor is the danger of abuses underestimated by the writers in the second group, but they are careful to point out that other legal principles have lent themselves to abuses in interpretation and application and that to deny, in the abstract, the existence of principles which are clearly operative in real international legal life would not check the abuses committed under cover of those principles. Thus, what these writers are more concerned to show are the inherent limits to the applicability of the notion of state of necessity.

(30) The Commission considers that the divergence of views which seems to divide the more recent opinion, like that which preceded it, into two opposing camps is, in reality, much less radical than it appears at first sight and than some vehement assertions would have us believe. In the last analysis, the “negative” position on state of necessity amounts to this: we are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unacknowledgeable purposes, but we are ultimately prepared to grant it a limited function in certain specific areas of international law less sensitive than those in which the deplored abuses usually occur. The “positive” position, on the other hand, reduced to its essentials, is this: we accept the ground of necessity as constituting a recognized principle of existing international law, and we cannot overlook the function which this concept performs in legal relations between States, as in all other legal systems; but we are careful to lay down very restrictive conditions for the application of this principle, so as to prevent this “plea” from providing too easy a pretext for violating international law with impunity. We particularly wish to make it impossible to invoke this principle in those areas where abuses have traditionally occurred in the past. Thus it is easy to see that the gap separating the best “reasoned” positions of the two camps is a narrow one. Hence the Commission does not see these doctrinal differences, the importance of which has

pp. 205 *et seq.*; M. Sørensen, “Principes de droit international public”, *Recueil des cours* . . . , 1960–III (Leyden, Sijthoff, 1961), vol. 101, pp. 219 *et seq.*; Sereni, *op. cit.* (1962), vol. III, pp. 1528 *et seq.*; A. Favre, “Fault as an element of the illicit act”, *The Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 2 (Winter 1964), pp. 565 *et seq.*; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, pp. 387 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967) pp. 338–339; J. Zourek, “La notion de légitime défense en droit international”, *Annuaire de l’Institut de droit international*, 1975 (Basel), vol. 56, pp. 66 *et seq.*; B. Graefrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 74–75.

often been exaggerated, as a serious obstacle to the accomplishment of the task entrusted to it.

(31) It was not until the Commission had carefully examined the international practice and doctrinal opinion described in the preceding paragraphs that it turned its attention to the content of the rule to be inserted in the draft articles. Before discussing this, it had naturally to decide the preliminary question whether or not an article on state of necessity should form part of chapter V of the draft articles. In this connection, one member of the Commission—without denying the merits of the rule that, exceptionally, a State might find itself justified in having adopted conduct not in conformity with an international obligation, because that was in fact the only way it could escape an extreme peril that was facing it—nevertheless expressed the opinion that such cases would be very rare and that, in view of the abuse to which the rule might lend itself, and above all of the difficulty of determining objectively that the State had an “essential” interest which was threatened by an extreme peril, it would probably be best not to insert an express provision on the subject in the draft. A few other members of the Commission were at first inclined to take this view, but were led to change their opinion after the question had been thoroughly discussed. In doing so, they continued to bear in mind the risks of abuse to which the matter might lend itself, but came round to the view of the great majority of the Commission that those risks would largely be avoided by including in the draft, in regard to state of necessity, an explicit provision that would not only set out in precise terms the various conditions that must exist for a State to be entitled, exceptionally, to invoke a state of necessity as justification for its action, but would also plainly exclude certain matters from the domain in which the state of necessity might be held to operate. The notion of state of necessity is too deeply rooted in general legal thinking for silence on the subject to be considered a sufficient reason for regarding the notion as totally inapplicable in international law, and, in any case, there would be no justification for regarding it as totally so. The fact that abuses are feared—abuses which are avoidable if detailed and carefully worded provisions are adopted—is no reason to bar the legitimate operation of a ground for precluding the wrongfulness of conduct by a State in cases in which the utility of this ground is generally acknowledged. In other words, the great majority of the Commission came to the view that any possibility of the notion of state of necessity being applied where it is really dangerous must certainly be prevented, but that this should not be so in cases where it is and will continue to be a useful “safety-valve” by means of which States can escape the inevitably harmful consequences of trying at all costs to comply with the requirements of rules of law. The imperative need for compliance with the law must not be allowed to result in situations characterized so aptly by the maxim *summum jus summa injuria*.

(32) The Commission thus decided to give an affirmative answer to the question whether the text of the draft article should contain a provision of an act not in conformity with an international obligation. It then set about the task of determining, firstly, what conditions must exist—and coexist—for a State to be entitled to invoke the existence of a state of necessity as justification for a course of conduct not in conformity with an international obligation. In this connection, the Commission found that the first condition which called for mention concerned the manner of determining those interests of the State which must be in peril for the State to be justified in adopting conduct not in conformity with what is required of it by an international obligation. In the view of the Commission, the most appropriate way of determining them was to indicate that an essential interest of the State must be involved, but this does not mean that the Commission considered the interest in question to be solely a matter of the “existence” of the State; it has made it quite clear in its review of practice that the cases in which a state of necessity has been invoked in order to safeguard an interest of the State other than the preservation of its very existence have ultimately proved more frequent and less controversial than the cases in which a State has sought to justify itself on the ground of a danger to its actual existence. As regards the specific identification of the State interests that could be described as essential, the Commission decided that it would be pointless to try to spell them out any more clearly and to lay down pre-established categories of interests. The extent to which a given interest is “essential” naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.

(33) Secondly, the Commission thought it essential to point out that the peril, the danger to what proves in the circumstances to be a genuinely “essential” interest of the State, must have been extremely grave, that it must have been a threat to the interest at the actual time, and that the adoption by that State of conduct not in conformity with an international obligation binding it to another State must definitely have been its only means of warding off the extremely grave and imminent peril which it apprehended; in other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations. Also, not just part but the whole of the conduct in question must have proved indispensable for preserving the essential interest threatened. Any conduct going beyond what is strictly necessary for this purpose will inevitably constitute a wrongful act *per se*, even if the excuse of necessity is admissible as regards the remainder of the conduct. In particular, it is self-evident that once the peril has been averted by the adoption of conduct conflicting with the international obligation, the

conduct will immediately become wrongful if persisted in, even though it has not been wrongful up to that point. Compliance with the international obligation affected must, if still materially possible, begin again without delay.

(34) Thirdly, the Commission pointed to the condition that the State claiming the benefit of the existence of a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity.

(35) Fourthly, the Commission wished to draw particular attention to the fact that the interest of the State towards which the obligation existed—the interest sacrificed to the need of assuring the otherwise impossible defence of an “essential” interest of the State—must itself be a less essential interest of the State in question. In other words, it wishes to point out that the interest sacrificed on the altar of “necessity” must obviously be less important than the interest it is thereby sought to save. The Commission considered this point particularly important in view of its having barred the possibility of the state of necessity being invocable to safeguard the State’s interest in its own “existence” and nothing else.

(36) The Commission wishes to reiterate that the above conditions must coexist for a State to be entitled to invoke a state of necessity as justification for conduct not in conformity with an international obligation. In regard to those conditions, it feels it worth while to observe that the State invoking the state of necessity is not and should not be the sole judge of the existence of the necessary conditions in the particular case concerned. Obviously, at the moment when the State adopts the conduct conflicting with the international obligation, only that State itself can decide whether those conditions exist; it does not really have time in its situation of imminent peril to refer the matter to any other instance. But this does not mean that the determination of the existence of the conditions that permit the State to act out of a state of necessity will be left for good to the unilateral discretion of the State that relies on those conditions. The State affected by the conduct alleged to have been adopted in a state of necessity may very well object that the necessary conditions did not exist. This will give rise to a dispute, which will need to be settled by one of the peaceful means specified in Article 33 of the Charter.

(37) The Commission thus defined the conditions which it considered should coexist for a State to be entitled to invoke a state of necessity as precluding the wrongfulness of conduct adopted by it in breach of an international obligation. It then turned to the question whether the invocability of a state of necessity should not be totally barred *a priori* in cases in which the conduct requiring justification conflicted with certain particular categories of international obligations. The first such category which the Commission considered in this context was that of obligations arising out of

peremptory norms of international law (*jus cogens*), i.e., norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character. In the Commission’s view, a decisive point in this connection is that peremptory rules may not be derogated from by the mutual agreement of the parties concerned, and that accordingly, as laid down in article 29, the consent of the injured State can in no event preclude the wrongfulness of an act of a State not in conformity with an international obligation created by such a rule. This obviously means that peremptory rules are so essential for the life of the international community as to make it all the more inconceivable that a State should be entitled to decide unilaterally, however acute the state of necessity which overtakes it, that it may commit a breach of the obligations which these rules impose on it. Moreover, States have most often abusively invoked a state of necessity in the past as justification for breaches of precisely this kind of obligation. Here again, of course, the Commission has simply referred in general to the obligations arising from the rules of *jus cogens*, and has not tried to enumerate them or specify them in any particular way. The question whether the obligation breached for reasons of necessity was peremptory or not will have to be settled, in each particular case, by reference to the general international law in force at the time the question arises. The only point which the Commission feels it appropriate to make in this commentary is that one obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State. The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation. The rule outlawing genocide and the rule categorically condemning the killing of prisoners of war were mentioned in the discussion as further examples of rules whose breach is in no event to be justified on any ground of necessity.

(38) The second category of obligations to which the Commission referred, with the same aim, was that of obligations established in the text of a treaty, where the treaty is one whose text indicates, explicitly or implicitly, that the treaty excludes the possibility of invoking a state of necessity as justification for conduct not in conformity with an obligation which it imposes on the contracting parties. This possibility is obviously excluded if the treaty explicitly says so, as in the case of certain humanitarian conventions applicable to armed conflicts. However, there are many cases in which the treaty is silent on the point. The Commission thinks it important to observe in this connection that silence on the part of the treaty should

not be automatically construed as allowing the possibility of invoking the state of necessity. There are treaty obligations which were especially designed to be equally, or even particularly, applicable in abnormal situations of peril for the State having the obligation and for its essential interests, and yet the treaty contains no provision on the question now being discussed (this is true of other humanitarian conventions applicable to armed conflicts). In the view of the Commission, the bar to the invocability of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted. The Commission therefore felt it was particularly important to mention this situation too in connection with the present article.

(39) As regards those cases in which, on the other hand, the Commission decided that it should not exclude the possibility of invoking the state of necessity as justification for conduct of a State not in conformity with an international obligation, it asked itself whether such an exclusion, if established, would have the effect not only of completely relieving the State of the consequences which international law attaches to an internationally wrongful act, but also of relieving it of any obligation it might otherwise have to make compensation for damage caused by its conduct. Several publicists who regard a state of necessity as a circumstance precluding the wrongfulness of an act of a State nevertheless consider that the State should, all the same, be bound to make compensation for the material damage caused by the act in question. The Commission found instances in State practice where States relied on the existence of the state of necessity to justify their conduct but offered to make compensation for the material damage it had caused. This being so, the Commission takes the view that there can be no question of excluding the possibility of an obligation of this kind being laid on the State which has adopted the conduct justified by a state of necessity. Some members of the Commission went so far as to suggest that a state of necessity should not be regarded as a circumstance precluding the wrongfulness of the act of a State, but as a circumstance mitigating the responsibility arising from the wrongful act of the State. But this was not the view of the Commission as a whole, which did not fail to note that the existence of a genuine state of necessity, just like the existence of any other circumstance mentioned in the present chapter, has the effect of totally ridding the conduct of the acting State of its wrongfulness, but not thereby of necessarily precluding that State from being asked to make compensation for the injurious consequences of its action, even if that action is totally free of wrong. In other words, in the view of the Commission, the preclusion of the wrongfulness of an act of a State does not automatically entail the consequence that this act may not, in some other way, create an obligation to make compensation for the damage, even though that obligation should not be described as an obligation “to

make reparation for a wrongful act”. The Commission recalled, moreover, that the question of a possible obligation to make compensation for damage had already arisen in connection with the situations provided for in articles 29, 31 and 32, and that it had decided then that the conclusion to be reached on this question should be deferred and dealt with in a separate single article; it therefore decided that the same should be done with the present article.

(40) As regards the wording of the article, the Commission chose to adopt a negative formula, modelled to some extent on the solution taken in article 62 of the Vienna Convention on the Law of Treaties;¹⁷³ this was done in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception—and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness considered in chapter V. The Commission did not overlook the importance of the fact that, unlike what happens in the cases provided for in article 30 (Countermeasures) and article 34 (Self-defence), the State in regard to which a state of necessity is invoked as a justification for non-fulfilment of an international obligation may be, and often is, in the case in point, an entirely innocent State; that, unlike what happens in the case provided for in article 29 (Consent), the State has never given its consent to the act committed in regard to it; and that, unlike what is found in the cases provided for in article 31 (*Force majeure* and fortuitous event) and article 32 (Distress), the conduct which a State aims to justify on the ground of a state of necessity is entirely voluntary and intentional conduct.

(41) In *paragraph 1* of the article, the Commission has set out the various conditions which must in any case and at the same time be met by the situation invoked if a State is to be able to claim that the wrongfulness of its act is precluded by reason of that situation. In *paragraph 2*, the Commission has added an indication of the cases in which, even if the conditions set out in paragraph 1 are satisfied, the existence of a state of necessity cannot preclude the wrongfulness of an act of the State not in conformity with the obligation. The first of these cases, provided for in subparagraph (*a*), is that in which the obligation in question is one arising out of “a peremptory norm of general international law”. The Commission did not consider it necessary to introduce into the text of the article an explanation of the significance of this expression, which appears in article 29, since it wished to avoid unnecessary repetition in the same chapter of the draft articles. The Commission will, moreover, examine on second reading the question whether this explanation would be better placed in an article containing definitions. The second case, mentioned in

¹⁷³ *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. 297.

subparagraph (b), is that in which the obligation with which the conduct is not in conformity is an obligation "laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation". Several members of the Commission emphasized the importance they attached to mentioning the case in which the exclusion, although only implicit, was none the less evident and important. Finally, as regards the exclusion provided for in subparagraph (c), it must be mentioned that the form of words "if the State in question has contributed to the occurrence of the state of necessity" is that used in paragraph 2 of articles 31 and 32. By those words, the Commission intended to refer to the case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification for its non-fulfilment of an international obligation.

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) This article relates to self-defence only from the standpoint and in the context of the circumstances precluding wrongfulness covered by chapter V of the draft. Its sole purpose is to indicate that, when the requisite conditions for a situation of self-defence are fulfilled, recourse by a State to the use of armed force with the specific aim of halting or repelling aggression by another State cannot constitute an internationally wrongful act, despite the existence at the present time, in the Charter of the United Nations and in customary international law, of the general prohibition on recourse to the use of force. Accordingly, this article does not seek to define a concept that, as such, goes beyond the framework of State responsibility. There is no intention of entering into the continuing controversy regarding the scope of the concept of self-defence and, above all, no intention of replacing or even simply interpreting the rule of the Charter that specifically refers to this concept. The article merely takes as its premise the existence of a general principle admitting self-defence as a definite exception, which cannot be renounced, to the general prohibition on recourse to the use of armed force, and merely draws the inevitable inferences regarding preclusion of the wrongfulness of acts of the State involving such recourse under the conditions that constitute a situation of self-defence.

(2) The absolutely indispensable premise for the admission of a self-contained concept of self-defence, with its intrinsic meaning, into a particular system of

law is that the system must have contemplated as a general rule the general prohibition of the use of force by private subjects and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Another element—which, in logic, is not so indispensable as the foregoing, but has been confirmed in the course of history as its necessary complement—is that the use of force, even for strictly defensive purposes, is likewise admitted not as a general rule, but only as an exception to a rule under which a central authority has a monopoly or virtual monopoly on the use of force so as to guarantee respect by all for the integrity of others. Only in specific situations where, by its very nature, the use of force by the agencies of the central authority cannot be resorted to promptly and efficiently enough to protect a subject against an attack by another does the use of means of defence involving force by the subject in question remain legitimate. In view of these remarks, it is obvious that only in relatively recent times did the international legal order adopt a concept of self-defence that, in certain essential aspects, is entirely comparable to that normally employed in national legal systems. It is in any case obvious that the gradual development of the definition of the concept could only go hand in hand with that of the principle outlawing wars of aggression and conquest, regardless of the times or the circles in which the principle asserted itself in the international law in force.

(3) In view of the considerations set out in the commentary to draft article 33 in connection with the study of the features that distinguish state of necessity from the other circumstances precluding wrongfulness, it is not now necessary to spend much time on determining the aspects in which in theory self-defence resembles state of necessity or the aspects which, by contrast, clearly differentiate the two concepts. Admittedly, a State acting in self-defence, like a State acting in a situation of necessity, acts in response to an imminent danger or peril, which must in both cases be serious, immediate and incapable of being countered by other means. But, as has been pointed out, the State towards which another State adopts a course of conduct not in conformity with an international obligation without having any excuse other than "necessity" may be completely innocent, a State which has committed no international wrong against the State that took the action. It may in no way have been responsible by any of its own actions for the danger threatening the other State.¹⁷⁴ By contrast, the State

¹⁷⁴ This does not mean that the imminent peril cannot originate in the State's own territory, in the area in which it exercises its sovereignty, e.g. from actions carried out in that territory by private persons not acting on behalf of the State or not under its control. The test for deciding that a case comes within the scope of state of necessity and not within the scope of self-defence is that the cause of the grave and imminent peril must not be an act attributable to the State and constituting non-performance by that

(Continued on following page.)

against which another State acts in self-defence is itself the cause of the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law but also constitutes the especially serious specific international offence of recourse to armed force in breach of the existing general prohibition on such recourse. Acting in self-defence means responding by force to wrongful forcible action carried out by another. In other words, for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of armed force, by the subject against which the action is taken.¹⁷⁵

(4) Again, a distinction should be drawn between action taken by a State in self-defence and action constituting legitimate exercise of one of the countermeasures that a State can take against another State which has committed an internationally wrongful act, i.e. the countermeasures dealt with in article 30 of the draft. A comparison has sometimes been made between action taken by a State in the form of self-defence and action taken in the form of reprisals. There is undeniably a common element in that, in both cases, the State—normally at least—takes action after it has suffered an internationally wrongful act, in other words, the failure to respect one of its rights by the State against which the action is directed. However, any possible analogy stops there. The internationally wrongful acts which make it permissible, exceptionally, for the State suffering them to adopt, in the form of countermeasures against the responsible State, conduct otherwise not in conformity with an international obligation may be extremely varied; by contrast, the only internationally wrongful act which makes it permissible, exceptionally, for a State to react against it by recourse to force, despite the general prohibition of the use of force, is an offence which itself constitutes a

violation of that prohibition.¹⁷⁶ Hence the offence is not only an extremely serious one, but is also of a very specific kind.¹⁷⁷

(5) Moreover, and even more important, self-defence and countermeasures (sanctions or enforcement measures) are reactions that relate to different points in time and, above all, are logically distinct. Action in self-defence is action taken by a State to defend its territorial integrity or its independence against violent attack; it is action whereby “defensive” means are used to resist an “offensive” use of armed force, with the object of preventing another’s wrongful action from proceeding and achieving its purpose. Action taking the form of a sanction, on the other hand, consists in the application *ex post facto*, to a State committing a wrongful act, of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially punitive; this punitive purpose may be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of the conduct which is being punished, or again, it might constitute a means of exerting pressure in order to obtain compensation for harm suffered, etc.¹⁷⁸ Be that as it may, the point is that self-defence is a reaction to the commission of a specific kind of internationally wrongful act of the kind discussed here, whereas sanctions, including reprisals, are reactions that fall within the context of the operation of the consequences of the internationally wrongful act in terms of international responsibility. It may also be noted that there is nothing to stop a State which, in the circumstances and

¹⁷⁶ It is often said that acts of unarmed aggression also exist (ideological, economic, political, etc.), but even though they are condemned, it cannot be inferred that a State which is a victim of such acts is permitted to resort to the use of armed force in self-defence. Hence, these possibly wrongful acts do not fall within the purview of the present topic, since recourse to armed force, as analysed in the context of self-defence, can be rendered lawful only in the case of armed attack.

¹⁷⁷ See, for example, Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), p. 131, and Žourek, *loc. cit.*, p. 60.

¹⁷⁸ Similar ideas are to be found in the publications of the most authoritative writers on international law. See Strupp, “Les règles générales . . .” (*loc. cit.*), p. 570; H. Waldock, “The regulation of the use of force by individual States in international law”, *Recueil des cours* . . ., 1952-II (Paris, Sirey, 1953), vol. 81, p. 464; Quadri, *op. cit.*, pp. 266 *et seq.*, 270 *et seq.*; D. W. Bowett, “Reprisals involving recourse to armed force”, *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), pp. 3 *et seq.*; Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 133 *et seq.*; Žourek, *loc. cit.*, pp. 60–61. Soviet writers too—for example, Levin and Petrovski—normally exclude self-defence from the sanctions allowed as legitimate countermeasures in response to an internationally wrongful act. E. I. Skakunov (“Samooborona i vopros o sanktsiakh v mejdunarodnom prave”, *Pravovedenie* (Leningrad), No. 3 (May–June 1970), pp. 107 *et seq.*) is an exception to this trend and criticizes the prevailing view, which he reproaches for the exclusively punitive idea of a sanction. In his opinion, the concept of a sanction should be extended to include measures aimed at securing application of the law. In this respect, therefore, he presents self-defence as a form of sanction.

(Foot-note 174 continued.)

State of an international obligation towards the State which reacts out of “necessity”. This point has to be made because, under the influence of a now obsolete terminology, measures taken against individuals, merchant ships or private aircraft in circumstances not implying any international responsibility on the part of the State of nationality of those individuals, ships or aircraft are sometimes classed as measured of “self-defence”.

¹⁷⁵ The great majority of writers agree that, unlike the case of state of necessity, to be able to invoke self-defence it is indispensable that the State against which measures of self-defence are taken shall have committed an internationally wrongful act. See, among the more recent writers, Bowett, *op. cit.*, p. 9; G. Arangio-Ruiz, “Difesa legittima (Diritto internazionale)”, *Novissimo Digesto Italiano* (Turin), vol. VI (1960), p. 632; J. Delavanis, *La légitime défense en droit international public moderne* (Paris, Librairie générale de droit et de jurisprudence, 1971), pp. 63–64; P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), p. 120; Žourek, *loc. cit.*, pp. 59 *et seq.*; Taoka, *op. cit.*, pp. 2 *et seq.*

for the purposes mentioned, uses force against another State in self-defence against a wrongful attack made by the latter from later adopting sanctions in respect of the offence suffered.¹⁷⁹ However, these measures manifestly do not form part of the action taken in self-defence; their purpose is different and, if they are justifiable, the reasons for their justification are different.

(6) Again, self-defence almost by its very nature involves the use of armed force. On the other hand, in consequence of the evolution that has apparently occurred in the legal thinking of States since the Second World War and which the Commission described in the commentary to article 30 of the draft,¹⁸⁰ it seems to be settled law that sanctions and the other countermeasures capable of being applied directly against the State committing an international wrong by the State suffering the wrong can now no longer—as they used to do—involve the use of armed force. As stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970,¹⁸¹ “States have a duty to refrain from acts of reprisal involving the use of force.” Armed reprisals cannot now be considered as legitimate. This may be regarded as a further element of differentiation, if such is needed, between the concept of self-defence and the countermeasures dealt with in article 30 of the draft.¹⁸² The prevailing view nowadays is that only the sanctions referred to in Chapter VII of the Charter of the United Nations can entail a lawful use of force. But it goes without saying that, in that instance too, a distinction will have to be made between the use of measures involving recourse to armed force as a “sanction” properly speaking from the use of armed force in the context, for example, of collective self-defence.

(7) This should not lead to the mistake, one that has already been amply decried in connection with “state of necessity”, of seeking in another concept a needless justification or a basis for “self-defence”. Moreover, self-defence cannot be confused with the concept of self-help (*autoprotection*, *Selbsthilfe*, *autotutela*, etc.), whereby legal theory describes and encompasses all

the specific forms taken by the system recognizing that, in principle, a State which enjoys a particular subjective right is entitled, where necessary, to take action to protect and safeguard that right within an egalitarian society such as the international community. “Self-defence” may therefore be regarded as a form of “armed self-help or self-protection” that, under modern international law, States are permitted to exercise directly.

(8) The legal justification for the effect attributed in terms of international responsibility for an internationally wrongful act to a situation of self-defence is here, as in all the other circumstances considered in this chapter of the draft, the existence of a rule of international law—a rule which specifically provides that action taken in self-defence does not come under the general ban now existing on recourse to armed force. It is indispensable to differentiate most clearly the concept of self-defence properly so-called from all the other concepts. Self-defence is a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to defend himself by the use of force against attack by another. Nowadays this is as true in the system of international law as in the systems of national law, where the concept was defined long ago. The State which is a victim of an armed attack and is therefore placed in a situation of self-defence is exceptionally permitted under international law to resort to the use of armed force to halt the attack and prevent it from succeeding, regardless of any actual punitive intention. The Charter of the United Nations expressly recognizes its right to do so. To distinguish self-defence from other concepts does not in any way deny that States may, in other circumstances, resort to certain courses of conduct that are justified by a state of necessity, even distress, or exonerated from any wrongfulness as lawful measures in response to an infringement of their rights that has nothing to do with an armed attack—on the understanding, of course, that the present limitations on such kinds of response are borne in mind.¹⁸³

(9) As has already been pointed out,¹⁸⁴ only relatively recently did the international legal order finally begin to contemplate a genuine and complete ban on the use of force as a means employed by States to safeguard their rights and interests. Only since then therefore, after the fulfilment of this paramount condition, has the principle come to be fully asserted

¹⁷⁹ See for example Quadri, *op. cit.*, pp. 269 *et seq.* Quadri none the less regards the two concepts as quite distinct.

¹⁸⁰ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 115 *et seq.*, document A/34/10, chap. III, sect. B.2, commentary to article 30.

¹⁸¹ Resolution 2625 (XXV), annex.

¹⁸² The distinction between self-defence and reprisals is unquestionably of practical importance. See, for example, the discussions in the Security Council on the attack carried out by the British Royal Air Force against the Yemen Arab Republic on 28 March 1964 (*Repertoire of the Practice of the Security Council, Supplement 1964–1965* (United Nations publication, Sales No. E.68.VII.1), chap. XI, part IV, Case No. 7). See also the discussions which took place in the Security Council on the attack against two United States destroyers in the Gulf of Tonkin on 4 August 1964 (*ibid.*, Case No. 8).

¹⁸³ The Commission realizes that behind the idea of describing as instances of self-defence cases which do not come within such a definition there may be the intention to circumvent the obstacle—one that some people consider to be too categorical—to the use of coercion in the application by a State of countermeasures designed to impose sanctions or to secure performance of an obligation after an infringement of its rights falling short of armed attack. Nevertheless, to advocate misguided interpretations of certain provisions could lead to a dangerous confusion of principles.

¹⁸⁴ See para. (2) of this commentary.

that, in international relations, recourse to war can only be compatible with the general prohibition of the use of armed force if it is in the nature of a defence against an armed attack by another subject in breach of the prohibition. The ban, now undeniably applicable to every State, on engaging in any violent infringement of the integrity or independence of another State represents in itself both the necessary and the sufficient condition for the full validity of the concept of self-defence in the international legal order. After the Second World War, the Charter of the United Nations, which enunciates the principle banning the use or threat of force in international relations in the clearest terms, also expressly recognizes the right to defend oneself by using armed force, if necessary, in a situation of self-defence. Before the Charter, in the period between the two wars, the adoption in various international instruments of clauses designed to restrict progressively, and eventually to outlaw, the freedom of States to resort to war and occasionally, in a more general way, their freedom to use armed force in any manner whatsoever, clearly reveals a parallel tendency to limit the scope of those clauses. The limitation is reflected in an exception, the effect of which is to rule out the wrongfulness of conduct involving recourse to war in the case where a State would do so only in order to defend itself against armed attack.¹⁸⁵

(10) Several of the instruments adopted at that time which provide for a general or special prohibition of recourse to war for the settlement of international disputes also contain an express clause stating the exception in question. In this respect, reference may be made to the Geneva Protocol for the Pacific Settlement of International Disputes, adopted by the Fifth Assembly of the League of Nations on 2 October 1924¹⁸⁶ and the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, which constitutes annex A to the Final Protocol signed at Locarno on 16 October 1925 and is known also as

the Rhine Pact.¹⁸⁷ Language similar to that used in the Rhine Pact recurs in bilateral treaties signed between 1926 and 1929.¹⁸⁸ Similar terms also occur in the model treaties of reciprocal assistance and non-aggression prepared in 1928 by the League of Nations Committee on Arbitration and Security.¹⁸⁹

(11) The attitude observed, and the conviction expressed, by States in connection with the scope and application of certain instruments intended to limit to extreme situations the possibility of resorting to armed force or designed even to rule out this possibility altogether, although the relevant clauses do not contain an express provision concerning the lawfulness of the use of armed force by a State that meant only to defend itself, is even more significant as regards the existence—undisputed even at that time—of the principle that self-defence is a situation that has the effect of precluding, exceptionally, the wrongfulness of conduct involving the use of armed force. The Covenant of the League of Nations and the General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (more commonly known as the Briand-Kellogg Pact or simply the Pact of Paris)¹⁹⁰ were occasions for particularly significant statements in this regard. Both the Member States and the bodies of the League of Nations at all times expressed the conviction that, although there was no such express provision in the Covenant, recourse to armed force in a situation of self-defence remained perfectly lawful despite the limitations on recourse to

¹⁸⁵ For a detailed discussion of the agreements entered into and, more generally, of the practice of States in the period 1920–1940, see in particular Lamberti Zanardi, *La legittima difesa* ... (op. cit.), pp. 79 et seq. See also Brownlie, op. cit., pp. 231 et seq.; Zourek, loc. cit., pp. 25 et seq.; Taoka, op. cit., pp. 88 et seq.

¹⁸⁶ League of Nations, *Official Journal, Special Supplement No. 21*, p. 21.

The general report on the Protocol, submitted to the Fifth Assembly of the League of Nations by Mr. Politis (Greece) and Mr. Beneš (Czechoslovakia), states that the prohibitions of recourse to war in article 2:

“affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim.” (League of Nations, *Official Journal, Special Supplement No. 23*, p. 483.)

At the same time, the Protocol provided another express exception to the obligation not to resort to war, viz. in the case where States resorted to war “with the consent of the Council or the Assembly of the League of Nations under provisions of the Covenant and the Protocol”.

¹⁸⁷ League of Nations, *Treaty Series*, vol. LIV, p. 289.

The notion of self-defence endorsed by the Rhine Pact was not limited to a State's resistance to an act of aggression directed against its own territory but extended also to resistance to an occupation of the demilitarized zone of the neighbouring State's territory. The Pact likewise provided for a further exception to the obligation laid down in article 2(1), viz., in the case of action in pursuance of Article 16 of the Covenant of the League of Nations or, more generally, in the case of action as the result of a decision taken by the Assembly or the Council of the League. For comments made on these points at the time, see *inter alia* K. Strupp (*Das Werk von Locarno* (Berlin, de Gruyter, 1926) and G. Salvioni (“Gli accordi di Locarno”, *Rivista di diritto internazionale* (Rome), XVIIIth year, 3rd series, vol. V (1926), pp. 429 et seq.).

¹⁸⁸ For example, the treaties of 10 June 1926 between France and Romania (League of Nations, *Treaty Series*, vol. LVIII, p. 226), art. 1; of 11 November 1927 between France and the Kingdom of the Serbs, Croats and Slovenes (*ibid.*, vol. LXVIII, p. 374), art. 1; of 27 March 1929 between Greece and the Kingdom of the Serbs, Croats and Slovenes (*ibid.*, vol. CVIII, p. 202), art. 2; of 21 March 1928 between Greece and Romania (*ibid.*, p. 188), art. 1.

¹⁸⁹ All the model treaties contained a clause in approximately the following terms:

“Each of the High Contracting Parties undertakes, in regard to each of the other Parties, not to attack or invade the territory of another Contracting Party, and in no case to resort to war against another Contracting Party”.

This stipulation did not, however, apply in the case of exercise of the right of self-defence, that is to say, the right to resist a violation of the undertaking entered into. (League of Nations, *Official Journal, Special Supplement No. 64*, pp. 513 et seq.)

¹⁹⁰ League of Nations, *Treaty Series*, vol. XCIV, p. 57.

armed force introduced by the Covenant.¹⁹¹ In armed conflicts, the States concerned and the bodies of the League of Nations never challenged the principle of the validity of self-defence as justification for recourse to armed force. They tended, rather, to go no further than to query the admissibility of the justification in particular cases.¹⁹²

(12) The diplomatic correspondence which preceded the conclusion of the Briand-Kellogg Pact in 1928¹⁹³ shows clearly that the contracting parties were fully in agreement in recognizing that the renunciation of war which they were about to proclaim¹⁹⁴ in no way debarred the signatories from the exercise of self-defence. The French and the British Governments stressed this point. The reason why the contracting parties eventually recognized, after the interpretative statements made by the Department of State of the United States of America, that it was not necessary to include in the treaty an express proviso for the case of self-defence was that they wished to accede to the opinion of the American Secretary of State, who argued that the value of the treaty depended largely on its simplicity, and also that they agreed with him that such a clause was superfluous. In their eyes, it was a self-evident truth that war waged in a situation of self-defence was not wrongful, a principle which should be recognized as implicitly written into any conventional instrument intended to limit or prohibit recourse to war—a principle which, in the final analysis, was bound to clash with the terms of the treaty in such a situation.¹⁹⁵ By the views that they expressed, the

contracting parties even gave the impression that they frankly admitted the existence of a principle of international law that was absolutely binding, did not admit of any derogation by a treaty, even a multi-lateral treaty, and meant that conduct adopted by a State in a situation of self-defence ceased to be wrongful.

(13) A like conviction regarding the existence of an absolute, or even peremptory, principle under which recourse to war—henceforth undeniably regarded as wrongful—ceases to be wrongful in a situation of self-defence, seems to be confirmed in the replies given by States to a questionnaire prepared by the Secretariat of the League of Nations concerning any amendments to be made in the League Covenant in order to bring it into harmony with the terms of the Briand-Kellogg Pact,¹⁹⁶ and also the statements made in the course of the debate on the question in the First Committee of the League of Nations Assembly during the Assembly's eleventh and twelfth sessions.¹⁹⁷ States then said that a total prohibition without "loopholes" on recourse to war would not affect the right to resort to war in cases where the conditions of a situation of self-defence were fulfilled. The same ideas are found in the report that was prepared on the close of the proceedings of the First Committee and submitted to the twelfth session of the Assembly.¹⁹⁸

(14) To close the list of the occasions between the two World Wars on which States were able to comment on the plea of self-defence in justification of conduct that would otherwise be wrongful, reference should also be made to some of the answers given by Governments to point XI (a) of the request for information by the Preparatory Committee of the Hague Conference of 1930 on the responsibility of States for damage caused to the person or property of foreigners.¹⁹⁹ The Government of Belgium, for example, stated that "the State is justified in disclaiming responsibility in the case of self-defence against an aggressor State",²⁰⁰ and the Government of Switzerland answered that "the situation of self-defence exists where a State suffers an *unjust aggression, contrary to law*."²⁰¹ Other Governments also agreed with the principle that a situation of self-defence permitted a State to disclaim responsibility, in other words, it

¹⁹¹ See Lamberti Zanardi, *La legittima difesa . . .* (op. cit.), pp. 90 et seq.

¹⁹² This is what happened in the cases of the Graeco-Bulgarian dispute of 1925 concerning a frontier incident, the dispute of 1932–1934 between Paraguay and Bolivia concerning the Chaco territory, the dispute between Japan and China in 1931–1934 concerning Manchuria, the Italo-Ethiopian dispute of 1935, and the Sino-Japanese dispute of 1937.

¹⁹³ See the documents reproduced in A. Lysen, ed., *Le Pacte Kellogg—Documents concernant le traité multilatéral contre la guerre signé à Paris le 27 août 1928* (Leyden, Sijthoff, 1928); and the passages cited in the note, probably by T. Perassi, "Trattato di rinuncia alla guerra", published with the text of the Pact in *Rivista di diritto internazionale* (Rome), 21st year, 3rd series, vol. VIII (1929), pp. 429 et seq.

¹⁹⁴ In article I of the Briand-Kellogg Pact (for reference, see foot-note 129 above), the high contracting parties declared:

"in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another",

and in article II, they agreed:

"that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means".

¹⁹⁵ To reassure the other partners, the American Government stated expressly that what it called "the right of self-defence" was, in its opinion, "inherent in every sovereign State and it is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion . . .". Many other States, including Italy and Japan, referred to this statement at the time of signing or acceding to the Pact. See Zourek, loc. cit., pp. 32 et seq.

¹⁹⁶ See, for example, the reply of the Italian Government (League of Nations, *Official Journal*, 12th year, No. 8 (August 1931), p. 1602.

¹⁹⁷ See, for example, the statement by the representative of Germany (League of Nations, *Official Journal, Special Supplement No. 94*, p. 41).

¹⁹⁸ *Ibid.*, *Special Supplement No. 93*, pp. 221 et seq.

¹⁹⁹ Point XI (a) of the request read:

"Circumstances in which a State is entitled to disclaim responsibility: (a) What are the conditions which must be fulfilled: 'When the State claims to have acted in self-defence'?"

²⁰⁰ League of Nations, *Bases of discussion . . .*, op. cit., p. 125.

²⁰¹ *Ibid.*, p. 127.

exonerated the State from the otherwise undeniable wrongfulness of the conduct that it adopted.²⁰²

(15) The International Military Tribunals of Nuremberg and Tokyo, established respectively by the Agreements of 8 August 1945 and 19 January 1946, virtually took it for granted that during the period from 1920 to 1939 there had come into being in international law a principle the effect of which was to preclude the wrongfulness of the use of armed force in a situation of self-defence, as an exception to and indefeasible limitation on the general ban on the use of armed force laid down by international instruments such as, in particular, the Briand-Kellogg Pact. The particular issue that had to be adjudicated by the Nuremberg Tribunal was whether the invasion by Nazi Germany of Denmark and Norway, and later of Belgium, the Netherlands and Luxembourg, and also its attack on the USSR, could be justified as acts committed in a situation of self-defence.²⁰³ The same issue came before the Tokyo Tribunal in connection with the conduct of Japan, on the one hand, and the Netherlands on the other (the question of the declaration of war by the Netherlands on Japan).²⁰⁴ In the judgements of both tribunals, the principle itself that conduct involving the use of armed force in self-defence was lawful was not challenged in any way whatsoever. What was challenged was the *de facto* existence of conditions representing a situation of self-defence, and it was solely on that basis that the plea of self-defence was rejected. The Tokyo Tribunal had occasion to state explicitly in an *obiter dictum*, in its judgement of 1 November 1948, that:

Any law, international or municipal, which prohibits recourse to force is necessarily limited by the right of self-defence.²⁰⁵

(16) Like the discussion of State practice, and for the same reasons, the study of doctrine confirms the

principle that a situation of self-defence justifies, exceptionally, conduct which would otherwise be internationally wrongful by reason of the bans which arose on the use of armed force. That having been said, the opinions of theoretical writers, especially in the period between the two World Wars, are based in many cases on a notion of self-defence that is in fact much closer to the one characterized today as "state of necessity" than to the notion denoted by the term "self-defence". Writers, mostly from the English-speaking world, speak for example of "self-defence" to indicate the circumstances in which a course of conduct occurs that is designed to ward off a danger, a threat emanating, in many cases, not from the State against which that conduct is adopted but from individuals or groups that are private, or at any rate unrelated to the organization of that State.²⁰⁶ However, that is not the prevailing opinion, which is that the lawfulness of State action undertaken in such cases and for such purposes must be explained on other grounds. As regards the point at present under discussion, it is sufficient to bear in mind that the writers referred to above are unanimous in acknowledging that conduct adopted by a State against another State in resisting an unlawful attack by the latter must be considered justifiable as being in self-defence.

(17) Many other authors writing more or less during that period draw attention to the logical connection between the progress made at the time by those who favoured the prohibition of the use of armed force and the acceptance in international law of the notion of self-defence as a limitation of that prohibition. In doing so, they made it quite clear that where the particular State is forbidden, in one way or another, to use armed force, there is also necessarily an overriding reason for precluding the wrongfulness of its use if it is genuinely employed in self-defence.²⁰⁷ It is of little importance

²⁰² It should none the less be noted that the idea of self-defence various Governments had in mind was very different from that reflected in the *opinio juris* of States as it evolved *pari passu* with the gradual affirmation of the principle of the prohibition of recourse to war and as a necessary exception to that principle. What happened was that, in referring to self-defence, Governments cited the case of measures taken by a State in defence against a threat emanating, not from another State but from private persons, in other words, a case that is wholly outside the present context. This is explained by the fact that the question was whether self-defence could be regarded as a circumstance precluding the wrongfulness of State conduct in an area such as that of responsibility, not for acts committed directly against a foreign State, but for actions harming foreign private persons. Influenced by the replies, those who prepared the questionnaire ended up by framing a basis of discussion that was obviously very far removed from the proper idea of "self-defence". (See Basis of discussion No. 24, in League of Nations, *Bases of Discussion* ... (op. cit.), p. 128).

²⁰³ As regards the Nuremberg Tribunal, see the passages in the judgement of 1 October 1946 reproduced in *Trial of Major War Criminals* ... (op. cit.) (1947), vol. 1, pp. 204 *et seq.*

²⁰⁴ As regards the Tokyo Tribunal, see the passages in the judgements reproduced in: B. V. A. Röling and C. F. Rüter, eds., *The Tokyo Judgment* (Amsterdam, APA-University Press, 1977), vol. 1, pp. 46 *et seq.* and 382.

²⁰⁵ *Ibid.*, pp. 46–47.

²⁰⁶ This school of thought therefore treats the celebrated case of the steamer *Caroline* as an example of self-defence in international law. See, for example, J. L. Brierly, "Règles générales du droit de la paix", *Recueil des cours* ... 1936-IV (Paris, Sirey, 1937), vol. 58, pp. 126 *et seq.*; and also de Visscher, "La responsabilité des Etats" (loc. cit.), pp. 107 *et seq.* Actually, de Visscher states that self-defence presupposes an "unjust aggression", but this does not prevent him from citing as cases of self-defence instances in which a State reacted to attacks from private individuals. Other writers also take the view that the notion of self-defence can justify reactions to conduct other than armed attack or a threat of armed attack. Basdevant (loc. cit., pp. 545 *et seq.*) discusses the question whether armed intervention by a State in foreign territory in order to protect its nationals, or the employment of coercive measures in response to acts, even lawful acts, by another State that jeopardize the vital interests of the State resorting to such measures, ought not to be justified as being in self-defence.

²⁰⁷ See, for example, A. Cavaglieri, "Règles générales du droit de la paix", (loc. cit.), pp. 555 *et seq.*, and *Corso di diritto internazionale*, 3rd ed. (Naples, Rondonella, 1934), pp. 530 *et seq.*; Verdross, loc. cit., pp. 481 *et seq.*; D. Anzilotti, *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti* (Padua, CEDAM, 1955), vol. 1, pp. 413 *et seq.*; Kelsen, loc. cit., pp. 562 *et seq.*; E. Giraud, "La théorie de la légitime défense", *Recueil des cours* ... 1934-III (Paris, Sirey, 1934), vol. 49, p. 715; Ago, loc. cit., pp. 538 *et seq.*

that, where the wrongfulness is not explicitly precluded by the written texts establishing the prohibition, it is generally held to be implicit in the text in question, rather than imposed by a pre-existing rule of general international law from which those texts could not have derogated. In the final analysis the practical result is the same. The conviction that there exists in customary international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question is taken in self-defence will become part and parcel of the thinking of publicists when the principle *per se* of such wrongfulness moves from the sphere of purely treaty law to that of customary international law. It is furthermore significant in this connection that the authors of works published since the Second World War all recognize that the use of armed force by a State in order to repel an aggression is to be considered as lawful notwithstanding the general prohibition on the use of such force, and they hold this view irrespective of the way in which they visualize the relationship between customary law and the provisions of the Charter on the subject.

(18) The long process of totally outlawing the use of armed force in international relations has thus led to the assertion of a rule imposing on all States the duty to refrain from using armed force in their relations with one another. The principle whereby its use was condemned once and for all as utterly wrongful has become part of the legal thinking of States in the form of a peremptory rule of international law. This same process has created the conditions for the definitive assertion of the other parallel and likewise peremptory rule that self-defence is a limitation of the prohibition imposed by the first rule. Both rules are now indisputably part of general international law and, in written form, of the juridical system represented by the United Nations. The United Nations Charter in fact provides in Article 2, paragraph 4, in much stricter terms than those employed even in the Briand-Kellogg Pact, that the "use of force" and even the "threat . . . of force" against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations is prohibited. The Charter also vests in the Security Council a wide range of powers for the adoption of suitable measures to prevent, and where necessary suppress, any breach of the obligation to refrain from the use or threat of force laid down in the Charter. Moreover, the Charter does not fail to specify *expressis verbis* in Article 51 that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.²⁰⁸

²⁰⁸ All the collective defence agreements concluded since the adoption of the Charter make an explicit or implicit reference to Article 51. Some of them reproduce textually the principle laid down in the article. Examples are art. 3, para. 1, of the

(19) The other circumstances taken into consideration in the present draft in connection with the preclusion of the wrongfulness of an act of a State share with self-defence the effect indicated but, unlike self-defence, are not provided for in the United Nations Charter. In the minds of some, therefore, the question arose whether the rule in Article 51 of the United Nations Charter and a customary rule of international law on the same subject should be presumed to be totally identical in content. A majority of the writers totally reject the idea that self-defence is invocable except where an armed attack occurs against the State, either from a direct and exclusive interpretation of Article 51 of the Charter, or from a consideration of the relationship between that provision and the corresponding rule of customary international law, or from an examination of the latter law alone.²⁰⁹

Inter-American Treaty of Reciprocal Assistance (1947) (United Nations, *Treaty Series*, vol. 21, p. 77); art. 5, para. 1, of the North Atlantic Treaty (1949) (*ibid.*, vol. 34, p. 243); art. 4, para. 1 of the Treaty of Friendship, Co-operation and Mutual Assistance between Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR (1955) (*ibid.*, vol. 219, p. 3). See the list of such agreements in L. M. Goodrich, H. Hambro and A. P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed., rev., (New York, Columbia University Press, 1969), pp. 349 *et seq.*

²⁰⁹ See, among the writers holding this majority view, J. L. Kunz, "Individual and collective self-defense in Article 51 of the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.), vol. 41, No. 4 (October 1947), pp. 877 *et seq.*; N. Q. Dinh, "La légitime défense d'après la Charte des Nations Unies", *Revue générale de droit international public* (Paris), 3rd series, vol. XIX, No. 1-2 (January-June 1948), pp. 240 *et seq.*; H. Kelsen, "Collective security and collective self-defense under the Charter of the United Nations", *The American Journal of International Law*, vol. 42, No. 4 (October 1948), pp. 791-792, and *The Law of the United Nations* (London, Stevens, 1950), pp. 269, 797 *et seq.*; P. Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948), pp. 165 *et seq.*; H. Wehberg, "L'interdiction du recours à la force: Le principe et les problèmes qui se posent", *Recueil des cours . . .*, 1951-I (Leyden, Sijthoff, 1952), vol. 78, pp. 81 *et seq.*; Oppenheim, *op. cit.*, 7th ed. (1952), vol. II, p. 156; E. Jiménez de Arechaga, "La legítima defensa individual en la Carta de las Naciones Unidas", *Estudios de derecho internacional (Homenaje al profesor Camilo Barcia Trelles)*, University of Santiago de Compostela (Zaragoza, Octavio y Félez, 1958), pp. 328 *et seq.*, and *Derecho constitucional de las Naciones Unidas* (Madrid, Escuela de funcionarios internacionales, 1958), pp. 401 *et seq.*; D. Ninčić, Reply to the questionnaire prepared by G. Schwarzenberger, in: ILA, *Report of the 48th Conference of the International Law Association held at New York* (1958) (London, 1959), pp. 617 *et seq.*; S. Krylov, Statement in the debate in the ILA: *ibid.*, p. 512; Q. Wright, "United States intervention in the Lebanon", *The American Journal of International Law*, vol. 53, No. 1 (January 1959), pp. 116 *et seq.*; K. J. Partsch, "Selbsterhaltungsrecht", in *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed., rev. by H. J. Schlochauer, (Berlin, de Gruyter, 1962), vol. III, p. 257; G. Dahm, "Das Verbot der Gewaltanwendung nach Art. 2 (4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten", in *Festschrift für Rudolf Laun zu seinem achtzigsten Geburtstag*, Special No. of *Jahrbuch für internationales Recht* (Göttingen, 1962), vol. XI, pp. 51 *et seq.*

(Continued on following page.)

A contrary school of thought, however, is that the draftsmen of the United Nations Charter did not intend the rule in Article 51 to have the same object and extent as customary international law imparts to the rule that self-defence is a circumstance precluding the wrongfulness of conduct involving the use of armed force. The writers of this latter school consider that Article 51 of the Charter betrays no intention whatsoever that self-defence should be invocable solely when "an armed attack" occurs against the State. In their view, this provision simply sets out to state the rule concerning a particular case.²¹⁰ These differences of opinion among publicists have naturally been reflected in the positions taken by States in discussions of specific problems in United Nations organs.

(20) That being so, the Commission considers that no codification taking place within the framework and under the auspices of the United Nations should be based on criteria which, from any standpoint whatsoever, do not fully accord with those underlying the Charter, especially when, as in the present case, the subject-matter concerns so sensitive a domain as the maintenance of international peace and security. There have, of course, been problems of interpretation as regards Article 51 and other provisions of the United Nations Charter, and also as regards the relationship between these provisions and general international law, and such problems still exist, but it is not for the Commission to take a stand on this matter in connection with the present draft articles, nor to allow itself to be drawn into a process of interpreting the Charter and its provisions, which would be beyond its mandate. The Commission therefore sees no reason

why its commentary should set forth its position on the question of any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence. The Commission intends in any event to remain faithful to the content and scope of the pertinent rules of the United Nations Charter and to take them as a basis in formulating the present draft article.

(21) Differences of opinion are also found in principle and doctrine in regard to a whole series of questions concerning the definition of the legal notion of self-defence and the interpretation of Article 51 and other pertinent provisions of the United Nations Charter. Examples of these questions are the interpretation of the English term "armed attack" and the French term "agression armée" and the exact extent to which they coincide with each other and correspond to the terms used in other languages; the determination of the moment at which the State can claim that it is in a situation of self-defence;²¹¹ whether self-defence can be invoked to justify resistance to an action which is wrongful and injurious, but undertaken without the use of force;²¹² the meaning of "collective" self-defence.²¹³ The Commission is acquainted with the differences of opinion that exist about the conclusions that may be drawn, on these and other issues, from a textual, or a historical, or a teleological interpretation of the Charter, and from the lengthy discussions that have taken place on this subject between States with different views in numerous specific cases. It nevertheless considers it both unnecessary and inappropriate that the present draft article should deal with all these questions, which are at the very root of the "primary" rules relating to self-defence. It would be mistaken to think that it was possible, in a draft concerning rules governing the responsibility of States for internationally wrongful acts, to explore and devise solutions to

(Foot-note 209 continued.)

Brownlie, *op. cit.*, pp. 272 *et seq.*; K. Skubiszewski, "Use of force by States. Collective security. Law of war and neutrality", *Manual of Public International Law (op. cit.)* pp. 765 *et seq.*; Skakunov, *loc. cit.*, pp. 107 *et seq.*; Lamberti Zanardi, *La legittima difesa . . .* (*op. cit.*), pp. 204 *et seq.*; Delivanis, *op. cit.*, pp. 49 *et seq.*; Žourek, *loc. cit.*, pp. 52 *et seq.* (see also the comments by E. Castrén and G. Chaumont on the report by Žourek, *ibid.*, pp. 74 *et seq.*; Taoka, *op. cit.*, pp. 126 *et seq.* In the 2nd ed. of H. Kelsen's *Principles of International Law*, rev. R. W. Tucker (New York, Holt, Rinehart and Winston, 1966), this author examines the two conflicting interpretations of Article 51, but in the main he seems to prefer that in which self-defence is applicable only in the case of armed attack (pp. 64 *et seq.*). Similarly, Goodrich, Hambro and Simons, in the 3rd ed. of their commentary (see foot-note 208 above), pp. 344 *et seq.*, incline towards the narrow interpretation, thus rectifying the attitude adopted in the earlier editions.

²¹⁰ See Waldock, *loc. cit.*, pp. 495 *et seq.*, and the chapter (by Waldock) on the use of force, in Brierly, *The Law of Nations (op. cit.)*, pp. 416 *et seq.*; L. C. Green, "Armed conflict, war and self-defence", *Archiv des Völkerrechts* (Tübingen), vol. 6, No. 4 (1956-1957), pp. 432 *et seq.*, pp. 987 *et seq.*; Bowett, *Self-Defence . . .* (*op. cit.*), pp. 187 *et seq.*; the statement by L. C. Green and the communications from D. W. Bowett and V. Dedijer on the occasion of the debate in 1958 at the International Law Association (ILA, *op. cit.*, pp. 517, 598, 609 *et seq.*); M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn., Yale University Press, 1961), pp. 232 *et seq.*; M. S. McDougal, "The Soviet-Cuban quarantine and self-

defense", *The American Journal of International Law*, vol. 57, No. 3 (July 1963), pp. 597 *et seq.*; J. Stone, *Legal Controls of International Conflict* (London, Stevens, 1954), pp. 243 *et seq.*, and *Aggression and World Order* (London, Stevens, 1958), pp. 43-44. See also the comments by McDougal and by Sir Francis Vallat on the provisional report prepared by Žourek in *Annuaire de l'Institut de droit international (op. cit.)*, pp. 76 *et seq.* S. M. Schwebel, in "Aggression, intervention and self-defence in modern international law", *Recueil de cours . . .*, 1972-II (Leyden, Sijthoff, 1973), vol. 136, pp. 479 *et seq.*, carefully sets out the opinions of the writers of this school of thought and objectively marshals the arguments for and against their theses.

²¹¹ Some writers, for example, recognize the existence of "preventive" self-defence in fairly broad terms. See in this connection the particular position taken by R. L. Bindshedler, "La délimitation des compétences des Nations Unies", *Recueil des cours . . .*, 1963-I (Leyden, Sijthoff, 1964), vol. 108, pp. 397 *et seq.*

²¹² One author who goes a long way in this direction is Bowett, *Self-defence . . .* (*op. cit.*), pp. 269 *et seq.*

²¹³ It should be pointed out in this connection that the "collective" self-defence expressly mentioned in Article 51 of the Charter is recognized in general international law, just as much as "individual" self-defence, as being an exception to the general prohibition of the use of armed force.

these problems—some of which are a matter of considerable controversy—arising in United Nations practice and in doctrine from the interpretation and application of Article 51 of the Charter. The Commission's task in regard to the point dealt with in article 34, as in the case of all the other draft articles, is to codify the international law which relates to the international responsibility of States. The Commission would certainly be doing more than it has been asked to do if it tried, over and above that, to settle questions which ultimately only the competent organs of the United Nations are qualified to settle. It is not for the Commission to opt for one or another of the opposing arguments sometimes put forward with regard to the interpretation of the Charter and its clauses. Besides, it is not the purpose of the present article to seek a solution to these various problems.

(22) Nor does the Commission feel that it should examine in detail issues, discussed in some cases at length in the literature, such as the "necessary" character which the action taken in self-defence should display in relation to the aim of halting and repelling the aggression, or the "proportionality" which should exist between that action and that aim, or the "immediacy" which the reaction to the aggressive action should exhibit. These are questions which in practice logic itself will answer and which should be resolved in the context of each particular case.

(23) Having found that a "primary" rule on self-defence exists in the United Nations Charter, and in present customary international law as well, and having seen its repercussions on State responsibility, the Commission concluded that it should insert in the present chapter of the draft articles a rule whose sole purpose is to state the principle that the use of force in self-defence precludes the wrongfulness of the acts in which force is so used. In doing this, the Commission has no intention of defining or codifying self-defence, any more than it defined or codified consent, counter-measures in respect of an internationally wrongful act, and so on. Quite simply, the Commission has found that self-defence is a principle recognized both in the Charter of the United Nations and in contemporary international law and it has drawn the necessary inferences from this in regard to the present chapter of the draft, which deals with circumstances precluding wrongfulness.

(24) In this connection the Commission wishes to point out, as it indicated in the introduction to chapter V, that the purpose of this chapter is to define the circumstances in which, despite the apparent combination of the objective element and the subjective element of the existence of an internationally wrongful act, the existence of such an act cannot be inferred owing to the presence of a circumstance which stands in the way of that inference.²¹⁴ Self-defence is one of

the circumstances to be taken into account in this connection. In this case, as in the case of the other circumstances dealt with in chapter V, the effect of a situation of self-defence underlying the conduct adopted by the State is to suspend or negate altogether, in the particular instance concerned, the duty to observe the international obligation, which in the present case is the general obligation to refrain from the use or threat of force in international relations. Where there is a situation of self-defence, the objective element of the internationally wrongful act, namely the breach of the obligation not to use force, is absent and, consequently no wrongful act can have taken place.

(25) As regards the wording of the article, the Commission has been particularly careful to avoid any formulation which might give the impression that it intended to interpret or even amend the United Nations Charter. It has adopted the following text:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

The words "in conformity with the Charter of the United Nations" refer to the Charter in general and get round the problems of interpretation that might arise from a reference solely to Article 51 of the Charter out of context, or to both the Charter and general international law, or to general international law alone.

(26) Some members of the Commission nevertheless expressed reservations about this wording. In the view of some members, the general reference to the Charter should be replaced, in conformity with what the Special Rapporteur had proposed in his draft, by a specific reference to Article 51 of the United Nations Charter. A further observation was that the article should use the actual terminology of Article 51 of the Charter, namely "inherent right of . . . self-defence". A further point was made that the article would be clearer if the words "a lawful measure of self-defence taken in conformity with . . ." were replaced by the words "action taken in exercise of the right of self-defence in conformity with . . .". A majority of the Commission nevertheless took the view that, as regards the effect of "self-defence" on the lawfulness or otherwise of "an act of a State"—the only question involved in chapter V of the draft—the point to be considered was the situation of the State acting, and that it was of no importance whether that situation constituted the exercise of a "right", of a "natural right" or of any other subjective legal situation.

(27) In the view of one member of the Commission, who of course approved of the idea of the article, the text could not possibly begin with a reference to "an act of a State not in conformity with an international obligation of that State", because no act of a State

²¹⁴ See *Yearbook . . . 1979*, vol. II (Part Two), p. 106, document A/34/10, chap. III, sect. B.2, commentary to chap. V, para. (1).

constituting self-defence is contrary to any international obligation.²¹⁵

(28) It should also be noted that action taken in self-defence may injure the interests of a third State. Those interests must obviously be fully protected in such a case. The Commission therefore wishes to point out that the provision in article 34 is not intended to preclude any wrongfulness of, so to speak, indirect injury that might be suffered by a third State in connection with a measure of self-defence taken against a State which has committed an armed attack. The observations made in this connection in the commentary to article 30 (Countermeasures in respect of an internationally wrongful act)²¹⁶ therefore apply *mutatis mutandis* to the case in which the rights of a third State are injured by action taken in self-defence.

(29) Having concluded its consideration, on first reading, of the chapter on circumstances precluding wrongfulness in international law, the Commission wishes to stress that the circumstances dealt with in this chapter are those which "generally" arise in this connection. Consequently, the chapter does not seek to make the list of circumstances it enumerates absolutely exhaustive. The Commission is sufficiently aware of the evolving nature of international law to believe that a circumstance which is not today held to have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation, may have that effect in the future. At all events, the Commission wishes to point out that chapter V is not to be construed as closing the door on that possibility.

Article 35. Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

Commentary

(1) At its thirty-first session, in 1979, during its examination of article 31 of the draft (*Force majeure and fortuitous event*), the Commission considered whether, bearing in mind the comments made on the subject, it should add to the article a third paragraph stating that preclusion of the wrongfulness of an act of a State committed in the circumstances indicated in

that article should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question. The Commission found, however, that a stipulation of that kind would also have to apply to other circumstances precluding wrongfulness dealt with in the present chapter of the draft. It therefore decided that, after completing its consideration of the various circumstances precluding the international wrongfulness of an act of the State, it would examine the advisability of inserting such a proviso in this chapter.²¹⁷

(2) At the same session, the Commission emphasized that the above considerations were also applicable to the provisions of article 32 on "*distress*" as a circumstance precluding wrongfulness.²¹⁸ Moreover, it had already pointed out in connection with article 29 (*Consent*) that a State may also consent to an action provided that the action includes the assumption of risks deriving from activities not prohibited by international law.²¹⁹

(3) At the present session, the question, already raised during the adoption of articles 29, 31 and 32, came up again forcefully in connection with article 33. For it appeared all the more logical for the Commission to reserve the possibility that compensation might be due for damage caused by an act or omission whose wrongfulness could only be precluded because it had been occasioned by a state of necessity.

(4) Having thus completed its examination of the various circumstances precluding wrongfulness, the Commission, at the present session, considered the question here discussed with respect to all the circumstances provided for in chapter V of the draft. It decided to include, at the end of that chapter, a reservation in quite general terms, stipulating that preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29 (*Consent*), 31 (*Force majeure* and fortuitous event), 32 (*Distress*) and 33 (*State of necessity*) does not prejudice any questions which may arise in regard to compensation for damage caused by that act. The Commission considered it essential that the reservation should not appear to prejudice any of the questions of principle that might arise in regard to the matter, either with respect to the obligation to indemnify, which would be considered in the context of part 2 of the present draft, or with respect to the codification of the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", the codification of which has already been entrusted to the Commission. The Commission also wishes to emphasize that the position of article 35 at the end of

²¹⁵ The member in question suggested that the article should read as follows: "Recourse by a State to self-defence in conformity with Article 51 of the Charter of the United Nations precludes the wrongfulness of an act of that State constituting such recourse to self-defence".

²¹⁶ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 120–121, document A/34/10, chap. III, sect. B.2, art. 30, paras. (17)–(19) of the commentary.

²¹⁷ *Ibid.*, p. 133, art. 31, para. (42) of the commentary.

²¹⁸ *Ibid.*, p. 136, art. 32, para. (14) of the commentary.

²¹⁹ *Ibid.*, p. 114, art. 29, para. (19), *in fine*, of the commentary.

chapter V of Part 1 of the draft is provisional. The final position of the article may be decided at a later stage in the elaboration of the draft.

Part 2. Content, forms and degrees of international responsibility

35. As indicated above,²²⁰ during the thirty-second session of the Commission Mr. William Riphagen, Special Rapporteur, presented a preliminary report (A/CN.4/330)²²¹ on the subject-matter of Part 2 of the draft under preparation, namely, the content, forms and degrees of State responsibility. The report analyses in general the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by Part 1 of the draft articles on State responsibility.

36. The report noted at the outset that a number of circumstances which are, in principle, irrelevant for the application of Part 1—such as the conventional or other origin of the obligation breached, the content of that obligation, and the seriousness of the actual breach of that obligation—may, however, have relevance for the determination of the new legal relationships in Part 2. It also recalled that some draft articles in Part 1—notably article 11, para. 2; article 12, para. 2; article 14, para. 2—may give rise to the question whether or not the content, form and degree of State responsibility are the same for this “contributory” conduct as for other internationally wrongful conduct, and that similar questions arise in respect of the cases of implication of a State in the internationally wrongful act of another State (articles 27 and 28). Furthermore, the report recalled that the Commission, in drafting the articles of Chapter V of Part 1—entitled “circumstances precluding wrongfulness”—deliberately left open the possibility that an act of a State, committed under such circumstances, might nevertheless entail some new legal relationships similar to those entailed by an internationally wrongful act. The Report recommended such new legal relationships to be dealt with in Part 2 of the draft articles rather than within the context of the topic “International liability for injurious consequences arising out of acts not prohibited by international law”.

37. The Report then set out three parameters for the possible new legal relationships arising from an internationally wrongful act of a State, the first being the new obligations of that State, the second the new rights of the “injured” State, and the third the position of “third” States in respect of the situation created by the internationally wrongful act. On this basis the Report drew up a catalogue of possible new legal

relationships established by a State’s wrongfulness, including the duty to make “reparation” in its various forms (first parameter), non-recognition, *exceptio non adimpleti contractus*, and other “countermeasures” (second parameter), and the right—possibly even the duty—of “third” States to take a non-neutral position (third parameter).

38. The report then turned to the problem of “proportionality” between the wrongful act and the “response” thereto, and in this connection discussed limitations of allowable responses by virtue of the particular protection, given by a rule of international law, to the object of the response; by virtue of a linkage, under a rule of international law, between the object of the breach and the object of the response; and by virtue of the existence of a form of international organization *lato sensu*.

39. Finally the report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, and suggested this matter be dealt with rather within the framework of Part 3 of the draft articles on State responsibility (the implementation of international responsibility).

40. During the discussion on the report in the Commission, which was of a preliminary character, several members noted the large scope of the topic to be dealt with in Part 2 and underlined the necessity for drawing up a concrete plan of work.

41. It was generally recognized that, in drafting the articles of Part 2, the Commission should proceed on the basis of the articles of Part 1 already provisionally adopted by the Commission on first reading, although, of course, on the second reading some revisions, rearrangements and mutual adaptations should not be excluded.

42. It was also noted that, while liability for injurious consequences arising out of acts not prohibited by international law might include the obligation of a State to give compensation, any possible degree of “overlap” with the treatment, in Part 2 of the articles on State responsibility, of the obligation of reparation resulting from a wrongful act, or even from an act the wrongfulness of which was precluded in the circumstances described in Chapter V of Part 1, would do no harm.

43. Some members expressed doubts as to the advisability of dealing extensively with “countermeasures”, international law being based not so much on the concept of sanction and punishment as on the concept of remedying wrongs that had been committed. Other members, however, considered the second and third parameters to be of the essence of Part 2.

44. It was generally recognized that the principle of proportionality was at the basis of the whole topic of the content, forms and degrees of responsibility, though some members contested its character as a rule

²²⁰ Para. 32.

²²¹ Reproduced in *Yearbook . . . 1980*, vol. II (Part One).

of international law, or were inclined to regard it as being a primary rather than a secondary rule.

45. Several members stressed the need to avoid the enunciation of primary rules within the context of Part 2. There was the feeling, however, that some “categorization”, according to their content, of the primary obligations with which an act of a State was not in conformity, was inevitable when determining the new legal relationships arising from the breach of those obligations.

46. Some members underlined the necessity of looking carefully at the distinction, made in the preliminary report, between the “injured” State and a “third” State, particularly in view of modern develop-

ments in international law, which assert the interdependence of States.

47. Various members advocated that the Commission adopt an empirical or inductive approach to the topic, as it had hitherto in dealing with State responsibility.

48. At the end of the discussion, the Special Rapporteur indicated his intention to follow-up his preliminary report with a second report outlining a plan of work and dealing with the first parameter of the new legal relationship (the new obligations of the State which has committed an act not in conformity with its international obligations) on the basis of the available jurisprudence, practice of States and opinions of authors.

Chapter IV

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

A. Introduction

49. The Commission described in an earlier report²²² the circumstances in which it had come to undertake the study of treaties to which an international organization was a party, as well as the method it had decided to follow in doing so. A number of General Assembly resolutions (resolution 3315 (XXIX) of 14 December 1974, sect. I, para. 4 (d); resolution 3495 (XXX) of 15 December 1975, para. 4 (d); resolution 31/97 of 15 December 1976, para. 4 (c) (ii); resolution 32/151 of 19 December 1977, para. 4 (c) (ii); resolution 33/139 of 19 December 1978, sect. I, para. 4 (c)) have recommended that the Commission should continue its work on this topic. General Assembly resolution 34/141 of 17 December 1979 recommended, in paragraph 4, that the Commission should:

“(c) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations with the aim of completing, at its thirty-second session, the first reading of these draft articles.”

50. At its twenty-sixth,²²³ twenty-seventh,²²⁴ twenty-ninth,²²⁵ thirtieth,²²⁶ and thirty-first²²⁷ sessions, the Commission adopted provisions corresponding to articles 1 to 60 of the Vienna Convention on the Law of Treaties²²⁸ adopted by the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969.

51. At its thirty-second session the Commission, at its 1585th to 1596th meetings, considered the texts of articles 61 to 80 as well as that of an annex submitted by the Special Rapporteur in his ninth report

(A/CN.4/327)²²⁹ and referred all these articles and the Annex to the Drafting Committee. On the Committee's report, the Commission adopted articles 61 to 80 and the Annex at its 1624th meeting.

52. With the adoption of those articles and the Annex, the Commission, pursuant to General Assembly resolution 34/141, completed the first reading of the draft articles on treaties concluded between States and international organizations or between international organizations. The text of all the draft articles adopted on first reading followed by the texts of articles 61 to 80 and of the Annex adopted by the Commission at its thirty-second session, with the commentaries thereto, are reproduced below in order to facilitate the work of the General Assembly.²³⁰

53. The articles considered and adopted by the Commission at its thirty-second session are those of Part V (Invalidity, termination and suspension of the operation of treaties) (articles 61 to 72), Part VI (Miscellaneous provisions) (articles 73 to 75) and Part VII (Depositaries, notifications, corrections and registration) (articles 76 to 80). The Annex adopted concerns the “Procedures established in application of article 66”. As on other occasions, the Commission did not feel it appropriate to prepare “final provisions” for its draft, that question being in most cases, a matter for consideration by the body entrusted with the task of elaborating the final instrument of codification. Hence, no provisions corresponding to those of Part VIII (Final provisions) (articles 81 to 85) of the Vienna Convention have been included in the set of draft articles adopted on first reading by the Commission.

54. It may be recalled that at its previous session the Commission reached the conclusion that the articles on the topic which had thus far been considered (articles 1–4, 6–19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21–23,

²²² *Yearbook* ... 1974, vol. II (Part One), pp. 290 *et seq.*, document A/9610/Rev.1, chap. IV.

²²³ *Ibid.*, pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, sect. B.

²²⁴ *Yearbook* ... 1975, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, chap. V, sect. B.

²²⁵ *Yearbook* ... 1977, vol. II (Part Two), pp. 95 *et seq.*, document A/32/10, chap. IV, sect. B.

²²⁶ *Yearbook* ... 1978, vol. II (Part Two), pp. 123 *et seq.*, document A/33/10, chap. V, sect. B.

²²⁷ *Yearbook* ... 1979, vol. II (Part Two), pp. 137 *et seq.*, document A/34/10, chap. 4, sect. B.

²²⁸ 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”.

²²⁹ Reproduced in *Yearbook* ... 1980, vol. II (Part One).

²³⁰ See section B below. Subsection 1 contains the texts of all the draft articles adopted on first reading by the Commission. Subsection 2 contains the texts of the provisions adopted at the thirty-second session and the commentaries thereto. For the commentaries to the articles adopted at the thirty-first session, see foot-note 227 above; for the commentaries to the articles adopted at the thirtieth session, see foot-note 226 above; for the commentaries to the articles adopted at the twenty-ninth session, see foot-note 225 above; for the commentaries to the articles adopted at the twenty-sixth and twenty-seventh sessions, see respectively foot-notes 223 and 224 above.

23 *bis*, 24, 24 *bis*, 25, 25 *bis*, 26–36 *bis* and 37–60) should be submitted to Governments for observations and comments before the draft as a whole was adopted on first reading. That procedure was seen as making it possible for the Commission to undertake the second reading without too much delay. In accordance with articles 16 and 21 of its Statute, those draft articles were then transmitted to Governments for their comments and observations. Furthermore, since the General Assembly recommended, in paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, that the commission should study the present topic “in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice”, the Commission also decided to transmit those draft articles to such organizations for their comments and observations.²³¹ It was indicated at that time that following completion of the first reading of the draft the Commission would request comments and observations of Member States and of the said international organizations on the remaining draft articles adopted and, in so doing, would set a date by which comments and observations should be received.²³²

55. In the light of the above, the Commission decided at its thirty-second session to request the Secretary-General again to invite Governments and the international organizations concerned to submit their comments and observations on the draft articles on treaties concluded between States and international organizations or between international organizations transmitted earlier, and to request that such comments and observations be submitted to him by 1 February 1981.

56. Furthermore, and in accordance with articles 16 and 21 of its Statute, the Commission decided to transmit through the Secretary-General to Governments and the international organizations concerned articles 61 to 80 and the Annex adopted by the Commission on first reading at its thirty-second session, for comments and observations, and to request that such comments and observations be submitted to the Secretary-General by 1 February 1982.

57. The procedure outlined above would, it is anticipated, allow Governments and organizations sufficient time for the preparation of their comments and observations on all the draft articles and would also allow the Commission to begin its second reading of the draft articles on the topic without too much delay, on the basis of reports to be prepared by the Special Rapporteur and in the light of comments and observations received from Governments and international organizations.

²³¹ In the light of Commission practice regarding its work on the topic, the organizations in question are the United Nations and the intergovernmental organizations invited to send observers to United Nations codification conferences.

²³² See *Yearbook ... 1979*, II (Part Two), p. 138, document A/34/10, para. 84.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

58. The text of articles 1–4, 6²³³–19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21–23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis*, 26–36, 36 *bis*,²³⁴ 37–80 and the Annex, adopted by the Commission on first reading at its twenty-sixth, twenty-seventh, twenty-ninth and thirtieth to thirty-second sessions, and the text of articles 61–80 and of the Annex, with the commentaries thereto, adopted by the Commission at its thirty-second session, are reproduced below.

I. TEXT OF THE DRAFT ARTICLES ADOPTED BY THE COMMISSION ON FIRST READING

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.

Article 2. Use of terms

1. For the purpose of the present articles:

(a) “treaty” means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations, or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) “ratification” means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b *bis*) “act of formal confirmation” means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b *ter*) “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) “full powers” means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

²³³ The draft does not include a provision corresponding to article 5 of the Vienna Convention.

²³⁴ The Commission agreed at its thirtieth session (1512th meeting) to take no decision on art. 36 *bis* and to consider the article further in the light of the comments made on its text by the General Assembly, Governments and international organizations.

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State,
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State,
- (ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" or "third international organization" means a State or an international organization not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

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

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply:

- (i) to international agreements to which one or more international organizations and one or more entities other than State or international organizations are [parties];
- (ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];
- (iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION I. CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Article 7. Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by treaty if:

- (a) he produces appropriate powers; or
- (b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

Article 8. Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

Article 9. Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing-up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

Article 10. Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; or
- (b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the international organizations participating in its drawing-up; or
- (b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

Article 11. Means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12. Signature as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

- (a) the treaty provides that signature shall have that effect;
- (b) the participants in the negotiation were agreed that signature should have that effect; or
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

- (a) the treaty provides that signature shall have that effect; or
- (b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

- (a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;
- (b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) those organizations were agreed that the exchange of instruments should have that effect.

Article 14. Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
- (b) the participants in the negotiation were agreed that ratification should be required;
- (c) the representative of the State has signed the treaty subject to ratification; or
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

- (a) the treaty provides for such consent to be established by means of an act of formal confirmation;
- (b) the participants in the negotiation were agreed that an act of formal confirmation should be required;
- (c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was established during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty, is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

Article 15. Accession as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an international organization to be bound by a treaty is established by accession when:

(a) the treaty provides that such consent may be established by that organization by means of accession;

(b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19. Formulation of reservations in the case of treaties between several international organizations

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 ter. Objection to reservations

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19 bis, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

- (a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or
- (b) its participation in the treaty is not essential to the object and purpose of the treaty.

Article 20. Acceptance of reservations in the case of treaties between several international organizations

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

- (a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;
- (b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;
- (c) an act expressing the consent of an international organization to be bound by the treaty and containing a

reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

- (a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;
- (b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force:

between the objecting State and the reserving State,
between the objecting State and the reserving organization,
between the objecting organization and the reserving State, or
between the objecting organization and the reserving organization

unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 19 ter, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19 bis, 19 ter, 20 bis and 23 bis in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. Procedure regarding reservations in treaties between several international organizations

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing, subject to formal confirmation, acceptance or approval, a treaty between several international organizations, a reservation must be formally confirmed by the reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Article 23 bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing, subject to ratification, acceptance or approval, a treaty mentioned in paragraph 1 or if formulated by an international organization when signing, subject to formal confirmation, acceptance or approval, a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. Entry into force of treaties between international organizations

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally, of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

SECTION 2. APPLICATION OF TREATIES

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES OR
THIRD INTERNATIONAL ORGANIZATIONS*Article 34. General rule regarding third States and third international organizations*

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35. Treaties providing for obligations for third States or third international organizations

1. [Subject to article 36 bis,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Article 36. Treaties providing for rights for third States or third international organizations

1. [Subject to article 36 bis,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

[Article 36 bis. Effects of a treaty to which an international organization is party with respect to third States members of that organization]

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the Organization acknowledged that the application of the treaty necessarily entails such effects.]

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

[5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]

[6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal:

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as

a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a

provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case referred to in paragraph 1, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be, prior to his communicating such consent.

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provision of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either:

- (i) in the relations between themselves and the defaulting State or international organization, or
- (ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall effect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) any one of the following parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of

treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS
AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's function, the depositary shall bring the question to the attention of:

(a) the signatory States and the organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations; or

(b) where appropriate, of the competent organ of the organization concerned.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

*Article 79. Correction of errors in texts
or in certified copies of treaties*

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

ANNEX

Procedures established in application of Article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

- (a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:
 - (i) one conciliator of the nationality of that State or one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
 - (ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

- (i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) In the case referred to in article 66, paragraph 3,

- (i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).
- (ii) the State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.
- (iii) when the provisions of subparagraph (c) (ii) apply, the other party to the dispute shall appoint conciliators as follows:
 - (1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);
 - (2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);
 - (3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c) (ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

2 bis. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

2. TEXT OF ARTICLES 61 TO 80 AND THE ANNEX,
WITH COMMENTARIES THERETO, ADOPTED BY THE
COMMISSION AT ITS THIRTY-SECOND SESSION

PART V

INVALIDITY, TERMINATION
AND SUSPENSION OF THE OPERATION
OF TREATIES

...

SECTION 3. TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES (*continued*)

...

*Article 61. Supervening impossibility of
performance*²³⁵

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Commentary

(1) The text of draft article 61 does not differ from that of article 61 of the Vienna Convention, which was adopted at the Vienna Conference without having given rise to particular difficulties. The principle set forth in article 61 of the Vienna Convention is so general and so well established that it can be extended without hesitation to the treaties which are the subject of the present draft articles. The title of the article is perhaps a little ambiguous because of its possible implication that the text of the article embraces all

cases in which a treaty cannot be performed. But the substance of the article shows that it refers exclusively to the case of permanent or temporary impossibility of performance which results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. It is therefore evident that this provision of the Vienna Convention does not seek to deal with the general case of *force majeure*, which is a matter of international responsibility and, in regard to international responsibility among States, was the subject of draft article 31, adopted by the Commission at its thirty-first session.²³⁶ Furthermore, article 73 of the Vienna Convention, like the draft article 73 which is to be considered later, reserves all questions relating to international responsibility.

(2) Although it is not for the Commission to give a general interpretation of the provisions of the Vienna Convention, it feels it necessary to point out that the only situations contemplated in article 61 are those in which an object is affected, and not those in which the subject is in question. Article 73, to which the draft article 73 mentioned above corresponds, also reserves all questions that concern succession of States and certain situations concerning international organizations.

(3) As regards the nature of the object implicated, article 61 of the convention operates in the first place like draft article 61, where a physical object disappears; an example given was the disappearance of an island whose status is the subject of a treaty between two States. Article 61, however, like draft article 61, also envisages the disappearance of a legal situation governing the application of a treaty; for instance, a treaty between two States concerning aid to be given to a trust territory will cease to exist if the aid procedures show that the aid was linked to a trusteeship regime applicable to that territory and that the regime has ended. The same will apply if the treaty in question is concluded between two international organizations and the administering State.

(4) Whether treaties between States, treaties between international organizations, or treaties between one or more States and one or more international organizations are concerned, the application of article 61 may cause some problems. There are cases in which it may be asked whether the article involved is article 61 or in fact article 62; particular cases mentioned were those in which financial resources are an object indispensable for the execution of a treaty and cease to exist or cannot be realized. Problems of this kind may in practice occur more often for international organizations than for States, because the former are less independent than the latter. It must be borne in mind in this connection that under draft article 27,²³⁷

²³⁵ Corresponding provision of the Vienna Convention:

"Article 61. *Supervening impossibility of performance*

"1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

"2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

²³⁶ See *Yearbook ... 1979*, vol. II (Part Two), p. 122, document A/34/10, chap. III, sect. B.2.

²³⁷ *Yearbook ... 1977*, vol. II (Part Two), p. 118, document A/32/10, chap. IV, sect. B.2.

although an organization may not withdraw from a validly concluded treaty by a unilateral measure not provided for in the treaty itself or in the present draft articles, it may, where a treaty has been concluded for the sole purpose of implementing a decision taken by the organization, terminate all or part of the treaty if it amends the decision. In applying the article, account must be taken as regards international organizations not only of the other rules set forth in the present draft but also of the reservations established in article 73; these concern a number of important matters which the Commission felt it was not at present in a position to examine.

Article 62. Fundamental change of circumstances²³⁸

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental

change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Commentary

(1) Article 62 of the Vienna Convention is one of its fundamental articles, because of the delicate balance it achieves between respect for the binding force of treaties and the need to discard treaties which have become inapplicable as a result of a radical change in the circumstances which existed when they were concluded and which determined the States' consent. Article 62 therefore engaged the attention of the Commission and the Vienna Conference for a long while; it was adopted almost unanimously by the Commission itself and by a large majority at the Conference.²³⁹ The Commission had no hesitation in deciding that provisions analogous to those of article 62 of the Vienna Convention should appear in the draft articles relating to treaties to which international organizations are parties. It nevertheless gave its attention to two questions, both of which concern the exceptions in paragraph 2 of the article of the Vienna Convention.

(2) To begin with the exception in paragraph 2 (b) of article 62 of the Vienna Convention, the question is whether the exception arises in such simple terms for an organization as it does for a State. The change of circumstances which a State invoking it faces through a breach of an international obligation is always, in regard to that State, the result of an act imputable to itself alone, and a State certainly cannot claim legal rights under an act which is imputable to it. The question might arise in somewhat different terms for an organization, bearing in mind the hypotheses mentioned above in connection with article 61. For a number of fundamental changes can result from acts which take place inside and not outside the organization; these acts are not necessarily imputable to the organization as such (although in some cases they are), but to the States members of the organization. The following examples can be given. An organization has assumed substantial financial commitments; if the organs possessing budgetary authority refuse to adopt a resolution voting the necessary appropriations to meet those commitments, there is quite simply a

²³⁸ Corresponding provision of the Vienna Convention:

"Article 62. Fundamental change of circumstances"

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

"(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

"(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

"2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

"(a) if the treaty establishes a boundary; or

"(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

"3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

²³⁹ *Yearbook ... 1966*, vol. I (Part One), p. 130, 842nd meeting, para. 53; *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 121, 22nd plenary meeting, para. 47.

breach of the treaty and the refusal cannot constitute a change of circumstances. But if several member States which are major contributors to the organization leave it and the organization subsequently finds its resources reduced when its commitments fall due, the question arises whether there is a change of circumstances producing the effects provided for in article 62. Other situations of this kind could be mentioned. Article 62, like article 61, therefore requires that account be taken of the stipulations or reservations made in other articles of the draft, including article 27 and especially article 73. The extent to which the organization's responsibility can be dissociated totally from that of its member States is a difficult subject and basically a matter of the responsibility of international organizations; article 62 reserves not only that question, but also certain issues involved in changes which, in the life of organizations, alter the relationship between the organization and its member States (termination of organizations, changes in membership of the organization).

(3) The first exception, that in article 62, paragraph 2 (a), on treaties establishing boundaries, nevertheless took up more of the Commission's time than the second. It involves two basic questions: the first must be considered initially in the light of the Vienna Convention and relates to the notion of a treaty which "establishes a boundary"; the second concerns the capacity of international organizations to be parties to a treaty establishing a boundary. Since the answer to the first question will have some bearing on the answer to the second, the two issues must be looked at in turn.

(4) The Vienna Convention has now entered into force and the practice of the States bound by it will govern the meaning of the expression "treaties establishing a boundary". Subject to that proviso, a number of important observations can be made. First of all, the expression certainly means more than treaties of mere delimitation of terrestrial territory and includes treaties of cession, or in more general terms, treaties establishing or modifying the territory of States; this broad meaning emerges from the preparatory work, since the Commission altered its original wording to reflect the broader meaning in response to comments from Governments.²⁴⁰

(5) The main problem, however, is to determine the meaning of the word "boundary". The scope of the question must be defined first of all. The term "boundary" customarily denotes the limit of the terrestrial territory of a State, but it could conceivably be taken more broadly to designate the various lines which fix the spatial limits of the exercise of different powers. Customs lines, the limits of the territorial sea, continental shelf and exclusive economic zone and also

certain armistice lines could be considered as boundaries in this sense. But it is important to be quite clear about the effects attaching to the classification of a particular line as a "boundary"; some of these lines may be "boundaries" for one purpose (opposability to other States, for example) and not for others (totality of jurisdiction). In regard to article 62, the effect of the quality of "boundary" is a stabilizing one. To say that a line is a "boundary" within the meaning of article 62 means that it escapes the disabling effects of that article.

(6) This observation is especially important in regard to the numerous lines of delimitation employed in the work of the Third United Nations Conference on the Law of the Sea, as reflected, at the date of the present report, in the "Informal Composite Negotiating Text".²⁴¹ It could be shown that the outer limit of the territorial sea is a true limit of the territory of the State, which is not the case with other lines.²⁴² The question arises, however, whether States will generally take the view that maritime delimitations already effected by treaty will remain perfectly stable, regardless of changes which may take place in the fundamental circumstances on the basis of which States have made treaty delimitations. The Commission is not equipped to answer such a difficult question, and at least some aspects of it will have to be taken up by the Third Conference on the Law of the Sea. The Commission confines itself to noting that, with developments taking place in the law of the Sea, at least the possibility of certain entirely new aspects of the régime of "boundaries" in the broad sense cannot be ruled out.

(7) The second question concerns the capacity of organizations to be parties to treaties establishing boundaries. An important preliminary remark is that international organizations do not have "territory" in the proper sense; it is simply analogical and incorrect to say that the Universal Postal Union set up a "postal territory" or that a particular customs union had a "customs territory". Since an international organization has no territory, it has no "boundaries" in the traditional meaning of the word and cannot therefore "establish a boundary" for itself.

(8) But can an international organization be said to "establish a boundary" for a State by concluding a treaty? The question must be understood correctly. An international organization, by a treaty between States, can quite definitely be given power to settle the future of a territory or decide on a boundary line by a

²⁴⁰ See *Yearbook ... 1966*, vol. II, p. 259, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries thereto, para. (11) of the commentary to art. 59.

²⁴¹ A/CONF.62/WP.10/Rev.2 (and Corr. 2-5).

²⁴² Mention might be made in this connection of the distinction drawn by the parties in regard to the competence of the arbitral tribunal constituted by the United Kingdom and France to make delimitations in the English Channel and the Mer d'Iroise, in respect of the delimitation of the continental shelf and the delimitation of the territorial sea. (Decision of 30 June 1977, *Delimitation of the continental shelf case: International Law Reports* (Cambridge), vol. 54 (1979), p. 33.)

unilateral decision; one example of this is the decision on the future of the Italian colonies taken by the United Nations General Assembly under the 1947 Treaty of Peace. But the point at issue at present is not whether the organization can dispose of a territory where it is especially accorded that authority, but whether by negotiation and treaty it can dispose of a territory which *ex hypothesi* is not its own. Although this situation is conceivable theoretically, not a single example of it can yet be given.

(9) Indications that such a situation might occur were nevertheless mentioned. It could do so if an international organization administered a territory internationally, under international trusteeship, for example, or in some other way. Although the practice examined on behalf of the Commission²⁴³ is not at present conclusive, the possibility remains that the United Nations might have to assume responsibility for the international administration of a territory in such broad terms that it was empowered to conclude treaties establishing a boundary on behalf of that territory.

(10) It can also be argued that the new international law of the sea demonstrates that an international organization (the International Sea-Bed Authority) should have capacity to conclude agreements establishing lines some of which might be treated as "boundaries", including boundaries that are within the meaning of article 62 and are subject to its stabilizing effects.

(11) The Commission recognized the interest which might attach to hypothesis of this kind, but felt that its task for the time being was simply to adapt article 62 of the Vienna Convention to provide for the treaties which are the subject of the present articles; the article has been worded from the traditional standpoint that only States possess territory and that only delimitations of territories of States constitute boundaries. The only treaties (in the meaning of the present articles) to which the rule in article 62, paragraph 2 (a), of the Vienna Convention will therefore have to apply are those establishing a boundary between at least two States to which one or more international organizations are parties. The organizations may be parties to such a treaty because the treaty contains provisions concerning functions which they have to perform; one instance of this is where an organization is required to guarantee a boundary or perform certain functions in boundary areas.

(12) Draft article 62 therefore involves one important departure from article 62 of the Convention: the provision in paragraph 2 (a) of the draft article is worded in such a way as to apply solely to treaties concluded between two or more States and one or more international organizations. Also, paragraph 2

has been split into two separate paragraphs and the final paragraph renumbered accordingly. Article 62, paragraph 2 (b), of the Vienna Convention becomes paragraph 3 of draft article 62. It was felt necessary, in the interests of the clarity of paragraphs 2 and 3, to specify that the fundamental change of circumstances may not be invoked *by a party*, so as to cover both States and international organizations. Paragraph 4 of the draft article is identical with paragraph 3 of article 62 of the Vienna Convention.

Article 63. Severance of diplomatic or consular relations²⁴⁴

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Commentary

(1) The severance of diplomatic or consular relations does not as such affect either existing treaties between States concerned or the ability of those States to conclude treaties. Evident as they are, the rules to this effect have not always been fully appreciated or gone unchallenged in the past, and the Vienna Convention therefore embodied them in two articles, article 63 and article 74; the latter will be considered later. The only exception to the first rule, and one as evident as the rule itself, is that of treaties whose application calls for the existence of such relations. For instance, the effects of a treaty on immunities granted to consuls are suspended for as long as the relations are interrupted. As diplomatic and consular relations exist between States alone, the general rule in article 63 of the Vienna Convention is solely applicable, as far as the treaties dealt with in the present articles are concerned, to treaties concluded between two or more States and one or more international organizations. Draft article 63 has therefore been limited to this specific case.

(2) The Commission observed that, in today's world, relations between international organizations and States have, like international organizations themselves, developed a great deal, particularly, but not exclusively, between organizations and their member States. Permanent missions to the most important international organizations have been established—

²⁴³ See "Possibilities of participation by the United Nations in international agreements on behalf of a territory: Study prepared by the Secretariat", *Yearbook ... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281.

²⁴⁴ Corresponding provision of the Vienna Convention:

"Article 63. *Severance of diplomatic or consular relations*

"The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty."

delegations whose status is in many aspects akin to that of agents of diplomatic relations, as shown by the Vienna Convention of 14 March 1975 on the Representation of States in Their Relations with International Organizations of a Universal Character²⁴⁵ which was prepared by the Commission in the form of draft articles. It is beyond question that the severance of these relations between a State and an international organization does not affect the obligations incumbent on the State and on the organization. To take the simplest example, if the permanent delegation of a State to an international organization is recalled or if the representatives of a State do not participate in the organs of the organization as they should under its charter, the substance of the obligations established by that charter remains unaffected.

(3) The Commission discussed that situation, but considered that it concerned primarily the legal regime of the treaties governed by the rules of the Vienna Convention, for treaties which establish international organizations are treaties between States. In certain specific cases, however, treaties concluded between an organization and a non-member State or even one of its member States may establish obligations between the parties whose performance calls for the creation of such specific organic relations as the local appointment of representatives, delegations and expert commissions, possibly of a permanent kind. If these organic relations were severed, a principle analogous to that laid down in article 63 for diplomatic and consular relations would have to be applied.

Article 64. Emergence of a new peremptory norm of general international law (*jus cogens*)²⁴⁶

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

(1) The notion of peremptory rules of general international law, embodied in article 53 of the Vienna Convention, had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions. The Commission therefore had no hesitation in adopting draft article 53, which extends article 53 of

the Vienna Convention to treaties to which one or more international organizations are parties.

(2) On that occasion the Commission stated that what made a rule of *jus cogens* peremptory was that it was "accepted and recognized by the international community of States as a whole" as having that effect, and that the expression "international community of States as a whole" included international organizations, but that it was unnecessary to mention them expressly.²⁴⁷

(3) These remarks apply equally to article 64 of the Vienna Convention and to the identical draft article 64. The emergence of a norm which is peremptory as regards treaties cannot consist in anything other than recognition by the international community of States as a whole that the norm in question has that character. The precise effects of this occurrence are the subject of draft article 71, which will be considered later.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty²⁴⁸

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

²⁴⁷ See *Yearbook ... 1979*, vol. II (Part Two), pp. 156–157, document A/34/10, chap. IV, sect. B.2, art. 53 and commentary.

²⁴⁸ Corresponding provision of the Vienna Convention:

"Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

"1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

"2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

"4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

"5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

²⁴⁵ *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.

²⁴⁶ Corresponding provision of the Vienna Convention:

"Article 64. Emergence of a new peremptory norm of general international law (*jus cogens*)

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

(1) Both the International Law Commission and the United Nations Conference on the Law of Treaties were keenly aware of the fact that the first three sections of Part V of the Vienna Convention (like the corresponding articles of the draft), in giving a methodical and complete account of all the possible cases in which a treaty ceased to be applicable, might give rise to many disputes, and in the long run seriously weaken the *pacta sunt servanda* rule. There could be no question, however, of disregarding altogether the rule which enables States to make their own judgements of the legal situations which concern them. In its draft articles the Commission, in what is now article 65 of the Convention, established certain safeguards concerning the procedure by which States should conduct their unilateral actions. The Conference on the Law of Treaties decided to supplement these safeguards by providing, in the case of lasting disputes, for recourse to an arbitrator, the International Court of Justice or a conciliation commission.

(2) The system established in article 65 was adopted without opposition at the Conference, and the Commission considers that, with certain slight drafting changes, it can easily be extended to the present draft articles. The purpose of the mechanism established under article 65 is to ensure a fair confrontation between the States in dispute, based on notification, explanation, a moratorium, and the possibility of recourse to the means for settlement of disputes specified in Article 33 of the Charter. The significance of the various components of the mechanism is illuminated by the procedural details given in article 67.

(3) A party wishing to invoke one of the provisions of the first three sections of Part V of the Vienna Convention in order to be released from its obligations must first make its claim in writing, giving the reasons for it. Except in cases of special urgency, a three-month period then begins during which that party may not execute its claim and during which the parties to the treaty that have thus been notified of the claim may raise an objection; if they do not, the notifying party may take its proposed measure in the form of an act consisting of an instrument which it communicates to the other parties. If any objection is raised, there is a dispute, and the parties to the dispute must apply the provisions in force between them for the settlement of disputes (article 65, para. 4) or resort to the means provided for in Article 33 of the Charter of the United Nations.

(4) This system can be applied without difficulty to international organizations by mentioning organizations together with States where article 65 speaks of the latter (article 65, para. 5). The Commission considered the possibility that the three-month moratorium might be too short to enable an organization to decide whether to raise an objection to another party's claim, a question of particular importance in the light of the fact that some organs of organizations meet infrequently. However, although the Vienna Convention does not specify the fact expressly, an objection may always be withdrawn; the three-month time-limit can therefore be retained for organizations in the knowledge that the organization might later decide to withdraw its objection.

(5) On the other hand, invoking a ground for withdrawing from conventional obligations, and even objecting to another party's claim, are sufficiently important acts for the Commission to have considered it necessary, as in the case of other draft articles (article 35, para. 3; article 36, para. 3; article 37, para. 7; article 39, para. 2; and article 45, para. 3), to specify that, when these acts emanate from an international organization, they are governed by the relevant rules of the organization. The provision in question forms a new paragraph 4. The paragraphs of the draft article corresponding to article 65, paragraphs 4 and 5 of the Vienna Convention have been renumbered as paragraphs 5 and 6, the text remaining unchanged.

Article 66. Procedures for judicial settlement, arbitration and conciliation²⁴⁹

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months

²⁴⁹ Corresponding provision of the Vienna Convention:

"Article 66. Procedures for judicial settlement, arbitration and conciliation

"If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on

(Continued on following page.)

following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Commentary

(1) Article 66 and the Annex to the Vienna Convention were not drafted by the International Law Commission, but by the Vienna Conference itself. Many Governments considered that the provisions of

article 65 failed to provide adequate safeguards for the application of Part V of the Vienna Convention, and they feared that a detailed statement of all the rules that could lead to the non-application of a treaty might encourage unilateral action and thus be a threat to the binding force of treaties; other Governments did not share those fears and considered that article 65 already provided certain safeguards. The opposing arguments were only settled by a compromise, part of which consisted of article 66 of the Vienna Convention.²⁵⁰

(2) This brief reminder will explain two peculiarities of article 66. The first is that an article which, as its title indicates, is devoted to settlement of disputes does not appear among the final clauses but in the body of the treaty; the second is that this article does not claim to cover all disputes relating to the interpretation or application of the Convention, but only those concerning Part V. It will also be noted that, in regard to the latter disputes, it distinguishes between articles 53 and 64 on the one hand and any of the remaining articles in Part V on the other; disputes in the former case may be submitted to the International Court of Justice by written application, while the remainder entail a conciliation procedure. This difference is justified purely by the fact that the notion of peremptory norms appeared to certain States to call for specially effective procedural safeguards owing to the radical nature of its consequences, the relative scarcity of fully conclusive precedents and the developments that article 64 appeared to foreshadow.

(3) Those considerations raised a question of principle for the Commission. The very subject-matter of the articles in question could be thought a disincentive to the adoption of analogous provisions in the draft articles, since articles on the settlement of disputes are generally formulated by diplomatic conferences. Another point of view was that by inserting article 66 in the body of the treaty, immediately after article 65, the Conference on the Law of Treaties had taken the position that substantive questions and procedural questions were linked as far as Part V was concerned. Since the Commission had always sought to depart as little as possible from the Vienna Convention, it should formulate a draft article 66 as well as an annex.

(4) The latter solution was the one the Commission finally chose. It raises a number of difficulties. The adaptation of the rules in article 66 to the case of treaties to which international organizations are parties at all events makes it possible for the Governments concerned to take the necessary steps in full knowledge of the circumstances. The Commission did not

(Foot-note 249 continued.)

which the objection was raised, the following procedures shall be followed:

“(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

“(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.”

²⁵⁰ The article was finally adopted by 61 votes to 20, with 26 abstentions. *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* (op. cit.), p. 193, 34th meeting, para. 72.

wish to shirk the task of transposing article 66 to the draft articles, however the results might be judged.

(5) Although only subparagraphs (a) and (b) of article 66 of the Convention refer to the existence of a dispute, the whole construction of the article is based on the notion of a dispute; this is already a matter of some complexity in the Vienna Convention, particularly in the light of the Annex to the present articles which will be discussed later.

(6) The settlement procedures established by article 66 form part of the mechanism provided for in article 65. When a party intends to avail itself of one of the articles in Part V in order to terminate the application of a treaty, it makes a notification to that effect; an objection may be raised within three months, and this constitutes the dispute; if not solved within 12 months, the dispute is subject to the procedures laid down in article 66. The same claim may be made by more than one party on the same legal grounds; similarly, an identical objection may be raised by more than one party; from the point of view of the procedures followed, there may be a number of disputes or a single dispute on which a number of States make common cause. However, it was not found necessary that the Annex to the Vienna Convention should do more in this respect than indicate these possibilities in its wording, or that it should deal extensively with other matters of specific procedural method. Subject to making a few references to this question in connection with the Annex, the Commission decided, after lengthy consideration, that the draft articles need not deal with it in greater detail than the Vienna Convention itself had done.

(7) On the other hand, the Commission quickly realized that in order to solve problems calling for diversified provisions and to make the wording of draft article 66 clear, it should distinguish between three possible cases, depending on the nature of the parties to the dispute, namely whether they are States alone, organizations alone or one or more States and one or more organizations. The main but not the only reason for this tripartite classification of disputes is that only States can be parties in cases before the International Court of Justice; when an international organization appears in a dispute, there must be a substantial departure from the provisions of the Vienna Convention in regard to articles 53 and 64, which concern rules of *jus cogens*.

(8) The first of the three cases mentioned above raises no difficulty; in a dispute in which only States are involved, there is no reason not to apply the settlement provisions of article 66 of the Vienna Convention. Article 3 (c) of the Convention invites this by providing for "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties", and indeed there is no reason why this should not be so.

(9) In the second case, where all the parties to the dispute are international organizations, the question arises how disputes relating to the existence, the interpretation or the application of a rule of *jus cogens* are to be settled. It seemed to the Commission that, although the Vienna Convention mentions both arbitration and recourse to the International Court of Justice in connection with disputes between States, it was in fact intended to give the supreme world tribunal the principal responsibility for deciding matters of such gravity as the existence, the interpretation or the application of a peremptory norm. Failing the possibility of giving international organizations the right to make unilateral application to the Court, an advisory opinion procedure might be attempted. If one of the organizations parties to the dispute had the right under Article 96 of the Charter to request an advisory opinion, it could do so; otherwise the advisory opinion would be obtainable only indirectly; an organ competent to request such an opinion in an international organization would have to discuss the matter and agree to submit the request.

(10) The advisory opinion procedure thus seems in any event imperfect and uncertain. The Special Rapporteur had provided for such an eventuality in draft article 66, but the Commission considered that to mention it in the text of this draft article merely made explicit a possibility which existed in any case, independently of the wishes of the parties to the dispute, without in any way remedying the disadvantages or uncertainties of the procedure. After considering all aspects of this problem at length, it therefore decided to delete the reference to the possibility of seeking an advisory opinion. It also discarded the idea of referring to the possibility of requesting an advisory opinion and at the same time conferring binding force on that opinion.²⁵¹ The possibility of setting in motion an advisory opinion procedure seemed to be fraught with too many uncertainties for a binding character to be attached to the opinion thus obtained.

(11) Without thereby excluding the possibility that an advisory opinion might be requested from the International Court of Justice if the competent body of an international organization authorized to request such an opinion so resolved, the Commission therefore decided to extend to disputes concerning the

²⁵¹ In addition to the particular cases in which a special advisory opinion procedure has been devised as a particular safeguard for the decisions taken by the Administrative Tribunal of the ILO and the United Nations Administrative Tribunal, some conventions have made provision for advisory opinions with binding effect—for instance, the Convention on the Privileges and Immunities of the United Nations, of 13 February 1946 (sect. 30) (United Nations, *Treaty Series*, vol. 1, p. 30); the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, of 26 June 1947 (sect. 21) (*ibid.*, vol. 11, p. 30); and the Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947 (sect. 32) (*ibid.*, vol. 33, p. 282).

application or interpretation of articles 53 or 64 the arrangements laid down for disputes relating to the application or interpretation of another article in Part V, namely, mandatory recourse to a conciliation procedure. Had this not been done, the disputes to which the draftsmen of the Vienna Convention wished to apply the most binding solution, namely, disputes involving a peremptory norm, would be those for which the least detailed provision would be made. The drafting of paragraph 2 of article 66 was thereby facilitated, since it provides for mandatory recourse to conciliation in the case of a dispute involving *any* article in Part V.

(12) The third category of dispute is that between a State and an international organization. It forms the subject of paragraph 3 of draft article 66. While the dispute must involve at least one State and one organization, the situation may be more complicated procedurally and the dispute be between States and organizations, or between certain States and organizations and other States and organizations, or between one State and other States and one organization, and so forth. Account needs to be taken of the possibility with multilateral treaties that other parties to the treaty may adopt the same position as one or other of the parties to the dispute and decide to make common cause with that party. This eventuality, which is not explicitly mentioned in article 66 of the Vienna Convention, emerges clearly in the Annex to the Convention. It seemed to the Commission that it was sufficient to mention the basic case in the text of paragraph of article 66; the more complicated cases will be dealt with further on, in the draft Annex.

(13) Whatever complications may arise from the fact that two or more parties to the treaty make common cause, it remains true that the parties to the dispute will in any event include an organization. However, as was seen in connection with disputes between international organizations,²⁵² such organizations cannot be parties in cases before the International Court of Justice. Since provision must be made for remedies consistent with the alternatives available to all possible parties to a dispute, it is necessary, in the case dealt with in paragraph 3 of article 66, to rule out the submission to the International Court of Justice of a dispute relating to the application or interpretation of articles 53 and 64, and to institute mandatory recourse to conciliation on a general basis, as in the case of disputes between international organizations.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty²⁵³

1. The notification provided for under article 65, paragraph 1, must be made in writing.

²⁵² Para. (9) above.

²⁵³ Corresponding provision of the Vienna Convention:

"Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

"1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

Commentary

(1) In the commentary to draft article 65, it was shown how article 67 supplemented article 65 of the Vienna Convention. It must therefore be extended to the treaties which are the subject of the present draft articles, and calls for adjustment only as far as the powers to be produced by the representative of an organization are concerned.

(2) The meaning of article 67 of the Vienna Convention needs to be clarified. In relation to acts leading a State to be bound by a treaty, article 7 of the Convention provides, firstly, that certain agents represent States in virtue of their functions, in such a way that they are dispensed from having to produce full powers (article 7, para. 2); other agents can bind the State only if they produce appropriate powers or if "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers". If these rules are compared with those established by article 67 of the Vienna Convention for the act whereby a State divests itself of its obligation, it can be seen that the Convention is stricter in the latter case; unless the instrument is signed by the Head of State, Head of Government or Minister for Foreign Affairs, "the representative of the State . . . may be called upon to produce full powers". This greater stringency, and particularly the elimination of dispensation from the production of full powers by virtue of practice or the presumption drawn from the circumstances, is readily understandable considering that one of the guarantees afforded by the procedure laid down in articles 65 and 67 is the use of an instrument characterized by a degree of formality. It was sought to avoid any ambiguity in a procedure designed to dissolve or suspend a treaty, and to set a definite time-limit for that procedure; no account can therefore be taken either of

"2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers."

practice or of circumstances, which are invariably ambiguous factors taking firm shape only with the passage of time.

(3) It is necessary for draft article 67 to expand the text of the Convention by providing for the case of international organizations; as far as their consent is concerned, a distinction similar to that for States needs to be made between the procedure for the conclusion of a treaty and the procedure for its dissolution or suspension. As regards the conclusion of a treaty, draft article 7 (paras. 3 and 4) provides for only two cases: the production of appropriate powers and the tacit authorization resulting from practice or circumstances. If the rules applying to the dissolution of a treaty are to be stricter than those applying to its conclusion, only one solution is possible, namely production of appropriate powers without provision for the case of tacit authorization resulting from practice or circumstances. Accordingly a sentence having this object has been added at the end of paragraph 2.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67²⁵⁴

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

Commentary

(1) Article 68 of the Vienna Convention is designed to help protect treaties and did not raise any difficulties either in the Commission or at the United Nations Conference on the Law of Treaties. The essential effect of the instruments revocable under this provision is, in varying degrees, the non-application of the treaty. As long as these instruments have not taken effect, they can be revoked. There is no reason why such a natural provision should not be extended to the treaties which are the subject of the present draft articles; draft article 68 contains no departure from the corresponding text of the Vienna Convention.

(2) The Vienna Convention does not specify what form the "revocation" of the notifications and instruments provided for in article 67 (or for that matter the "objection") should take. The question is not important in the case of the "notification", which can only be made in writing, but it is important in the case of the "instrument". While recognizing that there is no general rule in international law establishing the "*acte contraire*" principle, the Commission considers that, in order to safeguard treaty relations, it would be logical for the "revocation" of an instrument to take the same

form as the instrument itself, particularly as regards the communication of the "full powers" and "appropriate powers" provided for in article 67.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty²⁵⁵

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Commentary

(1) The text which became article 69 of the Vienna Convention met with no opposition either in the Commission or at the United Nations Conference on the Law of Treaties, since its object is the logical exposition of the consequences of the invalidity of a treaty. Its extension to the treaties which are the

²⁵⁵ Corresponding provision of the Vienna Convention:

"Article 69. Consequences of the invalidity of a treaty

"1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

"2. If acts have nevertheless been performed in reliance on such a treaty:

"(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

"(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

"3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

"4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

²⁵⁴ Corresponding provision of the Vienna Convention:

"Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

"A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect."

subject of the present articles is necessary, and merely entailed the inclusion of a reference to international organizations alongside the reference to States (para. 4).

(2) It may simply be pointed out that article 69, paragraph 3 of the Convention, like draft article 69, clearly establishes that notwithstanding the general reservation made by article (and draft article) 73 on questions involving international responsibility, fraud, acts of corruption or coercion constitute wrongful acts in themselves. They are therefore not, or not solely, elements invalidating consent; that is why the Vienna Convention and, following it, the draft articles, establish rules for these cases which in themselves serve to penalize a wrongful act, particularly in regard to the separability of treaty provisions (article 44 and draft article 44, paras. 4 and 5).

Article 70. Consequences of the termination of a treaty²⁵⁶

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

Article 70 of the Vienna Convention sets forth the logical consequences of the termination of a treaty in language which leaves no room for doubt. This is why the Commission extended the rules of article 70 to the treaties which are the subject of the present articles,

²⁵⁶ Corresponding provision of the Vienna Convention:

"Article 70. Consequences of the termination of a treaty

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

"(a) releases the parties from any obligation further to perform the treaty;

"(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

"2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

adding only a reference to an international organization alongside the reference to a State. It will be noted that paragraph 1 (b) of the draft article lays down a rule regarding conflict of laws over time; the difficulty of formulating the rules applicable to this subject in precise and incontestable terms becomes particularly apparent if the relatively simple wording of paragraph 1 (b) is compared with the wording of paragraph 2 (b) of the following article.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law²⁵⁷

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

Three articles of the Vienna Convention (articles 53, 64 and 71) deal with peremptory norms. It follows necessarily from the Commission's adoption of draft

²⁵⁷ Corresponding provision of the Vienna Convention:

"Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

"1. In the case of a treaty which is void under article 53 the parties shall:

"(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

"(b) bring their mutual relations into conformity with the peremptory norm of general international law.

"2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

"(a) releases the parties from any obligation further to perform the treaty;

"(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law."

articles 53 and 64 that draft article 71 should be worded in exactly the same way as the corresponding provision of the Vienna Convention. This article relates essentially to questions of conflict of law over time; their interpretation, particularly in the case of paragraph 2 (b), raises difficulties. The Commission nevertheless considered it inappropriate to make any changes to this text, not only because of the need to be as faithful as possible to the wording of the Vienna Convention, but because the subject is so complicated that departures from a text which, even if not fully satisfactory, was carefully prepared may well raise more problems than they solve.

Article 72. *Consequences of the suspension of the operation of a treaty*²⁵⁸

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Commentary

Like all the articles in section 5 of Part V of the Vienna Convention, article 72 gave rise to no objection, so necessary are the rules which it lays down. The rules in question have therefore been extended without change to the treaties which are the subject of the present articles.

²⁵⁸ Corresponding provision of the Vienna Convention:

"Article 72. *Consequences of the suspension of the operation of a treaty*

"1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

"(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

"(b) does not otherwise affect the legal relations between the parties established by the treaty.

"2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty."

PART VI

MISCELLANEOUS PROVISIONS

Article 73. *Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization*²⁵⁹

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

Commentary

(1) When the Commission prepared the draft articles which were to become the Vienna Convention, it found it necessary to insert a reservation relating to two topics included in its general plan of codification which were to form the subject of separate sets of draft articles and which it had recently begun to study, namely State succession and the international responsibility of States. This first consideration was not only interpreted fairly flexibly but also coupled with a further justification for a reservation relating to responsibility, namely that, as pointed out earlier,²⁶⁰ some of the articles on the law of treaties necessarily raised questions of responsibility. The Commission went slightly further in asking itself whether it should not also include a reservation relating to a subject hotly debated in "traditional" international law, namely the effect of "war" upon treaties; that was not covered by its general plan of codification, and a reservation relating to it in the draft articles would therefore have the effect of drawing the attention of Governments to the importance of a matter which the Commission had deliberately left aside. Although the Commission

²⁵⁹ Corresponding provision of the Vienna Convention:

"Article 73. *Cases of State succession, State responsibility and outbreak of hostilities*

"The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

²⁶⁰ See article 69 above, para. (2) of the commentary.

decided after consideration to make no reference to it, the United Nations Conference on the Law of Treaties reopened the question and added a reservation on it to the two already in article 73.²⁶¹

(2) This brief summary of the background to article 73 of the Vienna Convention clearly shows that the purpose of that article was not to provide an exhaustive list of the matters which treaties between States can involve and on which the Convention took no position. In the view of the Commission, article 73 is intended to draw the reader's attention to certain particularly important questions, without thereby ruling out others.

(3) In the light of this view of the scope of article 73 of the Vienna Convention, an examination of the situation with regard to the treaties which form the subject of the present articles illustrates the need for an article which is symmetrical to article 73 of the Vienna Convention and which contains reservations at least as broad as those in article 73. The two-fold problem of substance and of drafting considered by the Commission in this connection was whether the reservations provided for in draft article 73 should be broadened to take account of the particular characteristics of international organizations.

(4) The easiest problem to solve relates to international responsibility. There is no doubt that cases exist in which the responsibility of an international organization can be engaged, as is shown by practice, and, in particular, treaty practice. In its work on the international responsibility of States, the Commission has had occasion to deal with this matter and has deliberately limited the draft articles in course of preparation to the responsibility of States.²⁶² It is logical and necessary, however, for draft article 73 to contain both a reservation relating to the international responsibility of international organizations and a reservation relating to the international responsibility of States.

(5) The question of the reservation relating to hostilities between States was less simple because it could be asked whether international organizations

might not also be involved in hostilities; if so, draft article 73 would have to refer only to "hostilities" and avoid the more restrictive words "hostilities between States". Many members of the Commission considered that, as international practice now stood, international organizations could be involved in "hostilities"; others had doubts on the matter. In the end the Commission decided to retain the words "hostilities between States", for a reason unconnected with the question of principle whether international organizations could be involved in "hostilities". Article 73 deals only with the effect of "hostilities" on treaties and not with all the problems raised by involvement in hostilities, whereas "traditional" international law dealt with the effect of "war" on treaties, an effect which, in the practice of States and the case-law of national courts has, in the past hundred years, undergone considerable changes. In introducing this reservation in article 73, the Vienna Conference took no position on the problems as a whole which arise as a result of involvement in "hostilities"; it merely made a reservation, without taking any position, on the problems which might at present continue to exist during armed conflict between States as a result of rules applied in the past on the effect of war upon treaties. Since the reservation in article 73 of the Vienna Convention is of such limited scope, it was only appropriate for the Commission to include in draft article 73 a reservation having the same purpose as that provided for in the Convention.

(6) The main difficulties are encountered in regard to widening the reservation relating to State succession. Reference might conceivably have been made to "succession of international organizations", if necessary by defining that term, which is sometimes found in learned studies. The Special Rapporteur had been set to follow that course, but members of the Commission pointed out not only that the term was vague but also that the word "succession" itself, which had been carefully defined in the Commission's work and in the Vienna Convention on Succession of States in Respect of Treaties (1978),²⁶³ should not be used to describe situations which appeared radically different.

(7) Closer examination of the cases that may come to mind when the term "succession of international organizations" is used shows that they are quite far removed from cases of State succession. It is true that certain organizations have ceased to exist and that others have taken over some of their obligations and property, as the United Nations did after the dissolution of the League of Nations. In all such cases, however, the scope and modalities of the transfers were determined by conventions between States. It was

²⁶¹ In connection with the question of responsibility, see also draft articles 48 to 52 and the commentaries thereto (*Yearbook* ... 1979, vol. II (Part Two), pp. 153-156, document A/34/10, chap. IV, sect. B.2).

In connection with the question of outbreak of hostilities, see *Yearbook* ... 1966, vol. II, pp. 267-268, document A/6309/Rev. I, Part II, chap. II, para. (2) of the commentary to art. 69; *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 451-453, 76th meeting of the Committee of the Whole, paras. 9-33.

²⁶² *Yearbook* ... 1975, vol. II, p. 54, document A/10010/Rev. I, para. 32, and *ibid.*, pp. 87-91, chap. II, sect. B.2, commentary to art. 13. See also *Yearbook* ... 1971, vol. II (Part One), pp. 272-273 document A/CN.4/246 and Add.1-3, paras. 209-213.

²⁶³ See *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, art. 2, para. 1 (b)).

pointed out that such transfers were entirely artificial and arbitrary, unlike in the case of a succession of States, in which it is the change in sovereignty over a territory that, in some cases, constitutes the actual basis for a transfer of obligations and property. Thus, strictly speaking, there can never be a "succession" of organizations.

(8) What can happen, though, is that the member States, when they establish an international organization, transfer to it certain powers to deal with specific matters. The problem is then to determine whether the organization thus established is bound by the treaties concluded on the same subject by the member States before the establishment of the organization. This situation usually involves treaties between States, but it may also concern treaties to which other international organizations are already parties. One example is that of a multilateral treaty, the parties to which are not only many States but also an international organization representing a Customs union. If three States parties to such a treaty also set up a Customs union administered by an international organization, it may be necessary to determine what the relationship is between that new organization and the treaty. It might be asked whether, in such a case, "succession" takes place between the States and the international organization.

(9) Questions might also be asked about the effects of the dissolution of an international organization. Must it be considered that the States members of that organization "succeed" to its property and obligations? Are they, for example, bound by the treaties concluded by the organization? Bearing in mind the existence of organizations having operational functions and constituted by only a few States, such a case might be of considerable practical importance.

(10) Many other more or less hypothetical cases were referred to in the Commission. It was asked how the treaties concluded by an organization might be affected by an amendment to its constituent instrument that deprived it of legal capacity to honour obligations under an existing treaty which it had concluded correctly. Since changes in the membership of an organization do not, formally at least, affect the identity of the organization, which continues to be bound by the treaties concluded before the changes took place, no problem of "succession" of international organizations arises in such a case; at most it might be asked, as the Commission has done in connection with other articles,²⁶⁴ whether in some cases such changes in membership do not give rise to certain legal consequences. On the other hand, the fact that a member State which has concluded a treaty with the organization ceases to be a member of the organization might in some cases give rise to difficul-

ties; these could be bound up with the fact that the conclusion or performance of such a treaty might depend on membership of the organization. Conversely, forfeiture of membership, if imposed as a sanction, might not release a State from treaty obligations which it had contracted under a specific treaty concluded with the organization. These are delicate issues which require detailed study and on which the Commission has taken no position. Such questions are not theoretical ones, but they lie outside the scope of a topic which might, even in the broadest sense, be characterized as "succession of international organizations".

(11) In view of all these considerations, the Commission decided not to use the term "succession of international organizations", not to try and give an exhaustive list of cases that are subject to reservation, and simply to mention two examples, namely termination of the existence of international organizations and termination of participation by a State in the membership of an international organization.

(12) Once the Commission had taken a position on the substance, it still had to solve a drafting problem. The easiest solution would have been to enumerate in a single paragraph all the different subjects governed by the reservation made in article 73 "in regard to a treaty". This approach was criticized because it would have resulted in a list of subjects to which the reservation would not apply in the case of all treaties. The international responsibility of States, a succession of States and the outbreak of hostilities between States are extraneous to treaties concluded solely between international organizations. For the sake of accuracy, therefore, the Commission drafted two paragraphs, even though this makes the text more unwieldy.

(13) It included in paragraph 1, in regard to a treaty between one or more States and one or more international organizations, a reservation relating to a succession of States and to the international responsibility of a State; it added to those two a reservation relating to the outbreak of hostilities between States parties to that treaty, the implication being that this reservation applies to a treaty concluded between at least two States and one or more international organizations. It is observed that the text refers not only to the responsibility of a State towards another State but also to the responsibility of a State towards an international organization.

(14) The reservation in paragraph 2 relates to the responsibility of an international organization, either towards another organization or towards a State, and to the two cases selected from among many others, namely, the termination of the existence of an organization and the termination of participation by a State in the membership of an international organization.

²⁶⁴ See art. 61 above, para. (2) of the commentary, and art. 62, para. (2) of the commentary.

Article 74. Diplomatic and consular relations and the conclusion of treaties²⁶⁵

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Commentary

(1) There is no legal nexus as such between treaty relations and diplomatic and consular relations. The first consequence drawn from that fact in article 63 of the Vienna Convention and draft article 63 is that the severance of diplomatic and consular relations is not in itself of legal consequence for treaty relations, unless the application of the treaty actually requires the existence of such relations. Article 74 and draft article 74 express two further consequences of the independence of treaty relations and diplomatic relations, namely, that the severance of diplomatic or consular relations does not prevent the conclusion of a treaty and that the conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

(2) The rules which article 74 of the Vienna Convention embodies cannot be extended to all the treaties which come within the scope of the present articles. For diplomatic and consular relations exist between States alone, and therefore draft article 74 can only apply to those treaties whose parties include at least two States between which diplomatic relations are at issue. Draft article 74 was therefore worded so as to limit its effects to treaties concluded between two or more States and one or more international organizations. With regard to the current relevance of such matters in terms no longer of diplomatic or consular relations, but of the relations which international organizations need in some cases to maintain with States, reference should be made to what has been said on that point in connection with article 63.

Article 75. Case of an aggressor State²⁶⁶

The provisions of the present articles are without prejudice to any obligation in relation to a treaty

²⁶⁵ Corresponding provision of the Vienna Convention:

"Article 74. Diplomatic and consular relations and the conclusion of treaties

"The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

²⁶⁶ Corresponding provision of the Vienna Convention:

"Article 75. Case of an aggressor State

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

(1) Article 75 of the Vienna Convention was adopted to take account of a situation created by the Second World War. States concluded certain treaties which imposed obligations on States considered as aggressors, but those obligations had not been accepted by treaty by all the latter States at the time the Vienna Convention was concluded. Article 75 prevents any provision whatsoever of the Vienna Convention from being invoked as a bar to the effects of those treaties. It nevertheless provides for the future in general terms.

(2) In these circumstances, the Commission discussed several awkward questions connected with the adaptation of the rule in article 75 to the case of the treaties forming the subject of the present draft articles. One such question was whether draft article 75 should not contemplate the case in which the aggressor was an international organization. It soon became clear that this matter had to be left aside, for several reasons. First, it was not at all certain that the term "aggressor State" might not apply to an international organization; it was noted that a text such as the Definition of Aggression adopted on 14 December 1974 by the General Assembly²⁶⁷ provides that "the term 'State' . . . Includes the concept of a 'group of States' where appropriate". Such a definition indicates that, in relation to an armed attack, it is difficult to distinguish between States acting collectively and the organization which they may in certain cases constitute. Whatever position is taken on this question, which is a matter solely for the States parties to the Vienna Convention to settle, there is a second, more compelling reason for not dealing with it: if good reasons could be shown to place an aggressor organization on the same footing as a State, that should seemingly have been done by the Vienna Convention itself, because the problem is far more important for treaties between States than for treaties to which one or more international organizations are parties. In formulating the present draft articles, however, the Commission has consistently refused to adopt proposals which would draw attention to gaps or shortcomings in the Vienna Convention. It therefore decided that draft article 75 should simply speak of an "aggressor State" as article 75 of the Vienna Convention does.

(3) The second problem involves the transposition to draft article 75 of the expression "in relation to a treaty". Its inclusion in the draft article unchanged

²⁶⁷ Resolution 3314 (XXIX), annex.

would mean that the treaty in question could either be a treaty between international organizations or a treaty between one or more States and one or more international organizations, in accordance with the definition in draft article 2, paragraph 1 (a). Now, of all the possibilities that come to mind, one very unlikely to occur in international relations as they now stand is that of a number of international organizations, under a treaty concluded between them alone, taking measures that would give rise to obligations for an aggressor State. A less unlikely possibility is that of a treaty between a number of States and one or more international organizations. The Commission hesitated between a simple solution which would cover unlikely cases and a more restrictive one which would cover only the least unlikely case. In the end it decided to make no reference to the case in which such a treaty would be concluded solely between international organizations. It thus described the treaties to which the draft article may apply as treaties "between one or more States and one or more international organizations", in order to refer only to the least unlikely cases.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

*Article 76. Depositaries of treaties*²⁶⁸

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

²⁶⁸ Corresponding provision of the Vienna Convention:

"Article 76. *Depositaries of treaties*

"1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

"2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

Commentary

(1) Like the other articles of Part VII of the Vienna Convention, article 76 is one containing technical provisions on which agreement was reached without difficulty both in the Commission and at the United Nations Conference on the Law of Treaties. These articles must be transposed to the present draft articles with the necessary changes.

(2) The only question with regard to article 76 which might have given rise to a problem is that of multiple depositaries. It will be recalled that in 1963, in order to overcome certain particularly sensitive political problems, international practice devised the solution, at least for treaties whose universality was highly desirable, of designating a number of States as the depositaries of the same treaty (multiple depositaries). Article 76 provides for the possibility of multiple depositaries, despite various criticisms to which that possibility had given rise, but it does so only for States, and not for international organizations or the chief administrative officers of organizations. The Commission considered whether the provision should not be extended to cover organizations; in other words, whether the draft should not say that the depositary of a treaty could be "one or more organizations".

(3) In the end, the Commission decided not to make that change and to word draft article 76 in the same way as article 76 of the Vienna Convention. It wishes to point out that, while it has no objection in principle to the designation of a number of international organizations as the depositary of a treaty, it found that, in the period of over ten years that has elapsed since the signing of the Vienna Convention, no example of a depositary constituted by more than one international organization has occurred to testify to a practical need for that arrangement; indeed it is difficult to see what it might meet. Moreover—and this is a decisive point, already made a number of times, in particular in connection with article 75—if the possibility of designating more than one international organization as the depositary of a treaty had been of any interest it would have been so mainly for treaties between States, and should therefore have been embodied in the Vienna Convention itself. Save in exceptional cases, the Commission has always tried to avoid, even indirectly, improving on a situation if the improvement could already have appeared in the Vienna Convention.

(4) The only change eventually made in draft article 76, by comparison with article 76 of the Vienna Convention, is in paragraph 1, and arises from the need to mention negotiating international organizations as well as negotiating States and to cater for the two types of treaty governed by the present articles, namely, treaties between one or more States and one or more international organizations and treaties between one or more international organizations.

*Article 77. Functions of depositaries*²⁶⁹

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations

entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations; or

(b) where appropriate, of the competent organ of the organization concerned.

Commentary

(1) The lengthy article 77 of the Vienna Convention needs to be transposed to the present draft articles, but with certain amendments, some of them minor ones. The changes will be considered in paragraph and subparagraph order.

(2) Paragraph 1 (a) must provide that the depositary should also assume custody of powers, an expression which, according to draft article 2, paragraph 1 (c bis) means a document emanating from the competent organ of an international organization and having the same purpose as the full powers emanating from States.

(3) In certain cases (paragraph 1(d) and the beginning of paragraph 2) it was sufficient to mention the international organization as well as the State. In other cases (the introductory part of paragraph 1 and paragraphs 1(b), 1(e), 1(f) and 2), it appeared necessary, despite the resultant unwieldiness of the text, to cater for the distinction between treaties between one or more States and one or more international organizations and treaties between two or more international organizations.

(4) In paragraph 1(f) the list of instruments enumerated in article 77 of the Convention has been extended to include instruments of "formal confirmation" in order to take account of the fact that the Commission replaced the term "ratification" by "act of formal confirmation", defined in draft article 2, paragraph 1 (b bis) as "an international act correspond-

²⁶⁹ Corresponding provision of the Vienna Convention:

"Article 77. Functions of depositaries"

"1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

"(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

"(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

"(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

"(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

"(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

"(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

"(g) registering the treaty with the Secretariat of the United Nations;

"(h) performing the functions specified in other provisions of the present Convention.

"2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned."

ing to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty”.

(5) Paragraph 1 (g) of article 77 was a source of serious difficulty for the Commission. The difficulty already existed in the Vienna Convention itself; it has become more acute now that this provision has had to be adapted to the treaties with which the present draft articles are concerned. Consideration will be given first to the difficulties inherent in the Vienna Convention as such and then to those arising out of the adaptation of the provision.

(6) The main problem concerns the meaning to be given to the term “registration”, and it is complicated by the relationship between article 77 and article 80. The Commission had proposed in 1966 a draft article (article 72) on the functions of the depositary, which contained no provision on the registration of treaties. Its draft article 75 (eventually article 80), on the other hand, laid down the obligation to register treaties with the Secretary-General but did not stipulate whose the obligation was; registration and publication were to be governed by the regulations adopted by the General Assembly and the term “registration” was to be taken in its broadest sense.²⁷⁰ At the Conference on the Law of Treaties a proposal submitted by the Byelorussian Soviet Socialist Republic in the Committee of the Whole amended the text of that article 75 to give paragraph 1 of article 80 its present form, so that filing and recording were mentioned as well as registration.²⁷¹ However, an amendment by the United States of America to article 72 (the future article 77) making the depositary responsible for “registering the treaty with the Secretariat of the United Nations”²⁷² had been adopted a few days earlier, without detailed comment.

(7) What is the meaning of the word “register” in this text? In article 77, is this function merely stated—that is to say, should it be understood as a possibility which the Convention allows if the parties agree to it? Or does article 77 actually constitute the agreement? There are divergent indications on this point in the

preparatory work.²⁷³ What is certain, though, is that the Expert Consultant to the Conference made the following important statement:

It had been asked whether the registration of treaties should not be part of a depositary's functions. The International Law Commission had studied that problem, but had come to the conclusion that the function of registration might cause difficulties, in view of the rules applied by the General Assembly where the depositary was an international organization. There were very strict rules on the subject. The Commission had come to the conclusion that it would be unwise to mention registration as one of the functions of a depositary without making a more thorough study of the relationship between the provision and the rules on the registration of treaties applied by the United Nations.²⁷⁴

(8) In conclusion, doubts may be expressed as to both the scope and the usefulness of subparagraph (g) of paragraph 1; although using different terminology, it seems to duplicate article 80. Turning now to the question of its adaptation to the treaties to which the present draft articles relate, it may first be asked whether the subparagraph can be applied to all “treaties” as understood in the present draft. The reply to this question depends on the meaning of the term “registration”; since it has a narrow sense in article 80, it might be thought appropriate to give it a narrow meaning here as well. If so, subparagraph (g) could not apply to all treaties, since there are some treaties to which “registration” under the rules formulated by the United Nations does not apply. The Commission therefore considered at one time inserting the proviso “where appropriate” in subparagraph (g). Another solution, since the subject is governed by the terminology, rules and practices of the United Nations, would have been to mention Article 102 of the Charter of the United Nations in subparagraph (g) in order to emphasize that the subparagraph was confined to stating what could or should be done according to the interpretation of the Charter given by the United Nations. The Commission finally adopted subparagraph (g) of the Vienna Convention unchanged; although it was dissatisfied with that solution, it wished to avoid adding to the uncertainty and controversy which can arise from the Vienna Convention text. It was pointed out in the Commission, however, that

²⁷⁰ The commentary to the article which became art. 80 shows that the Commission used the term “registration” in its general sense to cover both “registration” and “filing and recording” (see *Yearbook ... 1966*, vol. II, p. 273, document A/6309/Rev.I, part II, chap. II, draft articles on the law of treaties and commentaries, art. 75, para. (2) of the commentary). The Commission added:

“However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 75 by reference to them in general terms.” (*Ibid.*, para. (3) of the commentary.)

²⁷¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 206, document A/CONF.39/14, para. 684 (b).

²⁷² *Ibid.*, p. 201, para. 657, sect. (iv), (6).

²⁷³ In connection with the Commission's draft art. 71 (now art. 76), which was discussed together with draft art. 72 (now art. 77), the United Kingdom delegation drew attention to the purely expository character of the wording on functions of depositaries (*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. 462, 77th meeting of the Committee of the Whole, para. 53). Sir Humphrey Waldoock, Expert Consultant to the Conference, confirmed this view (*ibid.*, p. 467, 78th meeting of the committee of the Whole, para. 51). The United States representative, however, in explaining his delegation's amendment, stated: “the United Nations Secretariat had informally indicated its preference that registration of a treaty be effected by the depositary” (*ibid.*, p. 459, 77th meeting of the Committee of the Whole, para. 20).

²⁷⁴ *Ibid.*, pp. 467–468, 78th meeting of the Committee of the Whole, para. 59.

registration did not at present apply to treaties between two or more international organizations.

(9) Article 77, paragraph 2, unfortunately gives rise to further difficulties. In its report,²⁷⁵ the International Law Commission gave no details or explanation about the concluding phrase of paragraph 2 of the corresponding article of its draft on the law of treaties. What is the organization "concerned"? What is the meaning here of the conjunction "or"? If the organization concerned is the depositary organization (which would be the logical explanation under the Vienna Convention), a formula by which the depositary brings the question to the attention of the competent organ of the depositary might be wondered at. It is true that at the time the text was drafted considerable difficulties had arisen in the United Nations with regard to the precise role of the Secretary-General when the United Nations was the depositary and reservations were made; in the end, the Secretary-General was relieved of all responsibility in the matter,²⁷⁶ and the concluding phrase of paragraph 2 simply reflects his concern to ensure that any difference arising on grounds which he considers do not engage his responsibility should be settled by a political body.²⁷⁷ If this is so, the conjunction "or" definitely establishes an alternative: if there is an organization "concerned" and if it has an organ competent to settle disputes between the depositary and a signatory State or contracting party, the dispute should be brought to the attention of that organ of the organization. Some members of the Commission nevertheless considered that the conjunction "or" was unsatisfactory and should either be replaced by the conjunction "and" or simply be deleted.

(10) Finally, although not entirely satisfied, the Commission decided to retain the text of the Vienna Convention with only one change, namely, the reference to States and organizations or, as the case may be, organizations, according to whether the treaty concerned is between one or more States and one or more international organizations or between two or more international organizations. Since that addition

made the text considerably more cumbersome, however, the Commission rearranged the text to make two subparagraphs, (a) and (b), solely for the sake of clarity.

*Article 78. Notifications and communications*²⁷⁸

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Commentary

Article 78, which is of a technical nature, gave rise to no difficulty either in the Commission or at the United Nations Conference on the Law of Treaties. Its adaptation to the treaties which are the subject of the present draft articles simply requires a reference to international organizations in the introductory wording and in subparagraphs (b) and (c), and a reference in subparagraph (a) to "the States and organizations or, as the case may be, to the organizations for which it is intended", in order to distinguish the case of treaties between one or more States and one or more international organizations from that of treaties between two or more international organizations.

²⁷⁵ *Yearbook ... 1966*, vol. II, pp. 269–270, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, art. 72 and commentary.

²⁷⁶ See art. 20, para. 3 of the Vienna Convention, which requires reservations to a constituent instrument of an international organization to be accepted by the competent organ of that organization, and the Commission's commentary to the corresponding draft article of 1966 (*ibid.*, p. 207, para. (20) of the commentary to art. 17).

²⁷⁷ See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), para. 80. This is certainly the explanation given by the Special Rapporteur himself concerning para. 2 of art. 29 (later art. 72, now art. 77):

"Reference to a competent organ of an international organization was needed in article 29, paragraph 2, because of the functions it might have to fulfil as a depositary." (*Yearbook ... 1966*, vol. I (part II), p. 295, 887th meeting, para. 95.)

²⁷⁸ Corresponding provision of the Vienna Convention:

"Article 78. *Notifications and communications*

"Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

"(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

"(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

"(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e)."

**Article 79. Correction of errors in texts
or in certified copies of treaties²⁷⁹**

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States

and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

Commentary

The comments made on article 78 also apply to article 79. Draft article 79 departs from article 79 of the Vienna Convention only in that reference had to be made in paragraph 1 (introductory wording), paragraph 2 (introductory wording and subparagraphs (a) and (b)) and paragraphs 3, 4 and 6 to States and organizations, or organizations, according to whether the treaty concerned is between one or more States and one or more international organizations or between two or more international organizations.

²⁷⁹ Corresponding provision of the Vienna Convention:

"Article 79. Correction of errors in texts or in certified copies of treaties

"1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

"(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

"(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

"(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

"2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

"(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

"(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

"3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

"4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

"5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

"6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States."

Article 80. Registration and publication of treaties²⁸⁰

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Commentary

(1) Article 80 of the Vienna Convention has already been commented on in connection with draft article 77. It will be observed that the text (particularly in its English version) establishes an obligation for the parties to the Vienna Convention, whereas it has been said that article 77 is purely expository. Article 80 can be applied to the treaties which are the subject of the present draft articles without altering the text at all, and would establish an obligation for those international organizations which might by one means or another become bound by the rules in the draft articles.

(2) It will also be noted that the only obligation imposed by article 80 of the Convention and by draft article 80 concerns "transmission". How the United Nations applies Article 102 of the Charter (as to form, terminology and method of publication) is exclusively a matter for the competent organs of that organization. Thus the General Assembly has seen fit to amend the regulations on the application of Article 102²⁸¹ and in particular to restrict the extent of publication of treaties between States.²⁸² The purpose of draft article 80 is that Article 102 of the Charter should be applied to new categories of treaty; it will be for the United Nations itself to amend the existing regulations if necessary, especially if draft article 80 becomes applicable to the Organization.

ANNEX²⁸³***Procedures established in application of Article 66*****I. ESTABLISHMENT OF THE CONCILIATION COMMISSION****1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United**

Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations."

²⁸⁰ Corresponding provision of the Vienna Convention:

"Article 80. Registration and publication of treaties

"1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

"2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph."

²⁸¹ See *Yearbook ... 1963*, vol. II, pp. 28-32, document A/CN.4/154, paras. 125-143.

²⁸² See General Assembly resolution 33/141 of 19 December 1978.

²⁸³ Corresponding provision of the Vienna Convention:

- (i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

- (i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

- (c) In the case referred to in article 66, paragraph 3,
 - (i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).
 - (ii) The State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.
 - (iii) When the provisions of subparagraph (c)(ii) apply, the other party to the dispute shall appoint conciliators as follows:
 - (1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);
 - (2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);
 - (3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c)(ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

2 bis. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Commentary

(1) The United Nations Conference on the Law of Treaties, after laying down in article 66 the principle of compulsory recourse to conciliation for disputes relating to the application or interpretation of the provisions of Part V of the Convention (except for articles 53 and 64), set forth in detail the machinery for this conciliation in a lengthy Annex. The Commission, having adopted the text of a draft article 66, needed to adopt in addition the text of an Annex which follows the provisions of the Vienna Convention but takes account of the special problems deriving from the participation of one or more international organizations in disputes.

(2) When making the necessary modifications, the Commission had to add new provisions which lengthen the Annex considerably by comparison with the already long text of the Annex to the Vienna Convention. To make comparison easier, the same paragraph numbering has been used as in the Annex to the Vienna Convention; the text of paragraph 2, which incorporates the most substantial additions, has been presented in such a way as to display the symmetry between the draft text and the Vienna Convention text. A paragraph 2 bis has been added in order not to depart from the Vienna Convention numbering. Lastly, to make the text clearer, the Annex as a whole has been divided into two sections: "*Establishment of the Conciliation Commission*" and "*Functioning of the Conciliation Commission*". It will be noted that Section II reproduces without change paragraphs 3 to 7 of the Vienna Convention Annex, and that all the

departures which had to be made from the latter are in section I.

(3) The first difficulty of principle encountered by the Commission concerns the establishment of the list of conciliators provided for in paragraph 1 of the Annex. Under the Vienna Convention, this rests with all States Members of the United Nations and States Parties to the Convention, two conciliators being nominated by each State. The question was whether certain organizations should also be allowed to nominate conciliators for inclusion in the list in advance, and if so, which organizations. A large majority of the members of the Commission held that they should, mainly on the ground that any parties to a dispute must in principle be placed on an equal footing and that organizations could be parties to a dispute. There can be no question, however, of granting this right to international organizations in their character as members of the United Nations since they cannot be such members; hence it can only apply to organizations to which the proposed articles "have become applicable". For the time being, however, the Commission has neither examined nor discussed how the articles under consideration might become applicable to an international organization; it considers that it should first hear the observations of Governments on that subject. International practice has shown that there are several ways in which the rules of a treaty become "applicable" to an organization. The Commission has therefore not only given the right to nominate two conciliators for inclusion in the list solely to those organizations to which the articles have "become applicable", but has placed the provision in question in square brackets to draw Governments' attention to the matter. One opinion dissenting from this course of action was also expressed in the Commission. This was that the proposed arrangement was unacceptable both for a reason of principle and for practical reasons. As a matter of principle, organizations should not be placed on the same footing as States; as a matter of practicality, the list of conciliators nominated by States was very long already and need not be any longer, and also the part played by the list in the appointment of conciliators showed that, so far as organizations were concerned, it was not essential. This was because the list served to limit the choice of the second conciliator, who must be chosen from it, and an organization which had to choose a second conciliator can be given the faculty of choosing someone not on the list.

(4) Paragraph 2 of the draft Annex, which relates to the appointment of conciliators, deals in turn, as does the Vienna Convention text: first, with the appointment of the four conciliators nominated by the parties to the dispute; second, with the appointment of the fifth conciliator, chairman of the Conciliation Commission; third, with that of any member of the Commission not appointed within the prescribed period; and fourth, with vacancies on the Conciliation Commission. Only the first point was the subject of significant elaboration on the Vienna text. In keeping with the

distinction drawn in article 66, the text deals in turn, in three subparagraphs—(a), (b) and (c)—with the case of a dispute between States, a dispute between international organizations, and a dispute between States and international organizations.

(5) When the dispute is between States alone (article 66, para. 2), the draft Annex (para. 2 (a)) reproduces the Vienna Convention arrangements word for word.

(6) When the dispute is between international organizations alone (article 66, para. 2), the draft Annex (para. 2 (b)) necessarily differs on one point from the provisions for a dispute between States. In the latter case, the second conciliator must be chosen from conciliators on the list who are not of the nationality of the State choosing him. No nationality link can exist between an organization and a natural person. The intention of the draftsmen of the Vienna Annex seems to have been to place a certain distance between the second conciliator and the State appointing him; in the case of international organizations, this intention would appear to be respected by providing that the organization may not choose as its second conciliator a person placed on the list on its own initiative.

(7) When the dispute is between States and organizations (article 66, para. 3), the situation is more complicated because a number of cases are possible, and it was necessary, in paragraph 2 (c) of the draft annex, to make several "sub-distinctions". When one of the parties to the dispute consists of homogeneous entities (subpara. (i))—a State or States and organization or organizations—the appointments are made in the same way as in the previous cases (subparas. (a) and (b)). But when one of the parties consists of a State or States and an organization or organizations (subpara. (ii)), the appointments are made by mutual agreement, and that of the second conciliator must comply both with the conditions applicable to the second conciliator appointed by one or more States and with those applicable to the second conciliator appointed by one or more international organizations, i.e. he must not be of the nationality of the State party or of one of the States parties and must not have been included in the list on the initiative of the organization party or one of the organizations parties. The view was expressed in the Commission that paragraph (c) should have dealt only with the simplest case, namely, that of a dispute between one or more States on the one hand, and one or more organizations on the other; it was said that the proposed text was too complicated and that, in the more complex cases, parallel conciliation proceedings could take place or it could be left to all the parties concerned to arrange by special agreement for single proceedings. The great majority of the Commission took a different view. They believed that parties to a multilateral treaty should be able to join forces in a dispute and that their opponent should be unable to use an omission in the text as a pretext for asserting that States and organizations could not do so and that there must be either parallel proceedings, with all the risks of

conflict they involve, or negotiations prior to the institution of joint proceedings.²⁸⁴

(8) A special difficulty arises with the Conciliation Commission machinery if the United Nations is a party or is included in a party to a dispute. This is because the entire procedure established in the Annex to the Vienna Convention and followed in the draft Annex centres on the Secretary-General of the United Nations. If the Organization is involved in a dispute, the Secretary-General clearly should not appoint conciliators when this has not already been done within the prescribed period. In such a case, it is the President of the International Court of Justice and not the Secretary-General who makes the appointments (penultimate subparagraph of paragraph 2); to assist the President in this, the Secretary-General transmits the list of conciliators to him in advance (end of paragraph 1). The Commission discussed at length

whether it was necessary to go further and, in the case referred to, relieve the Secretary-General of the various administrative functions which he exercises in regard to conciliation (notifications, transmission of the Conciliation Commission's report, assistance and facilities, financing (paras. 2, 6 and 7)). The Commission finally decided not; any alternative arrangements would give rise to considerable complications and might also imply an unwarranted lack of confidence in the Secretary-General.

(9) One final departure from the Vienna text is the addition of a paragraph 2 *bis*, the purpose of which is to make it clear that appointments of conciliators for which, under the conciliation procedure, an international organization is responsible are governed by the relevant rules of the organization. The reasons for this addition are the same as those given above.²⁸⁵

²⁸⁴ See art. 66 above, para. (6) of the commentary.

²⁸⁵ See art. 65 above, para. (5) of the commentary.

Chapter V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

59. Paragraph 1 of General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the International Law Commission should "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate".

60. At its twenty-third session, in 1971, the Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work.²⁸⁶ The Commission also agreed that, for the purpose of undertaking the substantive study of the rules of international law relating to the non-navigational uses of international watercourses with a view to its progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers",²⁸⁷ prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the United Nations Legislative Series.²⁸⁸ In paragraph 2 of resolution 2669 (XXV), the General Assembly requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, "taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter".

61. In section I, paragraph 5, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses".

62. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work. At the same session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity, and accordingly requested the Secretariat to continue to compile material relating to the topic, with special reference to the problems of the pollution of international watercourses.²⁸⁹

63. In section I, paragraph 5, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. By the same resolution (sect. I, para. 6) the General Assembly requested the Secretary-General "to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the General Assembly in resolution 2669 (XXV)", and to present an advance report on the study to the Commission at its twenty-fifth session.

64. At its twenty-fifth session, in 1973, the Commission gave special attention to the question of the priority to be given to the topic. Taking into account the fact that the supplementary report on international watercourses²⁹⁰ would be submitted to members by the Secretariat in the near future, the Commission considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.²⁹¹

65. By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission "should at its twenty-sixth

²⁸⁶ See *Yearbook* ... 1971, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

²⁸⁷ *Yearbook* ... 1974, vol. II (Part Two), p. 33, document A/5409.

²⁸⁸ *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (ST/LEG/SER.B/12) (United Nations publication, Sales No. 63.V.4).

²⁸⁹ *Yearbook* ... 1972, vol. II, p. 324, document A/8710/Rev.1, para. 77.

²⁹⁰ See para. 60 above.

²⁹¹ *Yearbook* ... 1973, vol. II, p. 231, document A/9010/Rev.1, para. 175.

session commence its work on the law of non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute". By paragraph 6 of the same resolution, the General Assembly requested the Secretary-General to complete the supplementary report requested in resolution 2669 (XXV), in time to submit it to the Commission before the beginning of its twenty-sixth session.

66. At its twenty-sixth session, in 1974, the Commission had before it the supplementary report on legal problems relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV).²⁹²

67. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), the Commission, at its twenty-sixth session, set up the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi, which was requested to consider the question and to report to the Commission. The Sub-Committee adopted and submitted a report²⁹³ which proposed the submission of a questionnaire to States regarding, *inter alia*, the scope of the proposed study, the uses of water to be considered and whether the problem of pollution should be given priority, the need to deal with flood control and erosion problems, and the interrelationship between navigational uses and other uses.

68. The Commission considered the report of the Sub-Committee at its 1297th meeting, held on 22 July 1974, and adopted it without change. It was included as an annex to the relevant chapter of the Commission's report on the work of its twenty-sixth session.²⁹⁴ The Commission also appointed Mr. Richard D. Kearney as Special Rapporteur for the question of the law of the non-navigational uses of international watercourses.²⁹⁵

69. At its twenty-ninth session, the General Assembly adopted resolution 3315 (XXIX) of 14 December 1974, by which, in paragraph 4 (e) of section I, it recommended that the Commission should:

Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669(XXV) of 8 December 1970 and 3071(XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

By a circular note dated 21 January 1975, the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in the above-mentioned paragraph of General Assembly resolution 3315 (XXIX) and the final text of which, as communicated to Member States, read as follows:²⁹⁶

- A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D. Should the Commission adopt the following outline of fresh water uses as the basis of its study:
 - (a) Agricultural uses
 1. Irrigation;
 2. Drainage;
 3. Waste disposal;
 4. Aquatic food production.
 - (b) Economic and commercial uses
 1. Energy production (hydroelectric, nuclear and mechanical);
 2. Manufacturing;
 3. Construction;
 4. Transportation other than navigation;
 5. Timber floating;
 6. Waste disposal;
 7. Extractive (mining, oil production, etc.).
 - (c) Domestic and social uses
 1. Consumptive (drinking, cooking, washing, laundry, etc.);
 2. Waste disposal;
 3. Recreational (swimming, sport, fishing, boating, etc.).
- 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?

70. The Commission did not consider the topic at its twenty-seventh session, in 1975, pending the receipt of the replies from Governments of Member States to the Commission's questionnaire.²⁹⁷

71. The General Assembly, by paragraph 4 (e) of its resolution 3495(XXX) of 15 December 1975, recommended that the Commission should continue its study

²⁹² *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

²⁹³ *Ibid.*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*, p. 301, para. 159.

²⁹⁶ *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

²⁹⁷ *Yearbook ... 1975*, vol. II, pp. 183–184, document A/10010/Rev.1, para. 138.

of the law of the non-navigational uses of international watercourses.

72. In 1976, at its twenty-eighth session, the Commission had before it the replies to the questionnaire received from the Governments of 21 Member States.²⁹⁸ It also had before it a report submitted by Mr. Richard D. Kearney, then Special Rapporteur for the topic.²⁹⁹ That report was devoted to consideration of Governments' replies to the questionnaire and the conclusions that might be drawn from them with regard to the scope and direction of the work on international watercourses. In view of the substantial variations among the replies to questions A, B and C,³⁰⁰ which dealt with the scope of the Commission's work, and the large measure of agreement in the replies to the other questions, the major part of the report was devoted to a discussion of what is encompassed by the term "international watercourse".

73. At that session, the Commission discussed the question of the law of the non-navigational uses of international watercourses at its 1406th to 1409th meetings, held on 14, 15, 16 and 19 July 1976.

74. In that discussion, attention was devoted mainly to the matters raised in the replies from Governments discussed in the report submitted by the Special Rapporteur concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The report noted that there were considerable differences in the replies of Governments to the questionnaire regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, with regard both to uses and to the special problems of pollution. Differences also appeared in the views expressed by members of the Commission in the debate on the Special Rapporteur's report. A consensus emerged that the problem of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work. The relevant paragraphs of the report of the Commission on the work of its twenty-eighth session read as follows:

164. This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance between those which were too detailed to be generally applicable and those which were so general that they would not be effective. Further, the rules should be designed to promote the adoption of regimes for individual international rivers and for that reason should have a residual character. Efforts

should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.

165. It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.³⁰¹

The discussions in the Commission showed general agreement with the views expressed by Governments in response to the questions dealing with other issues. The Commission indicated that the Special Rapporteur could rely on the outline of uses suggested in connection with question D,³⁰² but taking into account the various suggestions made by Governments for additions to or variations in the outlines. Flood control, erosion problems and sedimentation should be included in the study, as well as the interaction between use for navigation and other uses. Pollution problems should, so far as possible, be dealt with in connection with the particular uses that give rise to pollution. The Commission indicated that the Special Rapporteur should maintain the relationships already established with United Nations agencies and raise with the Commission the question of securing technical advice if and when such action appeared necessary.³⁰³

75. The General Assembly, in paragraphs 4 (d) and 5 of resolution 31/97 of 15 December 1976, recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses and urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible the written comments referred to in resolution 31/97.

76. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel as Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, to succeed Mr. Richard D. Kearney, who had not stood for re-election to the Commission.³⁰⁴

77. By paragraph 4 (d) of resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses. This recommendation was also made by the General Assembly by resolution 33/139 of 19 December 1978.

²⁹⁸ *Yearbook ... 1976*, vol. II (Part Two), p. 162, document A/31/10.

³⁰² See para. 69 above.

³⁰³ *Yearbook ... 1979*, vol. II (Part Two), p. 162, document A/31/10, para. 166.

³⁰⁴ *Yearbook ... 1977*, vol. II (Part Two), p. 124, document A/32/10, para. 79.

²⁹⁸ *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1.

²⁹⁹ *Ibid.*, p. 184, document A/CN.4/295.

³⁰⁰ See para. 69 above.

78. In 1978, at the thirtieth session of the Commission, replies received from the Governments of four Member States, submitted in accordance with General Assembly resolution 31/97, were circulated.³⁰⁵ Also at that session, the Commission heard a statement on the topic by the Special Rapporteur, who spoke, *inter alia*, on recent activities within the United Nations which concerned the law of the non-navigational uses of international watercourses. He also informed the Commission that, in co-operation with the Office of Legal Affairs, the secretariats of certain United Nations bodies, programmes and regional commissions, as well as certain specialized agencies and other international organizations, had been requested to provide recent information and materials relevant to the topic. The Commission took note of the presentation made by the Special Rapporteur, expressed the hope that he could proceed in the near future with the preparation of a report and decided to stress once again the invitation to Governments of Member States which had not already done so to submit their replies to the Commission's questionnaire, in pursuance of General Assembly resolution 31/97 referred to above.³⁰⁶

79. At its thirty-first session, in 1979, the Commission had before it the first report on the topic submitted by the Special Rapporteur,³⁰⁷ as well as a reply received from one Member State³⁰⁸ to the Commission's questionnaire. That first report contained four chapters. The first, introductory, chapter dealt with the nature of the subject, describing some salient physical characteristics of water which called for a singular treatment of the subject. Chapter II summarized some aspects of the history of the treatment of the subject hitherto, particularly by the Commission, and addressed the question of the scope of the Commission's work on it and the meaning of the term "international watercourse". It included a draft article 1 proposed by the Special Rapporteur entitled "Scope of the present articles". Chapter III discussed the utility of "user agreements" as a means of affording States immediately concerned with a particular international watercourse the possibility of undertaking detailed obligations calibrated to the particular characteristics of that watercourse, though remaining within the framework of a proposed set of draft articles setting out general, residual rules of universal application. In this context, and for the purpose of focusing and facilitating the Commission's debate on the topic, the Special Rapporteur proposed the following draft articles: "User States" (article 2); "User agreements" (article 3); "Definitions" (article 4); "Parties to user

agreements" (article 5); "Relation of these articles to user agreements" (article 6); and "Entry into force for an international watercourse" (article 7). The last chapter concerned one fundamental area of obligations, that of the regulation of data collection and exchange. Three draft articles were proposed: "Data collection" (article 8); "Exchange of data" (article 9); and "Costs of data collection and exchange" (article 10).

80. In presenting his report, the Special Rapporteur noted that he had received from the secretariats of various international organizations relevant information, documentation and materials submitted in response to the request noted above.³⁰⁹ In addition, he drew attention to the fact that the Secretariat had provided him with an annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses.

81. The Commission devoted its 1554th to 1556th, 1577th and 1578th meetings, held from 18 to 20 June and 26 and 27 July 1979, to consideration of the topic of the law of the non-navigational uses of international watercourses, on the basis of the first report submitted by the Special Rapporteur. It engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. A summary of that debate was set out in a section of the report of the Commission on the work of its thirty-first session and concerned the following matters raised during the consideration of the topic: the nature of the topic; the scope of the topic; the question of formulating rules on the topic; the methodology to be followed in formulating rules on the topic; the collection and exchange of data with respect to international watercourses and future work on the topic.³¹⁰

82. Bearing in mind the need for comprehension of the scientific and technical considerations involved in the topic, the Commission at its thirty-first session authorized the Special Rapporteur to explore with the Secretariat the possibilities of finding professional technical advice, preferably within the existing resources and personnel of the United Nations system.

83. Also, in view of the importance of the topic and the need to have at its disposal the views of as many Governments of Member States as possible, the Commission decided again to request, through the Secretary-General, the Governments of Member States which had not already done so to submit their written comments on the questionnaire formulated by the Commission in 1974. The Secretary-General, by a circular note dated 18 October 1979, invited the Governments of Member States which had not already

³⁰⁵ *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314.

³⁰⁶ *Ibid.*, vol. II (Part Two), p. 148, document A/33/10, paras. 157-160.

³⁰⁷ *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

³⁰⁸ *Ibid.*, p. 178, document A/CN.4/324.

³⁰⁹ Para. 78.

³¹⁰ *Yearbook ... 1979*, vol. II (Part Two), pp. 163 *et seq.*, document A/34/10, chap. V, sect. B, paras. 111-148.

done so to submit their written comments on the questionnaire prepared by the Commission.

84. The General Assembly, by paragraph 4 (d) of resolution 34/141 of 17 December 1979, recommended that the Commission should continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

85. The Commission at the current session had before it the second report submitted by the Special Rapporteur (A/CN.4/332 and Add.1),³¹¹ as well as replies received from the Governments of four Member States (A/CN.4/329 and Add.1)³¹² to the renewed request for comments on the 1974 questionnaire formulated by the Commission.³¹³ In the Special Rapporteur's second report, the texts of six draft articles were proposed as follows: "Scope of the present articles" (article 1); "System States" (article 2); "System agreements" (article 4); "Parties to the negotiation and conclusion of system agreements" (article 5); "Collection and exchange of information" (article 6); and "A shared natural resource" (article 7). Also indicated in the report was a draft article 3 on "Meaning of terms", to be supplied subsequently.

86. The topic "The law of the non-navigational uses of international watercourses" was considered by the Commission at its 1607th to 1612th meetings, held from 9 to 16 June 1980. The Commission referred to the Drafting Committee the draft articles on the topic proposed by the Special Rapporteur in his second report.

87. On the recommendation of the Drafting Committee, the Commission, at its 1636th meeting, held on 17 July 1980, provisionally adopted draft articles 1 to 5 and article X.³¹⁴ It was indicated that the Drafting Committee had been unable to consider the proposed draft article 6 on "Collection and exchange of information", as it had found that the important issues raised therein could not be adequately dealt with in the short time at the Committee's disposal. The Commission also accepted, as recommended by the Drafting Committee, a provisional working hypothesis as to what was meant, at least in the early stages of the Commission's work on the topic, by certain expressions.³¹⁵ Furthermore, the Commission accepted

the Drafting Committee's proposal to align the terminology used in the various language versions of the title of the topic so as to reflect more faithfully in the French version the intended meaning. Thus the French expression "des voies d'eau internationales" had been changed to "des cours d'eau internationaux".

2. SCOPE OF THE DRAFT

88. In the course of preparing the draft articles which follow, the Commission continued to be conscious of what in 1976 had been

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 regimes for individual international rivers and for that reason should have a residual character.³¹⁶

89. At the same time, it was thought necessary, especially in view of the use in the draft articles of the term "international watercourse system", to give some indication of what such a system was. The purpose of the Commission at that juncture was not to prepare a definition of the international watercourse or the international watercourse system that would be definitive and to which the Commission or States would be asked to commit themselves. Rather, it was to prepare a working hypothesis, subject to refinement and indeed change, which would give those who were called upon to compose and criticize the draft articles an indication of their scope.

90. With the foregoing considerations in view, the Commission prepared the following note describing its tentative understanding of what was meant by the term "international watercourse system":

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system, components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

³¹¹ To be reproduced in *Yearbook* ... 1980, vol. II (Part One).

³¹² *Ibid.*

³¹³ As at 15 July 1980, the Governments of the following 30 Member States had submitted replies to the Commission's questionnaire: Argentina; Austria; Barbados; Brazil; Canada; Colombia; Ecuador; Finland; France; Germany, Federal Republic of; Greece; Hungary; Indonesia; Libyan Arab Jamahiriya; Luxembourg; Netherlands; Nicaragua; Niger; Pakistan; Philippines; Poland; Spain; Sudan; Swaziland; Sweden; Syrian Arab Republic; United States of America; Venezuela; Yemen; Yugoslavia.

³¹⁴ See sect. B below.

³¹⁵ See paras. 88-94 below.

³¹⁶ *Yearbook* ... 1976, vol. II (Part Two), p. 162, document A/31/10, para. 164.

91. The first paragraph of this working hypothesis records the fact that the components of a watercourse system, such as rivers and lakes and the groundwater flowing in and out of them, constitute by virtue of their physical relationship a unitary whole. Thus, any use of waters of the system which affects those waters in one part of the system may—and the word “may” is used advisedly—affect waters in another part. Typically, the use of waters of a system upstream will affect the quality, quantity or rate of flow of those waters downstream, in large measure or small. In some cases, uses of waters of a system downstream will affect uses of the water upstream, as for example in respect of navigation, or the movements of certain kinds of fish such as salmon.

92. The second paragraph of the note characterizes an international watercourse system as a watercourse system, components of which (such as those referred to in the preceding paragraph of the note) are situated in two or more States.

93. The third paragraph makes clear the result of these conjunctions. If waters in one State are not affected by uses of waters in another State, they shall not be treated for the purpose of these articles as being included in the international watercourse system. For example, if the use of waters in a downstream State has no effect on uses of waters in an upstream State, as very often is the case, then that use would not be one within the scope of these articles. To the extent that the uses of the waters of the system actually have an effect on one another, to that extent—but only that extent—is the system international. Accordingly, as used in these articles, the watercourse has not an absolute, but a relative, international character.

94. While the great majority of the Commission favoured the adoption of a working definition of the foregoing substance, one member of the Commission was opposed. In his view, certain terms in the note, such as “hydrographic components”, of which only illustrations were given, lacked specificity and engaged the Commission in pseudo-scientific speculation, rendering the hypothesis devoid of any meaning. Hence he was unable to take a position on any of the articles provisionally adopted at the current session, as it was not known what was actually meant by the term “international watercourse system”. Work on the topic should adopt the definition of an international watercourse as a river which forms or traverses an international boundary, it being understood, however, that this definition could be expanded in particular articles of a draft to address particular uses which require a broader definition. It was maintained that such a definition would at once conform to the classical definition of an international river and serve to give a definite scope to the draft articles. In his view, the approach adopted by the majority would, in treating a watercourse as international for some uses but not for others, lead to uncertainty and difficulty of application.

3. CHARACTER OF THE DRAFT

95. From the outset of its work, the Commission has recognized the diversity of international watercourse systems; their physical characteristics and the human needs they serve are subject to geographical and social variations similar to those found in other connections throughout the world. Yet it has also been recognized that certain common watercourse characteristics exist, and that it is possible to identify certain principles of international law already existing and applicable to international watercourse systems in general. Mention was made of such concepts as the principle of good neighbourliness and *sic utere tuo ut alienum non laedas*, as well as the sovereign rights of riparian States. What was needed was a set of draft articles that would lay down principles regarding the non-navigational uses of international watercourses in terms sufficiently broad to be applied to all international watercourse systems, while at the same time providing the means by which the articles could be applied or modified to take into account the singular nature of an individual watercourse system and the varying needs of the States in whose territory part of the waters of such a system were situated.

96. Bearing in mind these considerations as well as the general debate on the topic held at its thirty-first session,³¹⁷ and the views expressed in the Sixth Committee of the General Assembly on the matter,³¹⁸ the Commission commenced its work at its current session by preparing draft articles for inclusion in a set of articles containing basic rules applicable to all international watercourse systems. These were to be coupled with distinct and more detailed agreements between States of an international watercourse system, which would take into account their needs and the characteristics of that particular watercourse system. At this stage in the work, the Commission intends to devote attention to the formulation of general, residual rules on the topic, designed to be complemented by other agreements which, when the States concerned choose to conclude them, will enable States of a particular watercourse system to establish more detailed arrangements and obligations governing its use.

97. It is evident that the elaboration of such draft articles, which might eventually serve as the basis for a “framework instrument”,³¹⁹ is not free from difficulty or complexity. The relationship between the articles

³¹⁷ *Yearbook* ... 1979, vol. II (Part Two), pp. 163 *et seq.*, document A/34/10, chap. V, sect. B, paras. 111–133.

³¹⁸ See “Report of the International Law Commission on the work of its thirty-first session (1979): topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its thirty-fourth session” (A/CN.4/L.311), paras. 208–213.

³¹⁹ The final form of the draft articles will as usual be decided only at a later stage in the Commission’s work on the topic.

currently being elaborated and the agreements to be drawn up to take account of the needs and characteristics of a particular international watercourse system will require careful examination and study. At the present stage, the framework character of the draft is set forth in the provisions of draft articles 3 and 4 (see below) relating to "system agreements".

98. It should be noted that, at a future stage in its work, after having elaborated general principles relating to the non-navigational uses of international watercourse systems and their waters, the Commission intends to examine the advisability of formulating, within the framework of the draft, additional draft articles on specific uses of international watercourse systems and their waters, such as those mentioned in its 1974 questionnaire addressed to Governments,³²⁰ as well as on various measures of conservation related to such uses (and abuses such as pollution) as are foreshadowed by the text of draft article 1 below concerning the scope of the present draft articles.

B. Draft articles on the law of the non-navigational uses of international watercourses

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Commentary

(1) The use of the term "uses"³²¹ in this draft article on the scope of the present articles derives from the essential concern of the topic as evidenced by its wording: the law of the non-navigational uses of international watercourses. This emphasis on uses likewise comports with the working definition of an international watercourse system described above.³²²

(2) The reference to an international watercourses "system" is a specification which requires comment. The Commission has selected this term because it gives the appropriate sense of dimension which characterizes an international watercourse. An international watercourse is not a pipe carrying water through the territory of two or more States. While its core is generally and

rightly seen as the main stem of a river traversing or forming an international boundary, the international watercourse is something more, for it forms part of what may best be described as a "system"; it comprises components that embrace, or may embrace, not only rivers but other units such as tributaries, lakes, canals, glaciers and groundwater, constituting by virtue of their physical relationship a unitary whole.

(3) The word "system" is frequently used in connection with "river". Article 331 of the Treaty of Versailles provides:

Article 331

The following rivers are declared international:

The Elbe (*Labe*) from its confluence with the Vltava (*Moldau*), and the Vltava (*Moldau*) from Prague;

The Oder (*Odra*) from its confluence with the Oppa;

The Niemen (*Russtrom-Memel-Niemen*) from Grodno;

The Danube from Ulm;

and all navigable parts of these river systems which naturally provide more than one State with access to the sea . . . ; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river . . .³²³

(4) There are a number of other references in the Treaty of Versailles to river systems, for example article 362, which, in dealing with the proposed extension of the jurisdiction of the Central Rhine Commission, refers to "any other parts of the Rhine river system which may be covered by the General Convention provided for in article 338 above".³²⁴

(5) The term "river system" is also employed in the Convention instituting the definitive status of the Danube (Paris, 1921). Article 1 of the Convention provides for freedom of navigation on the navigable course of the Danube and "over all the internationalized river system". Article 2 states that:

The internationalized river system referred to in the preceding article consists of:

The Morava and the Thaya where, in their courses, they form the frontier between Austria and Czechoslovakia;

The Drave from Barcs;

The Tiza from the mouth of the Szamos;

The Maros from Arad;

Any lateral canals or waterways which may be constructed . . .³²⁵

Similar uses of the term "river system" are to be found in other multilateral treaties dealing with freedom of navigation in European rivers.

(6) The principles of law governing the uses of international rivers and lakes adopted by the Inter-American Bar Association at its Tenth Conference, held in November 1957 in Buenos Aires, uses the term

³²⁰ See para. 69 above.

³²¹ The outline of fresh water uses suggested by the Commission in its 1974 questionnaire is set out in para. 69 above. See also para. 74 above.

³²² See paras. 89–94.

³²³ C. Bevans, ed., *Treaties and other International Agreements of the United States of America 1776–1949* (Washington, D.C., U.S. Government Printing Office, 1969), vol. 2, p. 211.

³²⁴ *Ibid.*, p. 221.

³²⁵ League of Nations, *Treaty Series*, vol. XXVI, p. 177.

"system" in a reformulation of the 1815 Vienna definition:

... the following general principles, which form part of existing international law, are applicable to every watercourse or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States; such a system will be referred to hereafter as "system of international waters".³²⁶

(7) The term "river systems" also appears in basic scholarly texts. H. S. Smith for example, writes: "The study of practice leads irresistibly to the conclusion that it is impossible to lay down any general rule as to the priority of interests upon all river systems."³²⁷ It is found in State practice, such as the memorandum issued by the United States Department of State in the course of the negotiations with Canada on the Columbia River.³²⁸ It is widely employed in scientific and technical writings and is commonly used in hydrographic descriptions and analysis. For example:

All river systems appear to have basically the same type of organization. The river system is dynamic in that it has portions that move and can cause events and create changes. There is not only unity displayed by important similarities between rivers in different settings, but also an amazing organization of river systems. This in part results from a delicate balance between the forces of erosion and the forces of resistance. The manner in which a channel moves across the valley floor, eroding one bank and building a nearly flat flood plain on the other, all the while maintaining a cross section similar in shape and size, is another aspect of the dynamic equilibrium that appears to characterize many channel systems...³²⁹

(8) These examples of the use of the word "system" in relation to watercourses or rivers or international waters indicate its usage and utility as a working term of useful connotation. Of itself, it does not purport to settle and does not settle, differences over the definition of the international watercourse. But it is a serviceable term which will permit progress in work on the topic on a basis which is not unduly confining. A sense of the scope of the term "international watercourse system" is afforded above.³³⁰

(9) Article 1 provides that the present articles apply both to uses of international watercourse "systems and of their waters". This is designed to make clear, in view of questions that had been raised on this score, that the uses which the articles address will be both uses of the watercourse itself and of its waters, to the extent that there may be any difference between the two. References in subsequent articles to uses of waters

should be read as including uses of the watercourse and of its waters.

(10) The phrase "for purposes other than navigation" appears in response to the provision in the title of the topic, the "non-navigational uses" of international watercourses.

(11) The reference to "measures of conservation related to the uses" of international watercourse systems and their waters is meant to embrace both measures taken to deal with abuses of water, notably uses resulting in pollution, and other problems pertaining to international watercourse systems, such as flood control, erosion, sedimentation and salt water intrusion. It will be recalled that the questionnaire addressed to States on this topic inquired whether problems such as these should be considered and that the generality of responses from States held that they should be, naming the specific problems just noted. At this juncture, however, the Commission does not find it necessary to commit itself to dealing with such specific problems. It prefers to indicate such place as these problems may have within the present articles by the comprehensive phrase "measures of conservation" related to the uses of international watercourse systems and their waters.

(12) Paragraph 2 of article 1 recognizes that the exclusion of navigational uses from the scope of the present articles cannot be complete. As both 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 present 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 between navigational and non-navigational uses of watercourses are so many that on any watercourse where navigation takes place, 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 charged with development of the watercourse. Paragraph 2 of article 1 has been drafted accordingly. It has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation. One member of the Commission favoured omission of paragraph 2 of article 1 because, in his view, it goes beyond the scope of the Commission's mandate on the topic.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

³²⁶ Inter-American Bar Association, *Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957* (Buenos Aires, 1958), vol. 1, p. 246. See also *Yearbook* ... 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092.

³²⁷ H. S. Smith, *The Economic Uses of International Rivers* (London, King, 1931), p. 143.

³²⁸ "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909", Memorandum of the State Department, 85th Congress, Second Session, document No. 118 (Washington, D.C., 1958), p. 89.

³²⁹ W. C. Walton, *The World of Water* (London, Weidenfeld and Nicolson, 1970), pp. 212-213.

³³⁰ See paras. 89-94.

Commentary

(1) It may be recalled that, in draft articles which the Special Rapporteur submitted to the Commission in 1979, the article corresponding to this article defined a system State (then denominated a "user" State) as a State which contributes to and makes use of water of an international watercourse. That definition gave rise to some criticism in the Commission and the Sixth Committee. Question was raised as to whether "contributes to and makes use of" were separate or cumulative, and as to what the provisions imported for the definition of an international watercourse.

(2) The present draft article lays down a requirement which is geographic. It is simpler to state and to apply than one based upon contribution to and use of waters. The test is one that relies upon the determination of physical factors. The key physical fact, whether some water of an international watercourse system exists in the territory of a particular State, is determinable by simple observation in the vast majority of cases.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Commentary

(1) The diversity characterizing individual watercourses and the consequent difficulty in drafting general principles that will apply universally to various watercourses throughout the world has been recognized by the Commission from the early stages of its consideration of the topic. Some States and scholars have viewed this pervasive diversity as an effective barrier to codification and progressive development of the subject on a universal plane. But it is clear that the General Assembly, aware of the diversity of watercourses, has nevertheless assumed that the subject is one suitable for the Commission's mandate.

(2) The Commission has found promising a solution which the Special Rapporteur proposed in 1979 to deal

with the problem of diversity: that of the framework treaty to be coupled with user or system agreements among the States of a particular international watercourse. This approach accepts the conclusion that, for optimum development, each international watercourse requires a regime tailored to its particular requirements, to be laid down by a system agreement. It also recognizes that the historical record illustrates the difficulty of reaching such agreements on the uses of the waters of individual international watercourses without the benefit of generally accepted legal principles regarding the uses of such waters. It contemplates that the framework agreement will be the instrument for the development and enunciation of such general principles.

(3) There is precedent for such framework agreements in the sphere of international watercourses. An early illustration is the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 9 December 1923). While setting forth a number of general principles concerning the development of hydraulic power, article 4 of that Convention provides:

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.³³¹

A more recent illustration is the Treaty on the River Plate Basin (Brasilia, 23 April 1969), by which the parties agree to combine their efforts to promote the harmonious development and physical integration of the River Plate Basin. Given the immensity of the basin involved and the generality of the principles which the treaty contains, it may be viewed as a kind of framework or umbrella treaty, to be supplemented by system agreements concluded pursuant to article VI of the treaty. Article VI provides:

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.³³²

(4) It should be noted that, as long ago as 1976, the Commission may be said to have anticipated the approach of a framework treaty to be combined with system agreements, its report on its twenty-eighth session providing that: "attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses ... the rules should be designed to promote the adoption of regimes for individual rivers and for that reason should have a residual character".³³³ This approach was received favourably by the large majority of the States that commented on it in the

³³¹ League of Nations, *Treaty Series*, vol. XXXVI, p. 81.

³³² To be printed in United Nations, *Treaty Series*, vol. 875, No. 12550. See also *Yearbook ... 1974*, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60. The signatory states were: Argentina, Bolivia, Brazil, Paraguay and Uruguay.

³³³ See para. 74 above.

Sixth Committee in 1979. The representatives of 26 States agreed that a framework or umbrella treaty coupled with individual watercourse agreements was a sound method of dealing with the problems arising from the diversity of watercourse systems. Representatives of only a few States expressed doubts.

(5) *Paragraph 1* of draft article 3 defines a system agreement as an agreement between two or more system States "which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof". The phrase "applies and adjusts" was accepted by the Commission after extended and searching analysis. Its purpose is to make clear that, while the Commission contemplates that system agreements will take due account of the principles and other provisions which the draft articles will, when complete, contain, the draft articles, should they come into force as a convention, will be essentially residual in effect. The States whose territory embraces a particular watercourse system will remain free not only to apply the provisions of the draft articles, but to adjust them to the special characteristics and uses of that watercourse or of part of that watercourse.

(6) The first sentence of *paragraph 2* of draft article 3, in providing that a system agreement "shall define the waters to which it applies", likewise emphasizes the unquestioned freedom of the States of an international watercourse system to define the scope of the agreements into which they enter. This provision recognizes that system States are able to confine their agreement to the main stem of a river forming or traversing an international boundary, or to cast their agreement to embrace the waters of a drainage basin, or to take some intermediate approach. Thus this provision should serve to moderate differences among States as to the optimum scope of these draft articles and to ease debate over the definition of an international watercourse.

(7) Paragraph 2 of draft article 3 goes on to provide that a system agreement may be entered into with respect to an entire international watercourse system, a provision which is not open to doubt. Indeed, the Special Rapporteur's first report pointed out that technical experts considered that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, and that this approach of including all the riparian States had been followed, *inter alia*, in the treaties relating to the Amazon, the Plate, the Niger and the Chad basins. The report also pointed out that some issues arising out of watercourse pollution necessitated co-operative action throughout the entire watercourse, and cited the Convention for the protection of the Rhine against chemical pollution (Bonn, 1976) as an example of a response to the need for unified treatment.³³⁴

(8) However, system States must be free to conclude system agreements "with respect to any part" of an international watercourse "or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent affected adversely".

(9) The general tenor of comments made in the Sixth Committee during the thirty-fourth session of the General Assembly favoured considerable latitude for States in working out agreements for individual watercourses. The representative of India remarked that "the Commission should not devote excessive attention to the question of the contents of user agreements between riparian States, which should be left to the States concerned".³³⁵ The representative of Venezuela drew special attention to article VI of the River Plate Basin Treaty, which has been quoted in paragraph (3) above.³³⁶

(10) Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins—the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger, the Nile, the Rhine, the Volta and the Zambezi.³³⁷ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse, which are effective between only some of the States situated on it.

(11) The *Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin*, published by FAO³³⁸ indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system. For example, for the decade 1960–1969, the *Index* lists 12 agreements that came into force for the Rhine system. Of these 12 agreements, only one includes all the Rhine States as parties; several others, while not localized, are effective only within a defined area; and the remainder deal with subsystems of the Rhine and with limited areas of the Rhine system.

(12) There will be a need for subsystem agreements and for agreements covering limited areas. In some watercourse systems, such as the Indus, the Plate and the Niger, the differences between subsystems are as marked as between separate watercourse systems. Agreements on subsystems are likely to be more readily attainable than agreements on the watercourse system as a whole, particularly if a considerable number of States are involved. Moreover, there will

³³⁴ See *Yearbook . . . 1979*, vol. II (Part One), pp. 168–169, document A/CN.4/320, paras. 98–100.

³³⁵ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

³³⁶ *Ibid.*, 44th meeting, para. 18; and *ibid.*, *Sessional fascicle*, corrigendum.

³³⁷ See *Yearbook . . . 1979*, vol. II (Part One), p. 170, document A/CN.4/320, para. 108.

³³⁸ FAO, Legislative study No. 15 (Rome), 1978.

always be problems the solution of which is of interest to a limited number of States of the system.

(13) There does not appear to be any sound reason for excluding either subsystem or localized agreements from the application of the framework treaty. A major purpose of the framework agreement is to facilitate the negotiation of agreements on the use of water, and this purpose encompasses all agreements, whether system-wide or localized, whether general in nature or dealing with a specific problem. The framework agreement, it is to be hoped, will provide system States with a firm common ground as a basis for negotiation—which is the great lack in watercourse negotiations at the present time. No advantage is seen in confining application of the framework agreement to a single systems agreement embracing the entire water course system.

(14) At the same time, if a system agreement is concerned with only part of the system or only a particular project, programme or use relating to the system, it must be subject to the proviso that the use, by one or more other system States not party to that agreement, of the waters of that system is not, to an appreciable extent, affected adversely. Otherwise, a few States of a multi-State international watercourse system could appropriate a disproportionate amount of its benefits for themselves or unduly and adversely prejudice the use of its waters by system States not party to the agreement in question. Such results would run counter to fundamental principles which will be shown to govern the non-navigational uses of international watercourses, such as the right of all system States to share equitably in the use of the waters and the obligation of all system States not to use what is their own so as to inflict injury upon others.

(15) The adverse effect of a system agreement upon system States not parties to that agreement must, however, be appreciable; if they are not adversely affected “to an appreciable extent”, other system States may freely enter into such a limited system agreement. It is recognized that the criterion “to an appreciable extent” raises questions. Those questions are addressed in the Commission’s commentary on that very phrase as it appears in article 4, paragraph 2, of the draft articles.

(16) The provision of *paragraph 3* of draft article 3 is of particular importance, enunciating as it does the obligation of system States to negotiate in good faith with other system States for the purpose of concluding one or more system agreements, “in so far as the uses of an international watercourse system may require”. That last proviso, which, to give it emphasis, has been placed at the beginning of the paragraph, qualifies the obligation to negotiate. If an international watercourse is hardly used, or if its uses are on such a level, relative to its resources, that agreement among the system States is not required, or if a given use by one or more system States will have so little effect on uses by other system States that agreement is not required, then no obligation to negotiate arises.

(17) Moreover, the obligation is an obligation to negotiate in good faith for the purpose of concluding one or more system agreements, where the uses of the system require, but system States are not obliged to conclude such an agreement before using the waters of an international watercourse. To require conclusion of a system agreement as a precondition of use would be to afford system States a veto over use by other system States of the waters of the international watercourse, by simply refusing to reach agreement on a system agreement. Such a result is not supported by the terms or the intent of draft article 3. Nor does it find support in State practice or international judicial decisions (indeed, the *Lac Lanoux* arbitral award, discussed below, negates it).³³⁹

(18) Even with these qualifications, are system States obliged to negotiate system agreements under customary international law, or, if not, should a progressive development of international law impose this obligation upon them? In the Commission’s view, the considerations set forth in the preceding paragraphs, especially paragraph (14), import the necessity of this obligation. It may further be maintained that an obligation to seek to conclude system agreements flows from customary international law in the light of its current development.

(19) There is, arguably, an analogy between the obligation of States to negotiate in good faith, which the International Court of Justice found to exist in the *North Sea Continental Shelf* cases³⁴⁰ in the continental shelf context, and the obligation of States to negotiate in good faith agreements with regard to the uses of the water of international watercourse systems.

(20) It will suffice to recall that the *North Sea Continental Shelf* cases essentially concerned the claims of two States that the application of the equidistance rule for delimitation of the continental shelf was required *erga omnes*. The two States—the Netherlands and Denmark—maintained that the equidistance rule, contained in a multilateral convention to which they were parties, had passed into customary international law. The third State involved, the Federal Republic of Germany, which was not a party to the convention, maintained that it was not bound by the equidistance rule, but was entitled to a just and equitable share of the shelf based upon its geographical situation in the North Sea.

(21) The Court held that the use of the equidistance method of delimitation of the shelf in these circumstances was not obligatory, as

[it] would not be consonant with certain basic legal notions which . . . have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which

³³⁹ See paras. (32)–(34).

³⁴⁰ *I.C.J. Reports* 1969, p. 3.

govern the delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied, for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) for the reasons given . . . , the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.³⁴¹

(22) In discussing the obligation to negotiate set forth in paragraph (a), the Court traced the obligation to the statement in the “Truman Proclamation” of 28 September 1945 that delimitation of lateral boundaries “shall be determined by the United States and the State concerned in accordance with equitable principles”.³⁴² The Court continued, with respect to the obligation to negotiate:

... the Court would recall . . . that the obligation to negotiate . . . merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

... Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was “not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements”, even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42, 1931*, at p. 116).³⁴³

(23) The Court thus states an obligation to negotiate with a view to arriving at an agreement on the continental shelf boundary. Does international law impose a similar obligation upon States as regards the apportionment of the use of that most vital of neutral resources, water?

(24) In discussing the criteria to be applied in determining boundaries on the continental shelf, the Court relied upon a number of circumstances which point to the similarity of the basic issues involved in

delimitation of the continental shelf and in balancing uses in an international watercourse:

The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care, which at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

... Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no further than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted . . . The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation.³⁴⁴

(25) The unity of deposits of natural resources of the continental shelf, while a substantial factor, is dwarfed by the unity of water in a watercourse. The need for agreements between the States concerned to ensure “the most efficient exploitation or the apportionment” of water can hardly be less than is the need to take into account the unity of any deposits in reaching agreement upon a continental shelf boundary.

(26) It may be argued that the nature of the two situations is sufficiently analogous that, if there is an obligation of international law to negotiate continental shelf boundaries taking the unity of resource deposits into account, there equally is an obligation under international law to negotiate with respect to the apportionment of the use of water. In each case, the legal regime responds to unique physical conditions. The continental shelf is a geological fact, being the natural prolongation of the land mass beneath the sea. In the case of fresh water, it is the hydrologic cycle of

³⁴¹ *Ibid.*, pp. 46–47.

³⁴² *Ibid.*, p. 33.

³⁴³ *Ibid.*, pp. 47–48.

³⁴⁴ *Ibid.*, pp. 51–52.

the water which is nature's governing fact, which provides a volume of water moving continuously through the States in a watercourse system to the sea. While the physical conditions differ, the need to take account of these physical characteristics, and to seek agreement on resource disposition, appears analogous.

(27) This conclusion is reinforced by the judgements of the International Court of Justice in the *Fisheries Jurisdiction* cases.³⁴⁵ What were the respective rights in the exploitation of a natural resource—the stock of fish off the Icelandic coast—as between a claim by Iceland based upon jurisdiction over fisheries and claims by the United Kingdom and the Federal Republic of Germany based, *inter alia*, upon historic fishing rights off the Icelandic coast?

(28) For present purposes, it is not necessary to examine the parallel *Fisheries Jurisdiction* cases beyond their impact on the duty to negotiate. With respect to that issue, the Court recognized the exceptional dependence of Iceland on its fisheries. It then stated:

The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation. This situation appears to have been reached in the present case. In regard to the two main demersal species concerned—cod and haddock—the Applicant has shown itself aware of the need for a catch limitation which has become indispensable in view of the establishment of catch limitations in other regions of the North Atlantic. If a system of catch limitation were not established in the Icelandic area, the fishing effort displaced from those other regions might well be directed towards the unprotected grounds in that area.³⁴⁶

It also found that the Federal Republic and the United Kingdom had special and historic fishing rights off the Icelandic coast and that these had been recognized by Iceland. Assertion of a right to exclude all fishing activities of foreign vessels in the 50-mile zone was not in accord with the concept of preferential rights, which “implies a certain priority, but cannot imply the extinction of the concurrent rights of other States . . .”.³⁴⁷ The Court then said that “in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland . . . be reconciled with the traditional fishing rights of the Applicant”.³⁴⁸ The Court continued:

. . . Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other

States, including the coastal State, and of the needs of conservation.³⁴⁹

(29) The manner in which the coastal State's right and the other fishing States' rights are to be reconciled is described as follows:

It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights, as was already recognized in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, which constituted the starting point of the law on the subject. This Resolution provides for the establishment, through collaboration between the coastal State and any other State fishing in the area, of agreed measures to secure just treatment of the special situation.

The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the *North Sea Continental Shelf* cases:

“... this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods of the peaceful settlement of international disputes” (*I.C.J. Reports 1969*, p. 47, para. 86).³⁵⁰

(30) It may be maintained that it is no less clear that an obligation to negotiate flows from the respective rights of States in the water of an international watercourse system. The movement of the water through the territory of one State into the territory of another, when considered in the light of the never ceasing changes in the amount of water available as a result of variations in the hydrologic cycle and the need for full and friendly co-operation among States to ensure the best use of this critical natural resource, is a special situation—indeed, a unique natural condition—that generally can be dealt with only by agreements among the system States arrived at through negotiations carried on in good faith.

(31) The judgments of the International Court of Justice in the *North Sea Continental Shelf* and the *Fisheries Jurisdiction* cases may consequently be construed to indicate that there is a general principle of international law that requires negotiations among States in dealing with international fresh water resources.

(32) Moreover, the existence of a principle of law requiring negotiations among States in dealing with fresh water resources is explicitly supported in the fresh water context by the arbitral award in the *Lac Lanoux* case.³⁵¹

³⁴⁵ *I.C.J. Reports 1974*, pp. 3 and 175.

³⁴⁶ *Ibid.*, p. 27.

³⁴⁷ *Ibid.*, pp. 27–28.

³⁴⁸ *Ibid.*, p. 30.

³⁴⁹ *Ibid.*, p. 31.

³⁵⁰ *Ibid.*, p. 32.

³⁵¹ *International Law Reports 1957* (London, Butterworth, 1961), p. 101. See also United Nations, *Reports of International Arbitral Awards*, vol. XII, p. 281, and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194–199, document A/5409, paras. 1055–1068.

(33) The French Government proposed to carry out certain works for the utilization of the waters of the lake, waters which flowed into the Carol River and on to the territory of Spain. Consultations and negotiations over the proposed diversion of waters from Lake Lanoux took place between the Governments of France and Spain intermittently from 1917 until 1956. Finally France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish frontier. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of 26 May 1866 between France and Spain and an Additional Act of the same date. Spain claimed that, under the Arbitration Treaty concluded with France in 1929, such works could not be undertaken without the previous agreement of France and Spain. Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne and of the Additional Act if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

(34) It is important to note that that obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France not merely by reason of the terms of the Treaty of Bayonne and its Additional Act, but as a principle to be derived from the authorities.³⁵² Moreover, while the arbitral tribunal based certain of its holdings relating to the obligation to negotiate on the terms of the Treaty and the Act,³⁵³ it by no means confined itself to the interpretation of their terms. In holding against the Spanish contention that Spain's agreement was a precondition of France's proceeding, the tribunal addressed the question of the obligation to negotiate as follows:

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another State. This is to admit a "right of consent", a "right of veto", which at the discretion of one State paralyzes another State's exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. Thus reference is made, although often incorrectly, to "an obligation to negotiate an agreement". In reality, the commitments thus assumed by States take very diverse forms, and their scope varies according to the way in which they are defined and according to the procedures for their execution; but the reality of the obligations thus assumed cannot be questioned, and they may be enforced, for example, in the case of an unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give

consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith.

... In fact, States today are well aware of the importance of the conflicting interests involved in the industrial use of international rivers and of the necessity of reconciling some of these interests with others through mutual concessions. The only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis. International practice reflects the conviction that States should seek to conclude such agreements; there would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements.³⁵⁴

(35) It should further be noted that 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", prepared by an International Working Group of Experts under the auspices of UNEP,³⁵⁵ support a requirement for negotiations among States in dealing with fresh water resources. The relevance to that proposition of the following draft principle is obvious:

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner, or should endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.

(36) While draft article 3 attracted general support in the Commission in the light of the foregoing considerations, it should be noted that a few members did not accept it. In their view, the draft articles, should they be embodied in an international convention, would not, as they stood, make it sufficiently clear that the riparians of an international watercourse are free to make such agreements as they choose. Their right to make or not to make agreements governing the uses of international watercourses which they share could in no way depend upon the draft articles. Moreover, the draft articles could not obligate the riparians of an international watercourse to "negotiate in good faith for the purpose of concluding one or more system agreements". In the view of these members, the Commission had adopted as its working hypothesis³⁵⁶

³⁵² *International Law Reports 1957 (op. cit.)*, pp. 111–112.

³⁵³ *Ibid.*, pp. 139, 141.

³⁵⁴ See *Yearbook ... 1974*, vol. II (Part Two), p. 197, document A/5409, paras. 1065–1066.

³⁵⁵ See the report of the Working Group on the work of its fifth session (Nairobi, 23 January–7 February 1978) (UNEP/IG.12/2), transmitted to the Governing Council at its sixth session (Nairobi, 9–25 May 1978) in a note by the Executive Director (UNEP/GC.6/17).

³⁵⁶ See para. 90 above.

a definition of an international watercourse system which would admit as a system State a State which, for example, contributed no more than groundwater or the melting of a glacier to an international river. Pursuant to article 3, if the riparians of that international river wished to use its waters in a way which affected, adversely and appreciably, such a system State, they would be obliged to negotiate with that State. If a lower riparian wished to use waters of a tributary of a system, which tributary did not flow onto the territory of an upper riparian, by what right could the upper riparian claim it was entitled to negotiate that use? For reasons such as these, these members did not agree to the terms or thrust of draft article 3.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Commentary

(1) This article deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in article 3. If there is a duty to negotiate, there is a complementary right to participate in the negotiations. Article 4 is limited to the identification of the States which are entitled to exercise this right under the varying conditions referred to in article 3.

(2) *Paragraph 1* of the article is self-explanatory. Inasmuch as the system agreement deals with the entirety of the international watercourse system, there is no reasonable basis for excluding a system State from participation in its negotiation or from becoming a party thereto. It is true there are likely to be system agreements that are of little interest to one or more of the system States. But since the provisions of such an agreement are intended to be applicable throughout the system, the purpose of the agreement would be stultified if every system State were not given the opportunity to participate.

(3) *Paragraph 2* of article 4 is concerned with agreements that deal with only part of the system. It provides that all system States whose use of the system water may be appreciably affected by implementation of an agreement applying to only a part of the system

or to a particular project, programme or use, are entitled to participate in the negotiation of that system agreement. The rationale is that if the use of water by a State can be affected appreciably by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of the State whose use is affected.

(4) Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, States A and B, whose common border is the river Styx, agree that each may divert 40 per cent of the river flow for domestic consumption, manufacturing and irrigation purposes, at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion, by 25 per cent from what would have been available without diversion.

(5) The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a treaty that is to provide general principles for the guidance of States in concluding agreements on the use of fresh water should contain a principle that will ensure that State C has the opportunity to join in negotiations, as a prospective party, with regard to proposed action by States A and B that will substantially reduce the amount of water that flows through State C's territory.

(6) There is similarity between the considerations involved in the hypothetical river Styx case and certain of the considerations involved in the *North Sea Continental Shelf* Judgments. In both lies the unity of natural resources, which requires the negotiation of agreements to solve the problems of exploitation. A system State must have the right to participate in negotiating an international agreement which may directly affect to an appreciable degree the quantity or quality of water available to it.

(7) The right is put forward as a qualified one. There must be an appreciable effect upon the use of water by a State to support its participation in the negotiation of a limited system agreement. If a system State is not affected by an agreement regarding a part or aspect of the system, the physical unity of the system does not of itself require giving a system State the right to participate in the negotiation of a limited agreement. The introduction of one or more system States whose interests are not directly concerned in the matters under negotiation would mean the introduction of unrelated interests into the negotiating process.

(8) This is not to say that a system agreement dealing with the entire system or with a subsystem should exclude decision-making with regard to some or all aspects of the use of system water through

procedures in which all the system States participate. For most, if not all, watercourses, the establishment of procedures for co-ordinating activities throughout the system is highly desirable and perhaps necessary, and those procedures may well include requirements for full participation by all system States in decisions that deal with only a part of the system. However, such procedures must be adopted for each watercourse system by the system States, on the basis of the special needs and circumstances of the system. Here it is provided that, as a matter of general principle, a system State does have the right to participate in the negotiation of a limited agreement which may affect that State's interests in system water.

(9) A significant issue is whether the rule should include qualification of the degree to which State interests must be affected in order to support a right to negotiate and become party to a system agreement. It is necessary to decide whether such a qualification—"to an appreciable extent"—gives rise to more problems than it resolves. If an "effect" could be quantified, it would be far more useful; however, at any rate in the absence of technical advice, such quantification is not practical.

(10) In the absence of any mathematical formula for fixing the extent to which use or enjoyment of system water should be affected in order to support participation in a negotiation, effect on a system State to an "appreciable extent" is proposed as the criterion. This extent is one which can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use.

(11) What is intended to be excluded is situations of the kind involved in the *Lac Lanoux* case, in which Spain insisted upon delivery of Lake Lanoux water through the original system. The Tribunal found that, "thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters . . . ; at the lowest water level, the volume of the surplus water of the Carol, at the boundary, will at no time suffer a diminution".³⁵⁷ The Tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works

would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests . . . Neither in the *dossier* nor in the pleadings in this case is there any trace of such an allegation.³⁵⁸

In the absence of any assertion that Spanish interests were affected in a tangible way, the Tribunal held that Spain could not require maintenance of the original unrestored flowage. It should be noted that the French proposal which was relied on by the Court was

reached only after a long drawn-out series of negotiations beginning in 1917, which entailed the establishment, *inter alia*, of a mixed engineering commission in 1949 and a French proposal in 1950—later supplanted by the plan on which the Tribunal passed—that would have appreciably affected the use and enjoyment of the waters by Spain.³⁵⁹

(12) At the same time, "appreciable" is not used in the sense of "substantial". A requirement that use be substantially affected before entailing a right to participate in negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed actions is likely to be far from clear at the outset of negotiations. The Lake Lanoux decision illustrates the extent to which plans may be varied as a result of negotiations and to which such variance may favour or harm a third State. That State should only be required to establish that its use may be affected to some appreciable extent.

(13) This appears to be the sense in which that qualification is used in article 5 of the Statute annexed to the Convention relating to the development of the Chad Basin (Fort Lamy, 22 May 1964):

The Member States undertake to abstain from taking, without prior consultation with the Commission, any measure likely to have an appreciable effect either on the extent of the loss of water or on the nature of the yearly hydrogramme and limnigramme and certain other features of the Basin, the conditions subject to which other riparian States may utilize the waters in the Basin, the sanitary conditions of the waters or the biological characteristics of its flora and fauna.³⁶⁰

(14) Other examples of a use with this meaning are to be found in article 1 of the Convention between Norway and Sweden on certain questions relating to the law on watercourses (Stockholm, 11 May 1929):

1. The present Convention relates to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country in respect of their depth, position, direction, level or volume of water, or to hinder the movement of fish to the detriment of fishing in the latter country.³⁶¹

and in article XX of the Convention regarding the determination of the legal status of the frontier between Brazil and Uruguay (Montevideo, 20 December 1933):

When there is a possibility that the installation of plant for the utilization of the water may cause an appreciable and permanent alteration in the rate of flow of a watercourse running along or intersecting the frontier, the contracting State desirous of such utilization shall not carry out the work necessary therefor until it has come to an agreement with the other State.³⁶²

³⁵⁹ *Ibid.*, pp. 106–108.

³⁵⁷ *International Law Reports* 1957 (*op. cit.*) p. 123 (see also United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 303).

³⁵⁸ *Ibid.*

³⁶⁰ *Nigeria's Treaties in Force for the Period 1st October 1960 to 30th June 1968* (Lagos, Federal Ministry of Information, 1969), p. 220. See also *Journal officiel de la République fédérale du Cameroun* (Yaoundé), 15 September 1964, 4th year, No. 18, pp. 1003 *et seq.*, and *Yearbook . . . 1974*, vol. II (Part Two), p. 291, document A/CN.4/274, para. 55.

³⁶¹ League of Nations, *Treaty Series*, vol. CXX, pp. 277–278.

³⁶² *Ibid.*, vol. CLXXXI, p. 87.

(15) It should be noted that, in an article requiring notice and provision of information on proposed construction or installations which would alter the regime of a basin, the Helsinki Rules of the International Law Association provide for the furnishing of such notice to the basin State "the interests of which may be substantially affected".³⁶³ In that regard, the "Draft principles of conduct ..." ³⁶⁴ are instructive. These principles provide for the making of environmental assessments before engaging in any activity with respect to a shared natural resource "which may create a risk of significantly affecting the environment of another State or States sharing that resource".³⁶⁵ Similarly, they provide for advance notification of plans to make a change in the utilization of a shared natural resource "which can reasonably be expected to affect significantly the environment in the territory of the other State or States".³⁶⁶ A single definition accompanies the draft principles: "the expression 'significantly affect' refers to any appreciable effects on a shared natural resource and excludes 'de minimis' effects".³⁶⁷

(16) The right of a system State to participate in the negotiation of a system agreement whose implementation may affect to an appreciable extent its use of the waters of an international watercourse system is further qualified. It exists "to the extent that its use is thereby affected"—that is, to the extent that implementation of the agreement will affect its use of the waters. The system State is not entitled to participate in the negotiation of elements of the agreement whose implementation will not affect its use of the waters. This qualification comports with the terms of paragraph 3 of draft article 3, which provides that system States shall negotiate in good faith for the purpose of concluding one or more system agreements only "in so far" as the uses of an international watercourse system may "require".

(17) A few members of the Commission, however, opposed acceptance of draft article 4, on essentially the same grounds as those on which they opposed acceptance of draft article 3.³⁶⁸

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one

³⁶³ Art. XXIX, para. 2. See *Yearbook ... 1974*, vol. II (Part Two), p. 359, document A/CN.4/274, para. 405. See also art. X, on pollution, where the standard of "substantial injury" and "substantial damage" is advanced (*ibid.*, p. 358).

³⁶⁴ UNEP/IG.12/2 (see above para. (35) of the commentary to art. 3 and foot-note 355).

³⁶⁵ *Ibid.*, principle 4.

³⁶⁶ *Ibid.*, principle 6, para. 1 (a).

³⁶⁷ *Ibid.*, p. 14.

³⁶⁸ See para. (36) of the commentary to art. 3 above.

system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

Commentary

(1) In recent years, the concept of shared natural resources has become widely accepted and reflected in resolutions of the United Nations. If the concept of natural resources shared by two or more States has any core of meaning, it must embrace the water of international watercourses. It was demonstrated in the Special Rapporteur's first report that the physical facts of nature governing the behaviour of water which flows from the territory of one State to that of another give rise to inescapable interaction of that water. What happens to water in one part of an international watercourse generally affects, in large measure or small, sooner or later, what happens to water in other parts of that watercourse.³⁶⁹ Masses of scientific proof can be brought to bear to reinforce this incontestable truth. The immediate essential fact is that the water of an international watercourse system is the archetype of the shared natural resource.³⁷⁰

(2) While the concept of shared natural resources may in some respects be as old as that of international co-operation, its articulation is relatively new and incomplete. It has not been accepted as such, and in terms, as a principle of international law, although the fact of shared natural resources has long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources. It is only during the last decade that the concept of shared natural resources has come to the fore.

(3) The paragraphs which follow relate initially to developments within the United Nations system indicating the acceptance by the international com-

³⁶⁹ *Yearbook ... 1979*, vol. II (Part One), pp. 145–150, document A/CN.4/320, paras. 4–31. See also *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), paras. 14–38. Changes in boundary waters, and upstream, necessarily affect other boundary waters and waters downstream. Changes downstream in some cases affect waters upstream.

³⁷⁰ Stating that there existed no satisfactory generic term for describing natural resources shared by two or more States, the Executive Director of UNEP limited himself to five of "the most obvious examples" of such resources, the first of which was: "(a) An international water system, including both surface and ground waters". See report of the Executive Director on co-operation in the field of the environment concerning natural resources shared by two or more States (UNEP/GC/44 and Corr. 1 and 2 and Add.1), para. 86. The draft principles prepared by UNEP, to which this article relates, are discussed below.

munity of the concept of shared natural resources. The relevant provisions of the Charter of Economic Rights and Duties of States³⁷¹ and of the Mar del Plata Action Plan adopted at the United Nations Water Conference are set forth.³⁷² The importance of General Assembly resolution 3129 (XXVIII) of 13 December 1973, entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States", is also noted.³⁷³ Attention is then drawn to 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" formulated by an intergovernmental working group of experts established by UNEP, and to the General Assembly's disposition of those draft principles.³⁷⁴ The concept of shared natural resources may also be distilled from the practice of States in the sharing of the waters of an international watercourse for navigational purposes. A number of paragraphs are devoted to setting out various illustrations of that submission. The judgment of the Permanent Court of International Justice in the *River Oder* case is examined,³⁷⁵ as well as a 1792 decree of the Executive Council of the French Republic.³⁷⁶ The Barcelona Convention and Statute on the regime of navigable waterways of international concern is summarized,³⁷⁷ together with other specific conventions on navigable waterways.³⁷⁸ Relevant portions of the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association are also set out.³⁷⁹ Further State practice giving support to the concept of shared natural resources as it relates to international watercourses is provided in a section of the commentary which sets forth a number of bilateral treaty provisions on the sharing of boundary waters.³⁸⁰ It was on the basis of the foregoing indications of acceptance by the international community of the concept of shared natural resources and of State practice and judicial pronouncement concerning the sharing of waters of an international watercourse system for navigational purposes, as well as of State practice relating to the sharing of boundary waters, that the Commission proceeded to the preparation of an article, for inclusion in the present draft articles, on the use of waters which constitute a shared natural resource.

1. *The Charter of Economic Rights and Duties of States*

(4) The Charter of Economic Rights and Duties of States, adopted by the General Assembly of the United Nations on 12 December 1974,³⁸¹ contains the following article:

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.

(5) This article was a source of controversy.³⁸² Nevertheless, it is of high interest. In the first place, it assumes and states, in terms, what is the undeniable fact: that there are natural resources shared by two or more countries. Secondly, it holds that, in the exploitation of such shared resources, "each State must co-operate". Thirdly, the basis of such co-operation is specified in terms resonant of the concern of this topic with the collection and exchange of data and with negotiation among riparians "on the basis of a system of information and prior consultations". And fourthly, the objective of such international co-operation is specified to be "optimum use of such resources without causing damage to the legitimate interest of others". In all these respects, this article of the Charter of Economic Rights and Duties of States is eminently sound.

2. *The United Nations Water Conference and the Mar del Plata Action Plan*

(6) The United Nations convened at Mar del Plata, Argentina, from 14–25 March 1977, the United Nations Water Conference, which adopted a report³⁸³ that contains much of immediate relevance to the topic. Of particular pertinence to the immediate point are the following recommendations of the Conference, which constitute part of the "Mar del Plata Action Plan":

G. REGIONAL CO-OPERATION

Development of shared water resources⁵

84. In the case of shared water resources, co-operative action should be taken to generate appropriate data on which future management can be based and to devise appropriate institutions and understandings for co-ordinated development.

³⁷¹ General Assembly resolution 3281 (XXIX) of 12 December 1974.

³⁷² See sect. 2 below.

³⁷³ See sect. 3 below.

³⁷⁴ See sect. 4 below.

³⁷⁵ See sect. 5 (a) below.

³⁷⁶ See sect. 5 (b) below.

³⁷⁷ See sect. 5 (c) below.

³⁷⁸ See sect. 5 (d) below.

³⁷⁹ See sect. 5 (e) below.

³⁸⁰ See sect. 6 below.

⁵ This term has been used only for the sake of uniformity of the text and its use is without prejudice to the position of countries supporting the terms "transboundary waters" or "international waters", in any of the problems involved.

³⁸¹ Resolution 3281 (XXIX).

³⁸² It was adopted in the Second Committee by 97 votes to 7, with 25 abstentions (see *Official Records of the General Assembly, Twenty-ninth Session, Second Committee*, 1648th meeting) and in plenary by 100 votes to 8, with 28 abstentions (*ibid.*, *Plenary Meetings*, 2319th meeting).

³⁸³ *Report of the United Nations Water Conference* (Mar del Plata, 14–25 March 1977) (United Nations publication, Sales No. E. 77.II.A.12).

85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of co-operation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resources development.

86. To this end it is recommended that countries sharing a water resource should:

(a) Sponsor studies, if necessary with the help of international agencies and other bodies as appropriate, to compare and analyse existing institutions for managing shared water resources and to report on their results;

(b) Establish joint committees, as appropriate with agreement of the parties concerned, so as to provide for co-operation in areas such as the collection, standardization and exchange of data, the management of shared water resources, the prevention and control of water pollution, the prevention of water-associated diseases, mitigation of drought, flood control, river improvement activities and flood warning systems;

(c) Encourage joint education and training schemes that provide economies of scale in the training of professional and subprofessional officers to be employed in the basin;

(d) Encourage exchanges between interested countries and meetings between representatives of existing international or interstate river commissions to share experiences. Representatives from countries which share resources but yet have no developed institutions to manage them could be included in such meetings;

(e) Strengthen if necessary existing governmental and inter-governmental institutions, in consultation with interested Governments, through the provision of equipment, funds and personnel;

(f) Institute action for undertaking surveys of shared water resources and monitoring their quality;

(g) In the absence of an agreement on the manner in which shared water resources should be utilized, countries which share these resources should exchange relevant information on which their future management can be based in order to avoid foreseeable damages;

(h) Assist in the active co-operation of interested countries in controlling water pollution in shared water resources. This co-operation could be established through bilateral, subregional or regional conventions or by other means agreed upon by the interested countries sharing the resources.

87. The regional water organizations, taking into account existing and proposed studies as well as the hydrological, political, economic and geographical distinctiveness of shared water resources of various drainage basins, should seek ways of increasing their capabilities of promoting co-operation in the field of shared water resources and, for this purpose, draw upon the experience of other regional water organizations.

...

H. INTERNATIONAL CO-OPERATION

*Development of shared water resources*⁵

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across inter-

national frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.⁶

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.

92. A concerted and sustained effort is required to strengthen international water law as a means of placing co-operation among States on a firmer basis. The need for progressive development and codification of the rules of international law regulating the development and use of shared water resources has been the growing concern of many Governments.

93. To this end it is recommended that:

(a) The work of the International Law Commission in its contribution to the progressive development of international law and its codification in respect of the law of the non-navigational uses of international watercourses should be given a higher priority in the working programme of the Commission and be co-ordinated with activities of other international bodies dealing with the development of international law of waters with a view to the early conclusion of an international convention;

(b) In the absence of bilateral or multilateral agreements, Member States continue to apply generally accepted principles of international law in the use, development and management of shared water resources;

(c) The Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States of the United Nations Environment Programme be urged to expedite its work on draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious exploitation of natural resources shared by two or more States;

(d) Member States take note of the recommendations of the Panel of Experts on Legal and Institutional Aspects of International Water Resources Development set up under Economic and Social Council resolution 1033 (XXXVII) of 14 August 1964 as well as the recommendations of the United Nations Inter-regional Seminar on River Basin and Inter-basin Development (Budapest, 1975).

(e) Member States also take note of the useful work of non-governmental and other expert bodies on international water law;

(f) Representatives of existing international commissions on shared water resources be urged to meet as soon as possible with a view to sharing and disseminating the results of their experience and to encourage institutional and legal approaches to this question;

(g) The United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question. The system should accordingly be organized to provide concerted and meaningful assistance to States and basin commissions requesting such assistance.³⁸⁴

(7) The foregoing passages of the report of the United Nations Water Conference are noteworthy in the following respects, among others. They accept and apply the term "shared water resources"—albeit

⁵ This term has been used only for the sake of uniformity of the text and its use is without prejudice to the position of countries supporting the terms "transboundary waters" or "international waters", in any of the problems involved.

⁶ Report of the United Nations Conference on the Human Environment (United Nations publication, Sales No. E.73.II.A.14), chap. I, sect. II.

³⁸⁴ *Ibid.*, chap. I, pp. 51–54.

without prejudice to the position of countries supporting the terms "transboundary waters" or "international waters". The need for international co-operation, through international river commissions and otherwise, and generation and exchange of data to that end, is stressed. The "right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation" is asserted. That there are "generally accepted principles of international law" which apply, even in the absence of bilateral or multilateral agreements, to the use, development and management of shared water resources is assumed, and stated; these principles Member States are to "continue to apply". Subsequently, the Economic and Social Council³⁸⁵ and the General Assembly³⁸⁶ adopted resolutions strongly commending the report. The General Assembly adopted without dissent the report of the United Nations Water Conference and approved the Mar del Plata Action Plan, of which the recommendations quoted above form a part. The resolution urges Member States to take intensified and sustained action for the implementation of the agreements reached at the Conference, including the Mar del Plata Action Plan.

(8) The recommendations of the Mar del Plata Action Plan and the resolutions of the Economic and Social Council and of the General Assembly approving them do not of themselves demonstrate or give rise to obligations under international law. But they are important in their indication that the world community as a whole recognizes both that the water of international watercourses is a shared natural resource and that there are "generally accepted principles of international law" which apply, even in the absence of bilateral or multilateral agreements, to the use, development and management of shared water resources.

3. *Co-operation in the field of the environment concerning natural resources shared by two or more States*

(9) In 1973, the General Assembly adopted a resolution which led to the preparation of the draft principles discussed below. Entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States", resolution 3129 (XXVIII) of 13 December 1973 refers to the Declaration of the United Nations Conference on the Human Environment, takes note with satisfaction of "the important Economic Declaration adopted by the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers", declares itself conscious of "the importance and urgency of safeguarding the conservation and exploitation of the natural resources shared by two or more States, by

means of an effective system of co-operation, as indicated in the above-mentioned Economic Declaration of Algiers",³⁸⁷ and considers it necessary to "ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States", co-operation which "must be developed on the basis of a system of information and prior consultation".

(10) The striking support General Assembly resolution 3129 (XXVIII) gives to the themes of these articles is clear. The concept of shared natural resources is accepted. The need for establishing adequate international standards for their conservation and exploitation is asserted. Co-operation among States sharing natural resources is called for on the basis of (a) a system of information and (b) prior consultation. Equally in point are the principles whose preparation resulted from the foregoing General Assembly resolution.

4. *Draft principles of conduct in respect of shared natural resources*

(11) An Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States was established by UNEP in 1975 pursuant to the provisions of General Assembly resolution 3129 (XXVIII).³⁸⁸ The Group held five sessions in the period 1976–1978. Interest in the activities of the Group grew, and at the final session, held from 23 January to 27 February 1978, experts from 26 States took part.³⁸⁹ At that final session the Working Group adopted 15 draft principles entitled "Draft principles of conduct in the field of the environment for the guidance of States

³⁸⁷ "The non-aligned countries consider it necessary to ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States in the context of the normal and habitual relations existing between them.

"They also believe that co-operation between countries interested in the exploitation of such resources should be developed on the basis of a system of information and prior consultations" (Fourth Conference of Heads of State or Government of Non-aligned Countries (Algiers, 5–9 September 1973), Economic Declaration, sect. XII (A/9330 and Corr.1, p. 72)).

³⁸⁸ The Intergovernmental Working Group was originally constituted by experts drawn from the following 17 States: Argentina; Brazil; Canada; France; India; Iraq; Kenya; Mexico; Morocco; Netherlands; Philippines; Poland; Romania; Senegal; Sweden; Union of Soviet Socialist Republics; United States of America. An observer for Turkey was also present (UNEP/GC.74, paras. 2 and 5).

³⁸⁹ Argentina; Bangladesh; Brazil; Canada; France; Germany, Federal Republic of; Ghana; Greece; India; Iran; Iraq; Jamaica; Kenya; Mexico; Netherlands; Philippines; Poland; Romania; Senegal; Sweden; Switzerland; Uganda; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United States of America; Yugoslavia. Experts from Austria, Japan and Turkey participated as observers (UNEP/IG.12/2, para. 11).

³⁸⁵ Resolutions 2115 (LXIII) and 2121 (LXIII) of 4 August 1977.

³⁸⁶ Resolution 32/158 of 19 December 1977.

in the conservation and harmonious utilization of natural resources shared by two or more States", which represented the consensus of the experts. These were accompanied by a variety of declarations and reservations.³⁹⁰

(12) In this latter connection, it should be noted that the principles are preceded by the following explanatory note:

The draft principles of conduct . . . have been drawn up for the guidance of States . . . in the field of the environment with respect to the conservation and harmonious utilization of natural resources shared by two or more States. The principles refer to such conduct of individual States as is considered conducive to the attainment of the said objective in a manner which does not adversely affect the environment. Moreover, the principles aim to encourage States sharing a natural resource to co-operate in the field of the environment.

An attempt has been made to avoid language which might create the impression of intending to refer, as the case may be, either to a specific legal obligation under international law, or to the absence of such obligation.

The language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law. Neither does the formulation intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of general international law—should be incorporated in the body of general international law.³⁹¹

(13) Principles 1 and 2 are of substantial importance to the issues raised by draft article 5:

Principle 1

It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that, consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned.

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner, or should endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.³⁹²

(14) The principles do not contain a definition of the term "shared resources". Attempts were made to draft such a definition. The report of the Working Group,

after mentioning a number of proposals made, states: "The Working Group, for want of time, was not in a position to enter into an in-depth discussion of the question of the definition of shared natural resources, and therefore did not reach any conclusion."³⁹³

(15) In May 1978, the Governing Council of UNEP proposed that the General Assembly adopt the principles of conduct.³⁹⁴ By its resolution 33/87 of 15 December 1978, the General Assembly requested the Secretary-General to submit the principles to Member States for consideration and comment. Thirty-six Governments commented on the report of the Working Group of experts. The report of the Secretary-General on co-operation in the field of the environment concerning natural resources shared by two or more States contains the following summary of replies received:

(a) Thirty of the 36 Governments whose views were received were generally in favour of the adoption of the principles. Without derogating from their favourable views on the principles, some of those Governments, however, expressed reservations on specific principles, or suggested alternative formulation of some of them. Some expressed the view that the adoption of the principles should not preclude the solution of specific problems on shared natural resources through bilateral agreements based on principles other than the 15 principles.

(b) Many Governments expressed views on the legal status of the principles. On this issue most of the Governments that regarded the principles as acceptable also wanted the principles to be regarded as guidelines only and not as an international code of conduct which was necessarily binding on States. Nearly all the Governments in favour of the principles wanted those principles to be used as the negotiating basis for the preparation of bilateral or multilateral treaties among States with regard to their conduct when dealing with natural resources they share in common. Some of them even indicated that similar principles were already being used by States to make treaties relating to shared natural resources.³⁹⁵

(16) Two States expressed strong opposition to the principles. A number of States were concerned that there was no definition of shared natural resources.³⁹⁶

(17) The Secretary-General's report suggested that the General Assembly might wish to adopt the principles. A draft resolution was introduced in the Second Committee which would have had the General Assembly adopt the draft principles for the guidance of States and request States Members "to respect the principles in their inter-State relations".³⁹⁷ The draft resolution attracted both considerable support and opposition.

³⁹³ *Ibid.*, para. 16. See also the report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the progress made at its first session (1976) (UNEP/GC./74).

³⁹⁴ UNEP Governing Council decision 6/14 of 19 May 1978. See *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25 (A/33/25)*, pp. 154–155.

³⁹⁵ See *Official Records of the General Assembly, Thirty-fourth Session, Annexes*, agenda item 60, document A/34/557, para. 6.

³⁹⁶ *Ibid.*, annex.

³⁹⁷ *Ibid.*, document A/34/837, para. 18.

³⁹⁰ *Ibid.*, para. 15.

³⁹¹ *Ibid.*, p. 10.

³⁹² *Ibid.*, p. 11.

(18) Efforts were made to find a compromise solution in the Second Committee, but without success. Finally, the representative of Pakistan, on behalf of the sponsors, introduced a revised version of the draft resolution as the highest measure of agreement that could be reached in informal discussions. The operative paragraphs as proposed by the representative of Pakistan included the following:

[*The General Assembly*]

2. *Adopts* the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not to affect adversely development and the interests of all countries and in particular of the developing countries.³⁹⁸

Agreement could not be reached on the proposed text, the representative of Pakistan stated, because a few delegations continued to press for the replacement of the word "*Adopts*" by the phrase "*Takes note of*".³⁹⁹ The representative of Brazil proposed that paragraph 2 of the resolution be so amended.

(19) The Brazilian amendment was adopted by 59 votes to 25, with 27 abstentions.⁴⁰⁰ As finally adopted by the General Assembly, the resolution provides:⁴⁰¹

[*The General Assembly*,

Recalling the relevant provisions of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, in which it reaffirmed the principle of full permanent sovereignty of every State over its natural resources and the responsibility of States as set out in the Declaration of the United Nations Conference on the Human Environment to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States and to co-operate in developing the international law regarding liability and compensation for such damages,

...

Recalling also the Charter of Economic Rights and Duties of States, contained in its resolution 3281 (XXIX) of 12 December 1974,

...

Desiring to promote effective co-operation among States for the development of international law regarding the conservation and harmonious utilization of natural resources shared by two or more States,

Recognizing the right of States to provide specific solutions on a bilateral or regional basis,

Recalling that the principles have been drawn up for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States,

1. *Takes note* of the report as adopted of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States established under decision 44 (III)

of the Governing Council of the United Nations Environment Programme in conformity with General Assembly resolution 3129 (XXVIII);

2. *Takes note* of the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not adversely affect development and the interests of all countries, in particular the developing countries;

...

(20) What conclusions are to be drawn from the adoption of the foregoing resolution in the light of its surrounding debate? A review of the record indicates that objections to adoption of the draft principles by the General Assembly were made on six grounds:

- (i) There was no definition of a "shared natural resource";
- (ii) There had been insufficient comment by States on the draft principles;
- (iii) Adoption of the principles by the General Assembly would constitute a premature commitment to the principles;
- (iv) The principles did not take into account the differences in regional problems;
- (v) The principles dealt with a field of co-operation among States in which research and actual experience were extremely limited;
- (vi) Some of the principles constituted an encroachment on sovereignty.

(21) These objections were advanced by a small number of States, so that it is not possible to tell what part they played in the vote in favour of "noting" and against "adoption" of the principles by the General Assembly. In any event, these objections have limited instruction for the Commission's work on international watercourses.

(22) The absence of a definition of shared natural resources in the draft principles does not bear upon consideration of the draft articles submitted by the Commission. Draft article 5 defines the water of an international watercourse as a shared natural resource. As noted at the outset of this commentary, while there is room for difference of view over the content of the concept of shared natural resources, if any meaning is to be attached to that concept it must embrace waters which move from the territory of one State to that of another.

(23) That there was insufficient written comment by States on the draft principles is a criticism which fails to take account of the restricted number of States that characteristically respond, often belatedly, to requests for comments of this kind. The Commission is aware that the number of State comments received by the

³⁹⁸ *Ibid.*, para. 19.

³⁹⁹ See *Official Records of the General Assembly, Thirty-fourth Session, Second Committee*, 57th meeting, para. 19; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴⁰⁰ *Ibid.*, para. 45.

⁴⁰¹ Resolution 34/186 of 18 December 1979.

Secretary-General in the case of the draft principles of conduct was not unusually low.

(24) The objection that adoption of the principles by the General Assembly would constitute a premature commitment to the principles was questionable because, as one representative put it, "all resolutions of the General Assembly were only recommendations, and the draft resolution of itself clearly stated that the principles were of the nature of recommendations".⁴⁰² As far as the work of the Commission is concerned, a legal commitment by States to the terms of draft article 5 would arise only at such indeterminate future time as a treaty based on the draft articles was concluded, ratified and came into force.

(25) As to the objection that the draft principles did not take into account the differences in regional problems, it may be noted that the draft articles in the process of preparation by the Commission are framed to be conjoined with system agreements which will deal with the distinctive character of diverse river systems.

(26) The fifth objection, namely, that the subject of shared natural resources is one in which research and experience are extremely limited, clearly does not apply to the shared resource constituted by the water of international watercourses, as debate in the Second Committee recognized. There is a large body of research and experience—and of State practice and treaty-making—in the sphere of international watercourses, especially on aspects such as navigation, irrigation and power.

(27) The sixth objection, of encroachment of sovereignty, recalls the elements of the Commission's work. The first contentious case before the Permanent Court of International Justice gave rise to the classic statement of a governing axiom:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.⁴⁰³

The task of codifying and progressively developing international law will inevitably produce proposals for treaty articles which, if they are to become provisions of treaties in force, will require States to exercise their sovereign rights in a certain way. That achievement constitutes no encroachment on sovereignty,⁴⁰⁴ but rather its enlightened exercise. Moreover, in so far as draft articles codify existing, customary international

law—law which equally restricts the ways in which States are entitled to exercise their sovereignty—that too constitutes no encroachment on sovereignty which is inconsistent with the fundamentals either of statehood or of international law.

(28) The foregoing considerations apply to the work of the Commission at large. But there is a singular aspect of work on the topic of the law of the non-navigational uses of international watercourses which requires comment as well. By its very nature, water flowing from the territory of one State to that of another is not in—in the sense of being within the exclusive jurisdiction and domain of—just one State; at any rate, until it is apportioned between States, it is shared between States, that is to say, in the words of draft article 5 of these articles, the waters of an international watercourse system are a "shared natural resource".

(29) Whatever the force of the objections to adoption of the UNEP draft principles of conduct in their context (and some of those objections may well have validity in the context of the entire, undefined field of shared natural resources), for the foregoing reasons it is submitted that those objections do not detract from the value of the draft principles for the topic under the Commission's consideration. Nor do they depreciate the values of the concept of shared natural resources or its cardinal application to the waters of international watercourse systems.

(30) While clearly the substitution of the phrase "Takes note of" for "Adopts", in the circumstances described,⁴⁰⁵ demonstrates reservations by a plurality of the General Assembly about the draft principles of conduct in certain apparently diverse respects, the General Assembly, in paragraph 3 of its resolution 34/186,⁴⁰⁶ requests all States "to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States". Although that request was not expressly directed to the Commission in its formulation of a draft multilateral convention on the primary shared natural resource, the water of international watercourses, it would be difficult to maintain that in so requesting States to act the General Assembly meant to exempt the expert examination of the subject by the Commission.

(31) Acceptance of this view does not mean that the Commission has adopted the 15 guidelines as the basis for its work. The Commission should, however, in carrying out its task of codifying the law of the uses of international watercourse systems, take full advantage

⁴⁰² See *Official Records of the General Assembly, Thirty-fourth Session, Second Committee*, 58th meeting, para. 20; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴⁰³ *The S.S. "Wimbledon"*, P.C.I.J., Series A, No. 1 (1923), p. 25.

⁴⁰⁴ See *Official Records of the General Assembly, Thirty-fourth Session, Second Committee*, 57th meeting, para. 21; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴⁰⁵ See para. (18) above.

⁴⁰⁶ The text as a whole was adopted in draft form in the Second Committee by 94 votes to none, with 23 abstentions (see *Official Records of the General Assembly, Thirty-fourth Session, Second Committee*, 57th meeting, para. 55), and in plenary meeting, in final form, without a vote (*ibid.*, *Plenary Meetings*, 107th meeting).

of the work that has been carried out under the aegis of UNEP, which is a very substantial contribution to the development of legal principles in the field of international environmental law.

5. *Sharing the waters of an international watercourse for navigational purposes*

(32) Use of international watercourses for navigation may be the most widespread and certainly is the best established of the various uses that have given rise to the existing body of international law applicable to shared resources. The Commission is not directly addressing the world-wide custom that riparian States share in the right to free and unimpeded navigation of an international watercourse and share as well in the duty to assist in maintaining the watercourse in navigable condition. Nevertheless, in framing principles for the non-navigational uses of international watercourses, the Commission must take into account the legal rules regarding the navigable uses of those waters which have developed in the course of the last 200 years. Those rules, after all, derive from one use of the very resource in question, the international watercourse; it is a use of continuing importance; it has been the subject of a substantial development of conventional and customary law; and, at the very least, the body of law respecting navigation should provide sources and analogies for the law of the non-navigational uses of international watercourses.

(a) *The River Oder case*

(33) The judgment of the Permanent Court of International Justice in the *River Oder* case⁴⁰⁷ provides a lucid statement of the legal position of riparian States in respect of navigation. Pursuant to articles 341 and 343 of the Treaty of Versailles,⁴⁰⁸ the Oder River was to be placed under the administration of an International Commission. The Commission considered that two tributaries of the Oder, the Netze and the Warthe, came within its jurisdiction. Both rivers rise in Poland and are navigable in Poland. Both cross into what was then German territory, where the Netze flows into the Warthe. The combined streams thereafter flow into the Oder. Under article 331 of the Versailles Treaty, the Oder "from its confluence with the Oppa . . . and all navigable parts of these river systems which naturally provide more than one State with access to the sea", are declared international and thus subject to the jurisdiction of the Commission.⁴⁰⁹

(34) The Polish Government advanced the position that the parts of the Warthe and the Netze which were in Poland naturally provided only one State, Poland, with access to the sea. Therefore the portions of these two rivers in Poland were not subject to the jurisdiction

of the Commission. The opposing position was that the provisions on access to the sea concerned "the waterway as such and not a particular part of its course". The Court put the question in the following terms:

It remains therefore to be considered whether the words "all navigable parts of these river systems which naturally provide more than one State with access to the sea" refer to tributaries and sub-tributaries as such, in such a way that if a tributary or sub-tributary in its naturally navigable course traverses or separates different States, it falls as a whole within the above definition; or whether they refer rather to that part of such tributary or sub-tributary which provides more than one State with access to the sea, in such a way that the upstream portion of the tributary or sub-tributary is not internationalized above the last frontier crossing its naturally navigable course.⁴¹⁰

(35) After considering canons of interpretation and other constructions urged by the parties and deciding that they were not decisive, the Court made the following illuminating statement:

The Court must therefore go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles in regard to these principles.

It may well be admitted, as the Polish Government contend, that the desire to provide the upstream States with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers.

But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions, is undoubtedly based.⁴¹¹

(36) This holding is notable in placing the weight of the Permanent Court of International Justice behind the principle of "a community of interest of riparian States". In speaking of a community of interest and of a "common legal right"—which it defines as "the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"—the Court appears to assume that the international watercourse is a shared natural resource. And, as a former President of the International Court of Justice and member of the Commission has written:

Although this progressive principle was stated by the Court, as *lege lata*, in respect of navigation, its fundamental concepts of

⁴⁰⁷ *P.C.I.J.*, Series A, No. 23.

⁴⁰⁸ See F. L. Israel, ed., *Major Peace Treaties of Modern History 1648-1967* (New York, Chelsea House, 1967), vol. II, pp. 1490-1491.

⁴⁰⁹ *Ibid.*, pp. 1486-1487.

⁴¹⁰ *P.C.I.J.*, Series A, No. 23, pp. 25-26.

⁴¹¹ *Ibid.*, pp. 26-27.

equality of rights and community of interests are applicable to all utilizations of international watercourses.⁴¹²

(37) Two further aspects of the *River Oder* case should be noted. The first is that by 1929 there was extensive State practice, often reflected in conventional law, in accordance with the Court's finding. Such conventional law includes the prototype provisions of the Final Act of the Congress of Vienna (1815):

Article 108

The Powers whose territories are separated or traversed by the same navigable river undertake to settle by common agreement all questions affecting navigation thereon. They shall appoint for this purpose commissioners, who shall meet, at the latest, six months after the end of this Congress, and take for the basis of their work the principles laid down in the following articles.

Article 109

Navigation throughout the whole course of the rivers referred to in the preceding article, from the point where they respectively become navigable to their mouths, shall be entirely free, and shall not in the matter of commerce be prohibited to anybody, provided that they conform to the regulations regarding the police of this navigation which shall be drawn up in a manner uniform for all and as favourable as possible to the commerce of all nations.⁴¹³

(38) The Court in the *River Oder* case quotes these articles in its decision and then states:

If the common legal right is based on the existence of a navigable waterway separating or traversing several States, it is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier; no instance of a treaty in which the upstream limit of internationalization of a river is determined by such frontier rather than by certain conditions of navigability has been brought to the attention of the Court.⁴¹⁴

(39) The second feature of interest is that articles 108–116 of the Final Act of the Congress of Vienna may be the earliest precedent for the adoption of a framework agreement within the context of which individual agreements would be negotiated by the system States to govern uses of the water of individual watercourse systems.

(b) *The French Decree of 1792*

(40) There are, however, other early examples of the assertion of the principle that an international river gives rise to a common interest of all riparian States in the use of its waters. One of the most interesting of these is the Decree of the Executive Council of the French Republic of 16 November 1792, which stated:

That the stream of a river is the common, inalienable property of all the countries which it bounds or traverses; that no nation can without injustice claim the right exclusively to occupy the channel of a river and to prevent the neighbouring upper riparian States from enjoying the same advantages; that such [an exclusive] right is a remnant of feudal servitude, or at any rate, an

odious monopoly which must have been imposed by force and yielded by impotence; that it is therefore revocable at any moment and in spite of any convention, because nature does not recognize privileged nations any more than privileged individuals, and the rights of man are for ever imprescriptible.⁴¹⁵

(41) The specific cause of this sweeping and strongly stated contention was article XIV of the Treaty of Munster (30 January 1648), in which Spain recognized the independence of the Netherlands United Provinces. Article XIV recognized the sovereignty of the United Provinces over the Scheldt estuary, which was the direct watercourse from Antwerp to the sea, and authorized the closing of the waters by the Netherlands.⁴¹⁶ The United Provinces in fact closed the Scheldt to Antwerp commerce. This closure remained in effect, despite efforts of the Emperor Joseph II of Austria to eliminate it in the 1780s, until French troops took control of Belgium and the Decree of 1792 was issued. Whatever the motivation of the French Republic may have been in issuing its decree, it indicates that the sharing of riparian States in the uses of the water of international watercourses is a principle with a genealogy extending back 200 years.

(42) While article 108 of the Final Act of Vienna of 1815 clearly applies to all the States bordering on or traversed by a navigable river, article 109 is not equally clear on the question whether or not the ships of non-riparian States have a right to the same treatment as the ships of riparian States. This ambiguity has resulted in differing regimes for different watercourses and has been the source of numerous disputes, negotiations and conferences.⁴¹⁷ However, it has not been disputed that freedom of navigation on international rivers in the context of the Vienna settlement meant in practice "freedom of navigation for the riparian States without discrimination, it being understood that vessels of non-riparian States might also use the waters concerned, be it on less favourable terms or conditions".⁴¹⁸

(43) Under both conventional regimes and established practice, riparian States acknowledge duties to facilitate river traffic to and from the other riparian States, and in fact carry out those duties routinely. Much more than mere passage is involved in the community of interests which the Permanent Court mentions in the *River Oder* case. Channels change, shoals form and shift, rivers flood, ships sink, streams dry up. These and a hundred other matters must be dealt with on a co-operative and continuing basis by the riparian States.

⁴¹⁵ G. Kaeckenbeeck, *International Rivers*, Grotius Society Publications, No. 1 (London, Sweet and Maxwell, 1918), p. 32.

⁴¹⁶ C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana, 1969), vol. 1 (1648–1649), p. 76.

⁴¹⁷ See Kaeckenbeeck, *op. cit.*

⁴¹⁸ L. J. Bouchez, "The Netherlands and the law of international rivers", *International Law in the Netherlands*, H. F. van Panhuys *et al.*, eds. (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), vol. I, p. 251.

⁴¹² E. Jiménez de Aréchaga, "International law in the past third of a century", *The Hague Academy of International Law, Collected Courses, 1978-I* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, p. 193.

⁴¹³ Reproduced in *P.C.I.J.*, Series A, No. 23, p. 27.

⁴¹⁴ *Ibid.*, pp. 27–28.

(c) *The Barcelona Convention on navigable waterways*

(44) The only general treaty in existence dealing with these rights and duties is the Convention and Statute on the regime of navigable waterways of international concern (Barcelona, 20 April 1921).⁴¹⁹ This agreement had its origin in article 338 of the Treaty of Versailles. Articles 332 to 337 of that Treaty established rules governing a number of internationalized rivers, such as the Elbe, the Oder, the Niemen and the Danube. Under article 338, these rules were to be replaced by a General Convention relating to waterways having an international character.⁴²⁰

(45) The Statute (which is made an integral part of the Barcelona Convention by its article 1) contains the operative rules on international navigable waterways. The general definition of such waterways is contained in article 1 of the Statute:

In the application of the Statute, the following are declared to be navigable waterways of international concern:

1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States.⁴²¹

(46) Each State party is required under the Statute to accord free access to flag vessels of all other States parties (article 3) upon a footing of perfect equality (article 4), subject to limited exceptions such as cabotage (article 5). Common obligations of the riparian States are highlighted in article 10, which requires each such State to maintain the waterway in a navigable condition. This requirement is coupled with provisions concerning works construction and cost-sharing.

(47) Even though the Convention was not universally accepted,⁴²² it reflects substantial agreement, declaratory of existing international law, that navigation of an international watercourse is not controlled by unilateral decision. The language of the provisions regarding responsibility for upkeep of watercourses, for cost-sharing, and for the assumption of the obligation to construct works in the river may be wanting in a variety of ways. These provisions represent, nonetheless, agreement on the principle that navigation entails rights and duties exercised in common by riparian States for the benefit of all who navigate the river.

⁴¹⁹ League of Nations, *Treaty Series*, vol. VII, p. 35.

⁴²⁰ F. L. Israel, ed., *op. cit.*, p. 1489.

⁴²¹ League of Nations, *Treaty Series*, vol. VII, p. 51. (It should be noted that art. 1 (c) states that tributaries are to be considered as separate waterways.)

⁴²² The 21 States which ratified or acceded to it were Albania, British Empire, Bulgaria, Chile, Colombia, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, India (which later denounced the Convention), Italy, Luxembourg, New Zealand, Norway, Peru, Romania, Sweden, Thailand and Turkey.

(d) *Specific conventions on navigable waterways*

(48) The numerous conventions which govern navigation on individual international watercourses buttress the existence—and the recognition of the existence—of this community of interest.

(49) The Scheldt, which has been referred to above,⁴²³ constitutes an example of the development of a river region from a situation in which a lower riparian exercised a right to cut off all access to a major port from the sea, to a situation in which the lower and upper riparians not only recognize freedom of navigation but are engaged in widespread co-operative action to ensure that vessels, both ocean-going and river-going, may use the watercourse for navigation in a safe and expeditious manner. This transition from conflict over rights of navigation on the Scheldt to co-operation in developing the river for navigational purposes through apportionment of benefits and costs parallels the development of navigational uses on the great majority of international watercourses. A few contemporary arrangements will now be cited which illustrate that, at least for purposes of navigation, international watercourse systems are treated as a shared natural resource.

(50) A most recent illustration is the Treaty for Amazonian Co-operation (Brasilia, 3 July 1978):

Article III

In accordance with and without prejudice to the rights granted by unilateral acts, to the provisions of bilateral treaties among the Parties and to the principles and rules of international law, the Contracting Parties mutually guarantee on a reciprocal basis that there shall be complete freedom of commercial navigation on the Amazon and other international Amazonian rivers, observing the fiscal and police regulations in force now or in the future within the territory of each. Such regulations should, in so far as possible, be uniform and favour said navigation and trade.

...

Article VI

In order to enable the Amazonian rivers to become an effective communication link among the Contracting Parties and with the Atlantic Ocean, the riparian States interested in any specific problem affecting free and unimpeded navigation shall, as circumstances may warrant, undertake national, bilateral or multilateral measures aimed at improving and making the said rivers navigable.

Paragraph: For this purpose, they shall carry out studies into the means for eliminating physical obstacles to the said navigation as well as the economic and financial implications so as to put into effect the most appropriate operational measures.⁴²⁴

(51) Another instructive recognition of the basic principle is found in the Statute relating to the development of the Chad Basin of 1964:

Article 7

The Member States shall establish common rules for the purpose of facilitating navigation on the lake and on the navigable

⁴²³ See para. (41).

⁴²⁴ American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (Sept. 1978), pp. 1046–1047. Signatory States: Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, Venezuela.

waters in the Basin and to ensure the safety and control of navigation.⁴²⁵

(52) One of the more complete, modern arrangements is illustrated by the Treaty on the River Plate Basin (Brasilia, 23 April 1969), article I of which reads:

Article I

The Contracting Parties agree to combine their efforts for the purpose of promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence which are immediate and identifiable.

Sole paragraph. To this end, they shall promote, within the scope of the Basin, the identification of areas of common interest and the undertaking of surveys, programmes and works, as well as the drafting of operating agreements and legal instruments they deem necessary, and which shall tend towards:

(a) Advancement and assistance in navigation matters . . .⁴²⁶

(53) Still other pertinent, illustrative treaty provisions are the following:

The Act regarding navigation and economic co-operation between the States of the Niger Basin (Niamey, 26 October 1963), article 3 of which reads:

Article 3

Navigation on the River Niger, its tributaries and sub-tributaries, shall be entirely free for merchant vessels and pleasure craft and for the transportation of goods and passengers. The ships and boats of all nations shall be treated in all respects on a basis of complete equality.⁴²⁷

The Agreement concerning co-operation with regard to navigation in frontier waters between the German Democratic Republic and Poland (Warsaw, 15 May 1969), which reads in part:

Article 2

1. The Contracting Parties grant each other, on a basis of complete equality, the right to navigation in frontier waters.

2. Sporting and tourist navigation shall be permitted only on the Oder.

Article 3

Co-operation on the basis of this Agreement for the safe and optimum conduct of navigation in frontier waters shall include, in particular, the following functions:

- (1) The preparation of rules concerning navigation and concerning the marking of frontier waters for navigation;
- (2) Supervision to maintain the order and safety of navigation;
- (3) Determination of the depth and breadth of the fairway;
- (4) Marking of frontier waters for navigation;
- (5) Removal of sunken vessels and other objects in the fairway which may become a danger to navigation;
- (6) Designation of moorings;
- (7) Conduct of aid and rescue operations;
- (8) Investigation of accidents occurring in the course of navigation.

⁴²⁵ *Nigeria's Treaties in Force . . . (op. cit.)*, p. 221. Signatory States: Cameroon, Chad, Niger, Nigeria.

⁴²⁶ See American Society of International Law (*op. cit.*), vol. VIII, No. 5 (Sept. 1969), pp. 905-906. Signatory States: Argentina, Bolivia, Brazil, Paraguay and Uruguay.

⁴²⁷ United Nations, *Treaty Series*, vol. 587, p. 13. Parties: Cameroon, Chad, Dahomey, Guinea, Ivory Coast, Mali, Niger, Nigeria, Upper Volta.

Article 4

1. The Contracting Parties shall jointly prepare uniform rules concerning the regulation of shipping and the marking of frontier waters for navigation and shall put them into force on the same date.

2. Provisions not covered by the rules referred to in paragraph 1 which may affect navigation by the other Contracting Party shall be agreed upon with that Party.⁴²⁸

The Treaty between Argentina and Uruguay concerning the River Plate and its maritime limits (Montevideo, 19 November 1973), which reads in part:

CHAPTER II

Navigation and facilities

Article 7. The Parties mutually acknowledge freedom of navigation, permanently and under all circumstances, on the river for vessels flying their flags.

Article 8. The Parties mutually guarantee the maintenance of facilities that have been available up to the present time for access to their respective ports.

Article 9. The Parties mutually pledge themselves to develop adequate navigation aids and buoy services within their respective coastal zones, and to co-ordinate the development of the same within waters of common utilization outside of the channels, in such manner as to facilitate navigation and to guarantee its safety.

Article 10. The Parties have the right to use all of the channels situated in waters of common utilization, under equal conditions and under any circumstances.

Article 11. Navigation shall be permitted in waters of common utilization by public and private vessels of the River Plate Basin countries, and by public and private merchant vessels of third flag States, without precluding rights which may have already been granted by the Parties pursuant to Treaties in force. In addition, one Party shall permit passage of war vessels of a third flag State when authorized by the other Party, provided this does not threaten its public order or security.

Article 12. Outside of the coastal zones, the Parties, jointly or individually, may construct channels or undertake other works pursuant to provisions established in articles 17 to 22.

The Party who constructs or has constructed any works shall continue to be responsible for their maintenance and control.

The Party who constructs or has constructed a channel shall, in addition, adopt the relevant regulations, shall exercise surveillance thereover to ensure compliance with adequate means for this purpose, and shall be responsible for the extraction, removal or demolition of craft, naval artifacts, aircraft, sunken remains or cargo, or any other objects that are likely to constitute an obstacle or hazard to navigation, and which are located sunken or aground in said waterway.

Article 13. In those cases not covered in article 12, the Parties shall co-ordinate, through the Administrative Commission, a rational sharing of responsibilities for the maintenance, control and regulation of the various sections of the channels, keeping in mind the special interests of each Party and the works that each has undertaken.

Article 14. All regulations relevant to the channels situated in waters of common utilization, and any substantial or permanent modification thereto, must be effectuated subject to advance consultation with the other Party.

In no case and under no conditions may a regulation be adopted which might cause appreciable detriment to the navigation interests of either Party.⁴²⁹

⁴²⁸ *Ibid.*, vol. 769, p. 58.

⁴²⁹ American Society of International Law (*op. cit.*), vol. XIII, No. 2 (March 1974), pp. 253-254.

(54) One further example is the Convention regarding the regime of navigation on the Danube (Belgrade, 18 August 1948), articles 1 and 3 of which read:

Article 1

Navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same State.

Article 3

The Danubian States undertake to maintain their sections of the Danube in a navigable condition for river-going and, on the appropriate sections, for sea-going vessels, to carry out the works necessary for the maintenance and improvement of navigation conditions and not to obstruct or hinder navigation on the navigable channels of the Danube. The Danubian States shall consult the Danube Commission (art. 5) on matters referred to in this article.

The riparian States may within their own jurisdiction undertake works for the maintenance of navigation, the execution of which is necessitated by urgent and unforeseen circumstances. The States shall inform the Commission of the reasons which have necessitated the works, and shall furnish a summary description thereof.⁴³⁰

(e) *The Helsinki Rules*

(55) The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association (Helsinki, August 1966),⁴³¹ address "Navigation" as follows:

CHAPTER IV. NAVIGATION

Article XII

(1) This chapter refers to those rivers and lakes portions of which are both navigable and separate or traverse the territories of two or more States.

(2) Rivers or lakes are "navigable" if in their natural or canalized state they are currently used for commercial navigation or are capable by reason of their natural condition of being so used.

(3) In this chapter the term "riparian State" refers to a State through or along which the navigable portion of a river flows or a lake lies.

Article XIII

Subject to any limitations or qualifications referred to in these chapters, each riparian State is entitled to enjoy rights of free navigation on the entire course of a river or lake.

Article XIV

"Free navigation", as the term is used in this chapter, includes the following freedom for vessels of a riparian State on a basis of equality:

(a) freedom of movements on the entire navigable course of the river or lake;

(b) freedom to enter ports and to make use of plants and docks; and

(c) freedom to transport goods and passengers, either directly or through trans-shipment, between the territory of one riparian State and the territory of another riparian State and between the territory of a riparian State and the open sea.

Article XV

A riparian State may exercise rights of police, including but not limited to the protection of public safety and health, over that portion of the river or lake subject to its jurisdiction, provided the exercise of such rights does not unreasonably interfere with the enjoyment of the rights of free navigation defined in articles XIII and XIV.

Article XVI

Each riparian State may restrict or prohibit the loading by vessels of a foreign State of goods and passengers in its territory for discharge in such territory.

Article XVII

A riparian State may grant rights of navigation to non-riparian States on rivers or lakes within its territory.

Article XVIII

Each riparian State is, to the extent of the means available or made available to it, required to maintain in good order that portion of the navigable course of a river or lake within its jurisdiction.

*Article XVIII bis*⁴³²

1. A riparian State intending to undertake works to improve the navigability of that portion of a river or lake within its jurisdiction is under a duty to give notice to the co-riparian States.

2. If these works are likely to affect adversely the navigational uses of one or more co-riparian States, any such co-riparian State may, within a reasonable time, request consultation. The concerned co-riparian States are then under a duty to negotiate.

3. If a riparian State proposes that such works be undertaken in whole or in part in the territory of one or more other co-riparian States, it must obtain the consent of the other co-riparian State or States concerned. The co-riparian State or States from whom this consent is required are under a duty to negotiate.

Article XIX

The rules stated in this chapter are not applicable to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any other form of public authority.

Article XX

In time of war, other armed conflict, or public emergency constituting a threat to the life of the State, a riparian State may take measures derogating from its obligations under this chapter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The riparian State shall in any case facilitate navigation for humanitarian purposes.

(56) A commentary to article XIII of the Helsinki Rules quotes the interpretation of international fluvial law set forth by the Permanent Court of International Justice in the *River Oder* case, and says of it:

The Court's statement in respect to the "perfect equality" of the co-riparian States is but a specific application of the principle of equality of rights in equitable utilization.⁴³³

⁴³⁰ United Nations, *Treaty Series*, vol. 33, pp. 197–199. Parties: Bulgaria, Czechoslovakia, Hungary, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia.

⁴³¹ See ILA, *Report of the Fifty-second Conference* (Helsinki, 14–20 August 1966) (London, 1967), pp. 484 *et seq.* See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 357–359, document A/CN.4/274, para. 405.

⁴³² Art. XVIII bis was included in the Helsinki Rules subsequently (see ILA, *Report of the Fifty-sixth Conference* (New Delhi, 29 December 1974–4 January 1975) (London, 1976), p. xiii).

⁴³³ ILA, *Report of the Fifty-second Conference*, (op. cit.), p. 507.

(57) This interpretation—to which, as noted above,⁴³⁴ Judge Jiménez de Aréchaga subscribes—is also supported in one scholar's examination of "equitable utilization", in the following terms:

While this [*River Oder* case] analysis was directed by the Court to the issue before it—the rights of navigation of co-riparians on an international river—both its language and its reasoning make it equally applicable to non-navigational uses. First, the Court expressly stated that it was applying "international fluvial law in general". If only the law of navigation were intended, it could have been readily so stated. Secondly, "the requirements of justice and the considerations of utility" referred to by the Court apply with equal force to both navigational and non-navigational uses. Thus, there is no utilitarian or logical basis for distinguishing the two. Finally, if navigation on an international river—which involves the physical entry of foreign vessels into the territory of another State—does not violate State sovereignty, it would seem that, *a fortiori*, States would have the right to use the waters of such river within their own territory subject to "the perfect equality of all riparian States" so to do.⁴³⁵

6. Sharing of boundary waters

(58) In fact, there is substantial direct precedent in treaty law and international practice for treating the waters of international watercourses as a shared natural resource, in addition to the body of related precedent found in the sphere of navigation. Some of this precedent will be drawn upon in the Commission's further work on this topic, which will address such general principles of law governing the use of the water of international watercourses as equitable utilization and not using what is one's own to the injury of others. At this juncture, material relating to the sharing of boundary waters will be set out, for it so well illustrates that it is an implemented assumption of States that the waters of an international watercourse constitute a shared natural resource.

(59) The greater proportion of treaties concerning the sharing of fresh water deal with the use of boundary waters, presumably because the physical nature of water requires co-operation of States on both sides of a boundary river if anything more than the most elementary uses are contemplated. Whatever these treaties show about the content of customary international law, it is submitted that their assumption that boundary waters are a shared natural resource is beyond controversy.

(60) A number of treaties regarding hydroelectric use were entered into prior to the First World War between European States. These accepted the necessity for co-operation and recognized that sharing the use of the water is the sensible solution. For example, the Convention between France and Switzerland (Bern, 4 October 1913) regarding the use of the Rhone River laid down the rule that each State was entitled to a

share in the power produced, based upon the fall of the water in relation to the extent of river bank in its territory. Switzerland, therefore, was allocated all the power resulting from the fall of the water in the area where it occupied both banks of the Rhone, while it would divide equally with France the power derived from the fall of the water in the area where each was a riparian.⁴³⁶

A forerunner of this sharing of the use of the Rhone water was article 5 of a frontier agreement of 4 November 1824 between the Canton of Neuchâtel (Switzerland) and France:

The liberty of using the watercourse for mills and other works and for irrigation will not be subordinated to the limits of sovereignty. It will appertain to each bank to the extent of half the quantity of flowing water in the lower State.⁴³⁷

(61) The equal division of the use of water of boundary rivers has become a commonly used norm of sharing. The Agreement between Argentina and Uruguay concerning the utilization of the rapids of the Uruguay River in the Salto Grande area (Montevideo, 30 December 1946) provides in article 1:

The High Contracting Parties declare that, for the purposes of this Agreement, the waters of the Uruguay River shall be utilized jointly and shared equally.⁴³⁸

(62) The Treaty between the United States of America and Canada relating to the uses of the waters of the Niagara River (Washington, D.C., 27 February 1950) provides:

Article V

All water specified in article III of this Treaty in excess of water reserved for scenic purposes in article IV may be diverted for power purposes.

Article VI

The waters made available for power purposes by the provisions of this Treaty shall be divided equally between the United States of America and Canada.⁴³⁹

(63) The Treaty between El Salvador and Guatemala for the delimitation of the boundary between the two countries (Guatemala, 9 April 1938) provides:

Article II

Each Government reserves the right to utilize half the volume of water in frontier rivers, either for agricultural or industrial purposes...⁴⁴⁰

(64) The Agreement between the Soviet Union and Iran for the joint utilization of the frontier parts of the rivers Aras and Atrak for irrigation and power

⁴³⁴ See para. (36).

⁴³⁵ J. Lipper, "Equitable utilization", A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds., *The Law of International Drainage Basins* (Dobbs Ferry, N.Y., Oceana 1967), p. 29.

⁴³⁶ *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (ST/LEG/SER.B/12) (United Nations publication, Sales No. 63.V.4), p. 708 (cited hereinafter as *Legislative Texts*).

⁴³⁷ *Ibid.*, p. 701. [Translation by the Secretariat.]

⁴³⁸ United Nations, *Treaty Series*, vol. 671, p. 26.

⁴³⁹ *Ibid.*, vol. 132, p. 228 (see also *Legislative Texts*, pp. 195–196).

⁴⁴⁰ League of Nations, *Treaty Series*, vol. CLXXXIX, p. 295 (see also *Legislative Texts*, p. 227).

generation (Tehran, 11 August 1957) contains a precise provision on division of the water:

The Imperial Government of Iran and the Government of Soviet Socialist Republics, signatories to this Agreement, taking cognizance of the friendly relations existing between the two countries and desiring further to strengthen these relations, do hereby agree to utilize their respective equal rights of fifty per cent of all water and power resources of the frontier parts of the rivers Aras and Atrak for irrigation, power generation and domestic use and, to this end, agree to the following joint enterprises:

Article 1

The parties hereto agree that the utilization of their above fifty per cent right on the part of each will require separate and independent division and transmission of water and power in each party's territory, in accordance with the provisions of a general preliminary project prepared for the joint utilization of the rivers and mutually agreed upon. If the activities of one of the parties in utilizing its fifty per cent of all resources are slower than those of the other, this fact shall not deprive that party of its right of utilizing all its share.⁴⁴¹

(65) A Convention between the Soviet Union and Turkey for the use of frontier waters and Protocol concerning the Araxe River (Kars, 8 January 1927), which entered into force on 26 June 1928, provides:

Article 1

The two Contracting Parties shall have the use of one half of the water from the rivers, streams and springs which coincide with the frontier line between the Turkish Republic and the Union of Soviet Socialist Republics.⁴⁴²

(66) The redrawing of the map of Europe after the First World War caused a proliferation of boundary water issues resulting from the coming into being of numerous new boundaries based on rivers. These were, in the main, settled by treaty. One example of a common solution is found in the frontier agreement between Austria and Czechoslovakia (Prague, 12 December 1928), which provides:

Article 28

1. Each of the two States is entitled in principle to dispose of half the water flowing through frontier waterways . . .⁴⁴³

(67) The 1922 Agreement between Denmark and Germany relating to frontier watercourses (Copenhagen, 10 April 1922) deals, *inter alia*, with the use of water for irrigation purposes:

Article 35. Distribution of water in connection with irrigation works

The proprietors on both banks of any one of the watercourses mentioned in article 1 have equal rights as regards the use of the water, so that, if irrigation works are erected upon one bank, only half of the water of the watercourses may be assigned to these works. The Frontier Water Commission shall establish detailed regulations for the apportionment of the water in connection with the erection of irrigation works.

If, however, all the proprietors and usufructuaries of the land on the opposite bank of the watercourse between the point at which

the water is diverted and the point at which it re-enters the watercourse give their assent, more than half the water may be applied to irrigation works on one bank.⁴⁴⁴

(68) Another relatively recent example of 50–50 percentage sharing is the Agreement between Romania and Yugoslavia concerning the construction and operation of the Iron Gates water power and navigation system on the River Danube (Belgrade, 30 November 1963), which entered into force in 1964.⁴⁴⁵ Under article 6, the Parties contribute equally to the costs of constructing control structures in the Iron Gates sector of the Danube, and article 8 provides for equal sharing of the power produced.

(69) Although the principle of equal sharing of boundary waters is generally accepted in treaties, the method of dividing either water use or energy on a 50–50 percentage basis is not the only solution employed. The agreement between Switzerland and Italy on the Averserrhein basin (Rome, 18 June 1949) is a somewhat specialized treaty, as the preamble indicates:

The Swiss Federal Council and the Government of the Republic of Italy,

Having considered an application by the Rhätische Werke für Elektrizität Company, Thusis, Switzerland, and the Edison Company, Milan, Italy, for the concession of the hydraulic power of the Reno di Lei and other watercourses situated in the Averserrhein basin,

Hereby recognize that the project submitted for the development in one single generating station of the hydraulic power of sections of Swiss and Italian watercourses will ensure the rational utilization of such power. They nevertheless note that the harnessing and utilization of such power, which can be ensured only by one single enterprise, should be the subject of an international agreement taking account of the differences in the legislation of the two States.

They accordingly agree that the two Governments should authorize the construction, by a single concessionaire, of the installations necessary for the harnessing and utilization of such power and should share between them the energy produced, each one subsequently being free to use at its discretion, and in conformity with the principles of its own legislation, the energy apportioned to it.

For this purpose, they have decided to conclude an agreement . . .⁴⁴⁶

Article 5 provides:

Article 5. Taking into account the water and gradients to be used on the respective territories, it is agreed that 70 per cent of the hydraulic power produced in the Innerferrera generating station shall be attributed to Switzerland and 30 per cent to Italy . . .⁴⁴⁷

(70) An exchange of notes constituting an agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes (Madrid, 29 August and 2 September 1912) contains the provision that each party is "entitled to half the flow of water

⁴⁴¹ *British and Foreign State Papers, 1957–58* (London, H.M. Stationery Office, 1966), vol. 163, p. 428.

⁴⁴² *Legislative Texts*, p. 384. [Translation by the Secretariat.]

⁴⁴³ League of Nations, *Treaty Series*, vol. CVIII, p. 69 (see also *Legislative Texts*, p. 455).

⁴⁴⁴ *Ibid.*, vol. X, p. 221 (see also *Legislative Texts*, p. 591).

⁴⁴⁵ United Nations, *Treaty Series*, vol. 512, p. 42.

⁴⁴⁶ *Legislative Texts*, p. 846. [Translation by the Secretariat.]

⁴⁴⁷ *Ibid.*, p. 847. [Translation by the Secretariat.]

existing at the various seasons of the year".⁴⁴⁸ This system of equal sharing was abandoned in the Convention between Spain and Portugal to regulate the hydroelectric development of the international section of the River Douro (Lisbon, 11 August 1927), in favour of sharing based on segmentation of the watercourse. It provides:

Article 2

The power capable of being developed on the international section of the Douro shall be distributed between Portugal and Spain as follows:

(a) Portugal shall have the exclusive right of utilizing the entire fall in level of the river in the zone included between the beginning of the said section and the confluence of the Tormes and the Douro.

(b) Spain shall have the exclusive right of utilizing the entire fall in level of the river in the zone included between the confluence of the Tormes and the Douro and the lower limit of the said international section . . .⁴⁴⁹

(71) A somewhat similar type of sharing is provided for in the Agreement between Norway and the Soviet Union on the utilization of the water-power of the Pasvik (Paatso) River (Oslo, 18 December 1957):

[Preamble]

The Government of Norway and the Government of the Union of Soviet Socialist Republics,

Desirous of further developing economic co-operation between Norway and the Soviet Union, and

Desirous, to this end, of utilizing the water-power of the Pasvik (Paatso) river, situated on the frontier between Norway and the Soviet Union, for their mutual benefit on the basis of an equitable apportionment between the two countries of the rights to utilize this water-power,

Have decided to conclude this Agreement . . .

Article 1

This Agreement concerns the apportionment between Norway and the Soviet Union of the rights to utilize the water-power of the Pasvik (Paatso) river from the river mouth up to the point 70.32 m above sea level where the river intersects the Norwegian-Soviet State frontier . . .

Article 2

The Soviet Union shall have the right to utilize the water-power of the Pasvik (Paatso) river:

(a) In the lower section, from the river mouth to altitude 21.0 m above sea level at Svan (Salmi) lake;

(b) In the upper section, from Fjaer (Høyhen) lake 51.87 m above sea level to altitude 70.32 m above sea level, where the river intersects the Norwegian-Soviet State frontier between boundary markers 9 and 10.

Norway shall have the right to utilize water-power in the middle section of the Pasvik (Paatso) river from Svan (Salmi) lake 21.0 m above sea level to altitude 51.87 m above sea level at Fjaer (Høyhen) lake.⁴⁵⁰

(72) There are examples of still other types of sharing, as by the allocation of waters for a given time, such as alternate days.⁴⁵¹

⁴⁴⁸ *Ibid.*, p. 909.

⁴⁴⁹ League of Nations, *Treaty Series*, vol. LXXXII, p. 133 (see also *Legislative Texts*, pp. 911-912).

⁴⁵⁰ United Nations, *Treaty Series*, vol. 312, pp. 274 and 276 (see also *Legislative Texts*, pp. 882-883).

⁴⁵¹ See C. A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *The Hague Academy of International Law, Collected Courses, 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 372-373.

(73) There are a number of boundary water treaties which recognize the interest of each riparian State in the water by requiring agreement on any change in the water regime. In effect, the decision on the nature and extent of sharing is postponed. Thus the Agreement between Hungary and Czechoslovakia concerning the settlement of technical and economic questions relating to frontier watercourses (Prague, 16 April 1954) provides:

Article 9. Planning

(1) The Contracting Parties shall establish joint directives for the preparation of general plans for all hydraulic works as specified in chapter I which are to be carried out on frontier watercourses. The plans must be prepared by joint agreement in accordance with the said directives. Each Contracting Party shall, at its own expense, prepare the plans for works to be carried out in its territory. The cost of joint plans for works to be carried out in the territory of both States shall be borne by the Contracting Parties in accordance with a separate agreement.

(2) The plans and all substantial modifications thereof must be approved by the Contracting Parties. The transfer of flood-protection dikes further inland from the river, or the levelling off of dikes at a lower height than approved by a plan shall not be considered a substantial modification of the plan.⁴⁵²

(74) Similarly, Poland and the Soviet Union agree, in article 9 of their Agreement concerning the use of water resources in frontier waters (Warsaw, 17, July 1964), that neither party may, save by agreement with the other party, carry out any work in frontier waters which may affect the use of those waters by the other party.⁴⁵³

(75) A substantial number of treaties dealing with boundary waters, which treat those waters as a shared natural resource to which the principle of equality of right applies, establish some form of joint board, or watercourse commission, which is given a measure of authority in the application of that principle. For example, the 1946 Agreement between Argentina and Uruguay concerning the utilization of the rapids of the Uruguay River provides:

Article 1

The High Contracting Parties declare that, for the purposes of this Agreement, the waters of the Uruguay River shall be utilized jointly and shared equally.

Article 2

The High Contracting Parties agree to appoint and maintain a Mixed Technical Commission composed of an equal number of delegates from each country which shall deal with all matters relating to the utilization, damming, and diversion of the waters of the Uruguay River.⁴⁵⁴

Other articles of the treaty provide that the Mixed Technical Commission shall establish its rules and plan of work, apply certain specified priorities of water-use, make decisions by majority vote, and, in the absence of a majority or agreement by the High Contracting Parties, further provide for submitting the resultant dispute to arbitration. Article 5 provides:

⁴⁵² United Nations, *Treaty Series*, vol. 504, p. 258 (see also *Legislative Texts*, p. 566).

⁴⁵³ *Ibid.*, vol. 552, p. 194.

⁴⁵⁴ *Ibid.*, vol. 671, p. 26 (see also para. (61) above).

The High Contracting Parties agree that permission for the use and diversion, whether temporarily or permanently, of the waters of the Uruguay River and its tributaries upstream of the dam shall be granted by the Governments only within their respective jurisdictions and after a report by the Mixed Technical Commission.⁴⁵⁵

(76) The 1954 Agreement between Czechoslovakia and Hungary on the settlement of technical and economic questions relating to frontier watercourses provides for equal sharing, but prohibits construction of works that may have an adverse effect upon the watercourse (article 23). Under article 26, a Mixed Technical Commission is established to give advice on the consequences of the establishment or construction of works on the watercourse and on whether a special agreement to authorize such construction is required.⁴⁵⁶

(77) The International Joint Commission (United States and Canada) is empowered, by the provisions of the Treaty between the United Kingdom and the United States of America relating to boundary waters and questions arising along the boundary between Canada and the United States (Washington, D.C., 11 January 1909) to deal with:

uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line . . . (article III).⁴⁵⁷

The High Contracting Parties agree that they will not permit:

the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission (article IV).⁴⁵⁸

Article VIII provides:

. . . The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters . . .

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may, in the discretion of the Commission, be suspended in the cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side . . .⁴⁵⁹

In addition, a cardinal provision empowers the International Joint Commission to examine and report upon the facts of particular cases and makes recom-

mendations, and thus establishes the Commission as an effective agency of co-ordination:

Article IX. The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award . . .⁴⁶⁰

7. The provisions of draft article 5

(78) Despite the foregoing body of resolutions and draft principles which support the concept of shared natural resources and the foregoing body of judicial and treaty precedent for treating the waters of international watercourses as a shared natural resource, draft article 5 characterizes the waters of an international watercourse system as a shared natural resource only, (a) to the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, and (b) for the purposes of the present articles. These qualifications are designed to meet criticism of the concept of shared natural resources as unduly vague and undefined, by confining the application of that concept to the waters of international watercourses for the purposes of the present articles and in the measure in which the use of such waters in one State affects its use in another State. Thus the theme of the articles—that the waters of an international watercourse system are international only in so far as their use in one system State affects a use in another system State—is carried through in this article as well.

(79) *Paragraph 2* of draft article 5 further provides that the waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles. It is assumed that, when the present articles are enlarged, they will include principles which will give concrete meaning to the parameters of this shared natural resource, and provide an indication as to how this shared natural resource shall be treated. As it stands, this article simply requires States to use the waters of an international watercourse system as a shared natural resource, with what that implies

⁴⁵⁵ *Ibid.*, p. 30.

⁴⁵⁶ *Ibid.*, vol. 504, pp. 268 and 270 (see also para. (73) above).

⁴⁵⁷ *British and Foreign State Papers, 1908–1909* (London, H.M. Stationery Office, 1913), vol. 102, p. 138 (see also *Legislative Texts*, p. 261).

⁴⁵⁸ *Ibid.*, p. 139 (and *ibid.*, p. 261).

⁴⁵⁹ *Ibid.*, pp. 140–141 (and *ibid.*, pp. 262–263).

⁴⁶⁰ *Ibid.*, pp. 141–142 (and *ibid.*, p. 263).

pursuant to principles such as the equitable use of those waters and of the axiom *sic utere tuo ut alienum non laedas*.

(80) One member of the Commission was unable to take a position on draft article 5, essentially on the ground of the undetermined meaning of the concept of a shared natural resource. Since that meaning could be determined only in the light of further articles, he saw no point in including this draft article. Another member stressed the relevance for the topic of the principles of permanent sovereignty over natural resources. However, his view differed from that of another member, who maintained that that principle did not apply to a shared natural resource.

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

Commentary

(1) There are a substantial number of treaties in force among riparians of international watercourses. These treaties may be denominated "system agreements", although they have not in fact been so called. Article X (which has been modelled on the first paragraph of article 73 of the Vienna Convention on Consular

Relations)⁴⁶¹ is designed to make clear that such treaties in force are in no way prejudiced or otherwise affected by the provisions of the present articles.

(2) It is believed that such a provision should find its place in the draft articles, probably just before or among the final clauses. However, the Commission has taken care to draft the principle now, in order to reassure any States that might tend to apprehend that the draft articles, were they to come into force as a treaty, would in some way prejudice or affect existing treaties relating to international watercourses. This is not the Commission's intention and would not be the effect of the draft articles were they to come into force as a treaty. Article X makes that clear beyond doubt.

(3) At the same time, as the first clause of article X indicates, the existence of a treaty relating to a specific international watercourse may not of itself relieve system States of that watercourse of an obligation to negotiate in good faith for the purpose of concluding one or more system agreements. The applicability of that latter obligation, which is set forth in paragraph 3 of article 3 of the present articles, depends not on whether there is an existing international agreement relating to the watercourse in question, but on whether—having regard to the terms and effects of the existing agreement as well as other factors—the uses of an international watercourse system require such negotiations.

⁴⁶¹ United Nations, *Treaty Series*, vol. 596, p. 261.

Chapter VI

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK

99. In 1977, at its twenty-ninth session, the Commission considered possible additional topics for study following the implementation of the current programme of work, and included a section thereon in its report.⁴⁶² The topic "Jurisdictional immunities of States and their property", which had been included by the Commission at its first session in its provisional list of 14 topics selected for codification⁴⁶³ and repeatedly mentioned in the Commission's discussions at its twenty-fifth session concerning the review of its long-term programme of work,⁴⁶⁴ was recommended for selection in the near future for active consideration by the Commission, bearing in mind the day-to-day practical importance of the topic as well as its suitability for codification and progressive development.⁴⁶⁵

100. The General Assembly, having considered the report of the Commission on the work of its twenty-ninth session, adopted on 19 December 1977 its resolution 32/151, paragraph 7 of which reads as follows:

[*The General Assembly,*]

7. Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

101. At its thirtieth session, in 1978, the Commission set up a Working Group to consider the question of the future work of the Commission on the topic and to report thereon to the Commission. The Working Group was composed as follows: Mr. Sompong Sucharitkul (Chairman), Mr. Abdullah El-Erian, Mr. Laurel B. Francis and Mr. Willem Riphagen.⁴⁶⁶

102. The Commission considered the report of the Working Group at its 1524th and 1527th meetings, on 24 and 27 July 1978, and on the basis of the recommendations contained therein decided to:

(a) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(b) appoint a Special Rapporteur for that 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.⁴⁶⁷

103. In addition, the Commission took note of the report of the Working Group⁴⁶⁸ and included a section thereof in the relevant chapter of the Commission's report.⁴⁶⁹ It also appointed Mr. Sompong Sucharitkul Special Rapporteur on the topic "Jurisdictional immunities of States and their property".⁴⁷⁰

104. Taking note of the preliminary work done by the International Law Commission regarding the study of, *inter alia*, jurisdictional immunities of States and their property, the General Assembly, in paragraph 6 of its resolution 33/139 of 19 December 1978, recommended that the Commission "should continue its work on the remaining topics in its current programme", which included the topic under consideration.

105. Pursuant to the Commission's request noted in paragraph 102 above, the Legal Counsel of the United Nations addressed a circular letter dated 18 January 1979 to the Governments of Member States, inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence.

106. At its thirty-first session, the Commission had before it a preliminary report on the topic submitted by

⁴⁶² *Yearbook* ... 1977, vol. II (Part Two), pp. 129-130, document A/32/10, paras. 107-111.

⁴⁶³ *Yearbook* ... 1949, p. 281, document A/925, para. 16.

⁴⁶⁴ *Yearbook* ... 1973, vol. II, pp. 230-231, document A/9010/Rev.1, paras. 173-174.

⁴⁶⁵ *Yearbook* ... 1977, vol. II (Part Two), p. 130, document A/32/10, para. 110.

⁴⁶⁶ *Yearbook* ... 1978, vol. II (Part Two), p. 152, document A/33/10, para. 179.

⁴⁶⁷ *Ibid.*, p. 153, para. 188.

⁴⁶⁸ A/CN.4/L.279/Rev.1.

⁴⁶⁹ *Yearbook* ... 1978, vol. II (Part Two), pp. 153-155, document A/33/10, chap. VIII, sect. D, annex.

⁴⁷⁰ *Ibid.*, p. 153, para. 190.

the Special Rapporteur.⁴⁷¹ The report contained five parts. The introduction stated the purpose of the report, sought to identify the types of relevant source materials on the topic and its appropriate contents, and recalled previous decisions of the Commission and resolutions of the General Assembly forming a basis for the study. Chapter I gave a historical sketch of international efforts towards codification, including those of the League of Nations Committee of Experts, the International Law Commission, regional legal committees and professional and academic circles. Chapter II grouped under four headings the various types of possible source materials to be examined: State practice (in the form of national legislation, judicial decisions of municipal courts and governmental practice); international conventions; international adjudication; and opinions of writers. Chapter III gave a rough analytical outline of the possible contents of the law of State immunity, covering the following: a number of initial questions; the problem of defining certain concepts; the general rule of State immunity, including the extent of its application; consent as an element of the rule; some possible exceptions; immunity from attachment and execution; other procedural and related questions. Chapter IV underlined the possibility and practicability of the eventual preparation of draft articles on the topic.

107. The preliminary report was discussed by the Commission at its 1574th and 1575th meetings, held on 23 and 24 July 1979.⁴⁷² Introducing his report, the Special Rapporteur indicated that, being purely preliminary in nature, it was designed to present an overall picture of the topic, without proposing any solution of each or any of the substantive issues identified therein. Features of the Commission's discussion on the preliminary report are noted in section 2 below.

108. It was pointed out in the discussion that relevant materials on State practice, including the practice of socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials could be found in the treaty practice of States, which indicated consent to some limitations in specified circumstances. In that connection, the Commission decided to seek further information from the Governments of States Members of the United Nations in the form of replies to a questionnaire to be circulated.⁴⁷³ States knew best their own practice, wants and needs as to immunities in respect of their activities. The rules of State immunities should operate equally for States claiming or receiving immunities, and for States from which like immunities were sought from the jurisdiction of their judicial or administrative authorities. The views and comments of Governments could provide an appropriate indication

of the direction in which the codification and progressive development of the international law of State immunities should proceed.

109. Pursuant to that decision, the Legal Counsel of the United Nations addressed a circular letter dated 2 October 1979 to the Governments of Member States, inviting them to submit replies, if possible by 16 April 1980, to a questionnaire on the topic formulated by the Special Rapporteur.

110. By paragraph 4 of its resolution 34/141 of 17 December 1979, the General Assembly recommended that the International Law Commission should, *inter alia*:

(e) Continue its work on jurisdictional immunities of States and their property, taking into account information furnished by Governments and replies to the questionnaire addressed to them, as well as views expressed on the topic in debates in the General Assembly.

111. At the current session the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/331 and Add.1),⁴⁷⁴ containing the text of the following six proposed draft articles: "Scope of the present articles" (article 1); "Use of terms" (article 2); "Interpretative provisions" (article 3); "Jurisdictional immunities not within the scope of the present articles" (article 4); "Non-retroactivity of the present articles" (article 5); "The principle of State immunity" (article 6). The first five constituted part I, entitled "Introduction", while the sixth was placed in part II, entitled "General principles".

112. The second report submitted by the Special Rapporteur was considered by the Commission at its 1622nd to 1626th meetings, held between 30 June and 4 July 1980. During the discussion, the Special Rapporteur indicated that the provisional adoption by the Commission of draft articles based on the proposed draft articles 1 and 6 could provide a useful working basis for the continuation of the work to be prepared by him. He therefore suggested that the Commission might wish, at the current session, to concentrate on draft articles 1 and 6, and that consideration of draft articles 2, 3, 4 and 5, which had been submitted for the preliminary reactions of members of the Commission, could be deferred. Concluding its consideration of the second report, the Commission referred to the Drafting Committee draft article 1 ("Scope of the present articles") and draft article 6 ("The principle of State immunity"). At its 1634th and 1637th meetings, held on 16 and 18 July 1980, the Commission considered the texts of articles 1 and 6 proposed by the Drafting Committee and provisionally adopted them. Without prejudice to the question of the final numbering of the articles that might eventually be included, the numbering of articles 1 and 6 was retained.

113. Bearing in mind paragraph 4 (e) of General Assembly resolution 34/141 (see para. 110 above) and

⁴⁷¹ *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

⁴⁷² *Ibid.*, vol. I, pp. 209–218.

⁴⁷³ *Ibid.*, vol. II (Part Two), p. 186, document A/34/10, para. 183.

⁴⁷⁴ Reproduced in *Yearbook ... 1980*, vol. II (Part One).

the particular importance and relevance of having available materials on State practice on the topic of jurisdictional immunities of States and their property, the Commission decided at its current session to renew, through the Secretary-General, the requests addressed to Governments to submit relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence,⁴⁷⁵ and to submit replies to the questionnaire formulated on the topic.⁴⁷⁶ It also requested the Secretariat to proceed with the publication of the materials and replies already received.

2. GENERAL REMARKS CONCERNING THE STUDY OF THE TOPIC AND THE PREPARATION OF DRAFT ARTICLES THEREON

(a) *Scope of the topic*

114. At the thirty-first session of the Commission, in 1979, a consensus emerged during the discussion of the Special Rapporteur's preliminary report⁴⁷⁷ to the effect that for the immediate future the Special Rapporteur should continue his study, concentrating on general principles and thus confining the areas of initial interest to the substantive contents and constitutive elements of the general rules of jurisdictional immunities of States. It was also understood that the question of the extent of or limitations on the application of the rules of State immunity required an extremely careful and balanced approach, and that the exceptions identified in the preliminary report were merely noted as possible limitations, without any assessment or evaluation of their significance in State practice.⁴⁷⁸

115. At that session, it was also agreed, in terms of priorities to be accorded in the treatment of the topic, that the Special Rapporteur should continue his work on immunities of States from jurisdiction, leaving aside for the time being the question of immunity from execution of judgement. The Commission also noted the special nature of the topic under discussion, which, more than other topics hitherto studied by it, touched on the realm of internal law as well as on that of private international law.⁴⁷⁹ A note of

caution was sounded, to the effect that the primary task of the Special Rapporteur was the search for rules of public international law on State immunities. In that task, he would inevitably have to examine, *inter alia*, the judicial or other practice of States as evidence of such rules. Several important questions of a procedural nature would also have to be looked into to complete the study. In that connection, the scope of the topic could be so delineated as to exclude from the study certain matters such as the "act of State" doctrine and purely internal law questions.⁴⁸⁰

116. Another point noted at that session and reiterated during the consideration of the topic at the current session was the widening functions of the State, which had accentuated the complexities of the problem of State immunities. Controversies had existed in the past concerning the divisibility of the functions of the State or the various distinctions between the activities carried on by modern States in fields of activity formerly confined to individuals, such as trade and finance. Such distinctions had been attempted in order to indicate the circumstances or areas in which State immunity could be invoked or accorded. No generally accepted criterion had been found. The greatest care was called for in the treatment of that particular area of the topic.⁴⁸¹

117. As noted above,⁴⁸² the Commission at its current session provisionally adopted draft articles 1 and 6, entitled respectively "Scope of the present articles" and "State immunity", on the basis of the draft articles submitted by the Special Rapporteur in his second report (A/CN.4/331 and Add.1). In that report, the Special Rapporteur also proposed, *inter alia*, draft article 4, entitled "Jurisdictional immunities not within the scope of the present articles"⁴⁸³ and draft

⁴⁸⁰ *Ibid.*, para. 181.

⁴⁸¹ *Ibid.*, para. 182.

⁴⁸² Para. 112.

⁴⁸³ Draft article 4 proposed by the Special Rapporteur (A/CN.4/331 and Add.1, para. 54) read as follows:

"Article 4. *Jurisdictional immunities not within the scope of the present articles*

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

- "(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- "(ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- "(iii) special missions under the Convention on Special Missions of 1969,
- "(iv) the representative of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
- "(v) permanent missions or delegations of States to international organizations in general,

shall not affect

"(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(Continued on following page.)

⁴⁷⁵ As of 25 July 1980, the Governments of the following 18 Member States had submitted materials or information relevant to the topic: Argentina; Austria; Barbados; Chile; Colombia; Czechoslovakia; Finland; Germany, Federal Republic of; Hungary; Jamaica; Mauritius; Morocco; Norway; Philippines; Poland; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United States of America.

⁴⁷⁶ As of 25 July 1980, the Governments of the following 11 Member States had submitted replies to the questionnaire formulated on the topic: Brazil; Egypt; Kenya; Lebanon; Sudan; Sweden; Syrian Arab Republic; Togo; Trinidad and Tobago; Union of Soviet Socialist Republics; United States of America.

⁴⁷⁷ *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

⁴⁷⁸ *Ibid.*, (Part Two), p. 186, document A/34/10, para. 178.

⁴⁷⁹ *Ibid.*, para. 180.

article 5, entitled "Non-retroactivity of the present articles".⁴⁸⁴ On the suggestion of the Special Rapporteur, the Commission agreed to defer consideration, *inter alia*, of those articles until it was in a position to examine the remainder of the draft articles to be proposed on the topic. It was noted, moreover, that the Special Rapporteur had submitted draft articles 4 and 5 as signposts for the framework of the projected plan of the draft articles.

118. In that connection, the Special Rapporteur informed the Commission of his intention to continue his study of the general principles relating to the topic. In an effort to provide a preview of possible further general principles that might provide the basis for proposed draft articles, the Special Rapporteur indicated that his future reports might be expected to deal, *inter alia*, with the following matters: the distinction between cases in which the question of State immunity arose and the other jurisdictional prerequisites or conditions of competence were fulfilled, and other cases in which the question of State immunity did not arise because the territorial State lacked jurisdiction or competence under its own internal law; relevance of consent; voluntary submission; question of counter-claims; waiver of State immunity.

(b) Question of use of terms

119. As indicated in the report of the Commission on the work of its thirty-first session, the expression "jurisdictional immunities" had been understood during the discussion of the preliminary report submitted by the Special Rapporteur to cover exemptions from the exercise of various types of governmental power by the territorial authorities, including the judicial power and the power exercised by the exclusive and other administrative authorities. Those exemptions, however, did not in general amount to substantive immunities from legislative provisions.⁴⁸⁵

120. In his second report, considered by the Commission at its current session, the Special Rapporteur

proposed a draft article 2 entitled "Use of terms" which included, *inter alia*, definitional notions of the following terms: "immunity"; "jurisdictional immunities"; "territorial State"; "foreign State"; "State property"; "trading or commercial activity"; "jurisdiction".⁴⁸⁶ He also proposed a draft article 3 entitled "Interpretative provisions", which contained further indications of the meanings to be attributed to the terms "foreign State" and "jurisdiction" as well as a provision on determining the "commercial character of a trading or commercial activity as defined in article 2, paragraph 1 (f)".⁴⁸⁷

⁴⁸⁶ Draft article 2 proposed by the Special Rapporteur (A/CN.4/331 and Add.1, para. 33) read as follows:

"Article 2. Use of terms

"1. For the purpose of the present articles:

"(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

"(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

"(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

"(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

"(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

"(f) 'trading or commercial activity' means

"(i) a regular course of commercial conduct, or

"(ii) a particular commercial transaction or act;

"(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization."

⁴⁸⁷ Draft article 3 proposed by the Special Rapporteur (A/CN.4/331 and Add. 1, para 48) read as follows:

"Article 3. Interpretative provisions

"1. In the context of the present articles, unless otherwise provided,

"(a) the expression 'foreign State', as defined in article 2, paragraph 1 (d), above, includes:

"(i) the sovereign or head of State,

"(ii) the central government and its various organs or departments,

"(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

"(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government;

"(b) the expression 'jurisdiction', as defined in article 2, paragraph 1 (g), above, includes:

"(i) the power to adjudicate,

"(ii) the power to determine questions of law and of fact,

"(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

"(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State."

(Foot-note 483 continued.)

"(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

"(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

⁴⁸⁴ Draft article 5 proposed by the Special Rapporteur (A/CN.4/331 and Add.1, para. 57) read as follows:

"Article 5. Non-retroactivity of the present articles

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

⁴⁸⁵ *Yearbook* ... 1979, vol. II (Part Two), p. 186, document A/34/10, para. 180.

(Continued on following page.)

121. Some members of the Commission reacted favourably to some of the terms included in the proposed draft article 2. It was tentatively indicated that the term "jurisdiction" had been given a narrow definition in the draft, but that it could be used to cover other types of power of the State, such as the power of the executive and legislative authorities, not necessarily linked to judicial power, administration of justice or other incidental authorities. Other members thought there was little or no evidence of immunity of a State from the jurisdiction of another State in the practice of States in the widest sense of executive and legislative power, but would be prepared to await the result of further research on that point. The terms "territorial State" and "foreign State" were thought not to be completely satisfactory for inclusion in the draft articles considered at the current session; however, for want of more readily acceptable terms, they could be used as points of reference in considering the topic. The term "trading or commercial activity" as defined and interpreted in proposed draft articles 2 and 3 attracted support from some members, but others observed that the nature of the transaction, as an objective criterion, although affording a useful and practical preliminary test, should be further qualified by other criteria, so as to achieve a better balance in determining a fair and just extent of State immunities. Finally, most members thought the interpretative provisions of the Special Rapporteur's proposed draft article 3 could be considered for inclusion in the commentary to any eventual article adopted by the Commission on use of terms.

122. It was generally agreed that it would be somewhat premature to discuss the substance of definitional problems, and the drafting problems consequent thereto, at the initial stage of the Commission's work on the topic. It was considered more prudent to follow the Commission's usual method of examining the question of use of terms more closely when it approached the final stages of its work on draft articles.

B. Draft articles on jurisdictional immunities of States and their property

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.

Commentary

(1) One of the initial questions to be determined in the very first instance is the scope of the draft articles, which may or may not take the form of a general convention. The purpose of the articles is to codify what might be considered to be existing customary rules of international law on the topic of jurisdictional immunities of States and their property. Closely linked to the process of identifying or determining existing rules is the possibility or opportunity of progressively developing additional rules to supplement and accelerate the process of crystallization of norms on the subject.

(2) The identity of the subject-matter to which the articles should apply may be defined by reference to the ultimate utilization of the draft articles, the scope of which in turn will become more vivid. The simplest and clearest indication should directly bring out the composite ingredients or constituent elements of the topic under examination. In any given situation in which the question of State immunity may arise, a few basic notions or concepts appear to be inevitable. In the first place, the main character or the principal subject of the present study is jurisdictional immunities or immunity from jurisdiction, whatever the inherent complexities and subtleties of that notional concept. Secondly, the existence of two independent sovereign States is a prerequisite to the question of State immunity with two States facing each other (*par in parem imperium non habet*). The jurisdictional immunities in question are accorded in normal circumstances to States, and they are sometimes said to belong to States. On the other hand, immunities of States are sometimes said to cover or "extend to" property of States, without becoming, as it were, the right of the property or exercisable by it. It should be added that the scope of the present articles should not only be wide enough to cover questions of jurisdictional immunities of States and their property but should also include provision for all questions relating to State immunity. The text of article 1 has been provisionally adopted by the Commission to define tentatively the scope of the present articles, as covering questions relating to the immunity of one State and its property from the jurisdiction of another State.

(3) Some members of the Commission, however, expressed reservations on the article on the grounds that, in their view, it established no legal rule: it was merely descriptive, referring to "questions relating to" the immunities of States. The article was meaningless with the inclusion of such words as "questions relating to", because such questions were not identified in any way. The majority of the members of the Commission, however, believed it preferable to maintain the reference to "questions relating to" in article 1, at least for the time being, in order to indicate that the scope of the draft was meant to be a broad one, encompassing various matters or questions, to be taken up and specified at subsequent sessions of the Commission,

(Foot-note 487 continued)

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1 (f), above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."

bearing upon the immunity of one State and its property from the jurisdiction of another State. Once those questions have been identified and rules relating to State immunity formulated, the wording of article 1 could be revised to read as follows:

"The present articles apply to the immunity of one State and its property from the jurisdiction of another State."

PART II

GENERAL PRINCIPLES

Article 6. State immunity

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

Commentary

(1) The formulation of a general rule of State immunity poses serious problems due to divergent views as to the theoretical foundations of contents of such a rule; various points of departure are available. The rule of the immunity of one State from the jurisdiction of another could be formulated as an exception to the basic norm of territorial sovereignty. It could be seen in terms of the interrelationships between various aspects of sovereignty: territorial sovereignty and national sovereignty or sovereign equality among States. A formulation along those lines would involve an assumption or presumption of consent on the part of the State of the territory not to exercise its jurisdiction over another equally sovereign State or its property, even though the latter State's activities may have been conducted in the territory of the former State. In the ultimate analysis, it might be necessary, if this approach were to be pursued, to go more deeply beyond the territorial aspect of State sovereignty to the principle of consent which lies at the root of other norms of international law.

(2) As the topic is entitled "Jurisdictional immunities of States and their property", it would appear that the more appropriate approach would be to begin by examining the concept of State immunity itself. In that connection two or more theoretical trends might be perceived as to the content of a rule of State immunity in contemporary international law. It might be held that there exists a universal and basic principle of State immunity from which might be carved exceptions under certain circumstances. It might also be held, on the other hand, that there is no such general rule, but rather various rules allowing State immunity in some circumstances and not allowing it in others. Yet another position which might be held is that, while a general rule on State immunity may well exist, that

general rule recognizing State immunity also comprises, at one and the same time, certain restrictions on or exceptions to that immunity.

(3) In the light of the above considerations, and taking into account the State practice indicated below, the Commission has attempted to draft an article on the rule of State immunity which would not completely foreclose or negate any of the theoretical considerations indicated above. The article is designed to state the existence of a general rule of State immunity under contemporary customary rules of international law in relative terms, its qualifications, limits, exceptions and extent being still subject to verification and formulation in the articles that will follow. Paragraph 1 refers to the general rule and reflects an endeavour to reaffirm the existence of a rule of State immunity providing that a State is immune from the jurisdiction of another State, while paragraph 2 reinforces the obligation to implement the general rule or to give effect to State immunity. In both paragraphs, the scope of application of the rule of State immunity and its implementation is confined within the purview of and in accordance with the provisions of the present articles. Such confinement takes an objective form without prejudging the contents of general principles governing State immunity or their extent, in both the expansive and the limitative sense. The wording adopted is indicative of further ramifications, qualifications and limitations, as well as possible exceptions, to the general rule of State immunity in various types of circumstances.

(4) The text of article 6 has been prepared with a view to laying the groundwork for future work on the topic without prejudicing at this stage the different views which might be held on the absolute, relative or restrictive nature of a rule on State immunity. In any event it would appear that what is necessary at the present stage is an indication that such a rule exists in customary international law and that it should be the basis for the commencement of work by the Commission on the topic. The limits and contours of that rule will become clearer as future proposed articles on other general principles and on possible exceptions are examined by the Commission.

(5) Within the Commission, opposition to article 6 was expressed by certain members who took the view that the article as currently drafted recognized State immunity only in so far as provided in the present articles, and that such an article was contrary to customary international law since it denied the existence of the basic principle of State immunity. Furthermore, one member who held this view proposed a formulation which was designed to set out clearly the principle of State immunity, while making it evident that the principle might be subject to exceptions.⁴⁸⁸

⁴⁸⁸ That formulation read as follows: "Each State is exempt from the power of any other State. A State and State property are not subject to the jurisdiction of another State, except as provided by the present articles."

(6) The above considerations must be viewed against the background of the practice of States with regard to the jurisdictional immunities of States and their property. It is therefore relevant to recount some of the historical and legal developments of the rule of State immunity and its rational bases. Accordingly, it is considered useful to set out the following information based upon the second report submitted by the Special Rapporteur.

Historical and legal developments of the rule of State immunity

(7) The general rule of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection. The opinions of writers and international conventions relating to State immunity are practically all of subsequent growth, although there is markedly a growing concern apparent in the writings of contemporary publicists and in relatively recent provisions of treaties and international conventions, as well as in national legislation. The scantiness of pre-19th century judicial decisions bearing upon the question of jurisdictional immunities of States serves as an eloquent explanation of the total absence of reference to the topic in the classics of international law, and the complete silence in earlier treaties and internal laws. To give but a few illustrations, neither Gentili⁴⁸⁹ nor Grotius,⁴⁹⁰ neither van Bynkershoek⁴⁹¹ nor de Vattel,⁴⁹² reveal any trace of the doctrine of State immunity, although the problems of diplomatic im-

munities and the immunities of personal sovereigns receive extensive discussion in their monumental treaties. Legislative provisions in Europe or elsewhere and international conventions of the same period make no mention of any principle of State immunity, while references to the immunities of ambassadors and personal sovereigns are to be found in European statutes of the corresponding period,⁴⁹³ as well as in the case law of several nations from the eighteenth century onwards.⁴⁹⁴

(8) It was mainly in the nineteenth century that national courts began to formulate the doctrine of State immunity in their practice. Since then, judicial deliberations on this doctrine have generated a great and divergent volume of municipal jurisprudence. The diversity and complexity of the problems involved in the application of this comparatively recent doctrine of State immunity by national authorities have increasingly enriched the archives of modern international legal literature.⁴⁹⁵

⁴⁹³ See, for example, the British Statute of 7 Anne (1708), chap. XII, sects. I–III “An Act for preserving the Privileges of Ambassadors, and other public Ministers of Foreign Princes and States” (United Kingdom, *The Statutes at Large of England and of Great Britain* (London, Eyre and Strahan, 1811), vol. 4, p. 17); a statute of the United States of America of 1790, which contains a clause providing that:

“Whenever a writ or process is sued out or prosecuted . . . whereby a person of any ambassador . . . is arrested or imprisoned, or his goods or chattels are distrained, seized or attacked, such writ or process shall be deemed void.” (United States of America, *United States Code, 1964 Edition*, Title 22, “Foreign relations and intercourse” (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, title 22, p. 4416);

and a French decree concerning envoys of foreign Governments, dated 13 Ventôse year 2 (3 March 1794), which provided:

“The National Convention prohibits any constituted authority from proceeding in any manner against the person of envoys of foreign governments; claims which may be raised against them shall be brought to the Committee of Public Safety, which alone is competent to satisfy them.” (J. B. Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du Conseil-d’Etat* (Paris, Guyot et Scribe, 1825), vol. 7, p. 108). [Translation by the Secretariat.]

A decree of the Constituent Assembly of 11 December 1789, also confirmed this principle (“Arrêté sur une demande faite par les ambassadeurs relativement à leurs immunités”, *ibid.* (1824), vol. 1, p. 73).

⁴⁹⁴ See for example the British cases *Buvot v. Barbut* [“Barbut’s case”] (1737) (*British International Law Cases* (London, Stevens, 1967), vol. 6, No. 1, pp. 261–262), and *Triquet and others v. Bath* (1764) (*ibid.*, pp. 211–213); a Dutch case reported in 1720 concerning the Envoy Extraordinary of the Duke of Holstein (see van Bynkershoek, *De foro legatorum* . . . (*op. cit.*), chap. XIV); the French case of *Bruc v. Bernard* (1883), in which the Court of Appeals of Lyon stated:

“... it must be recognized that full immunity from jurisdiction in civil matters is enjoyed by anyone invested with an official character as representing a foreign Government in any way . . .” (M. Dalloz, *Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine* année 1885 (Paris, Bureau de la Jurisprudence générale), part 2, pp. 194–195). [Translation by the Secretariat.]

⁴⁹⁵ See the selected bibliography annexed to S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 361–380, and more recently in *Recueil des cours de l’Académie de droit international de La Haye, 1976–I* (Leyden, Sijthoff, 1977), vol. 149, pp. 212–215.

⁴⁸⁹ Concerning contracts of ambassadors, see A. Gentili, *De legationibus, libri tres* (1594), reproduced and trans. in *The Classics of International Law*, Carnegie Endowment for International Peace (New York, Oxford University Press, 1924), vol. II, chap. XIV.

⁴⁹⁰ On the personal inviolability of ambassadors, see H. Grotius, *De jure belli ac pacis, libri tres* (1646), reproduced and trans. in *The Classics of International Law*, *idem* (Oxford, Clarendon Press, 1925), vol. II, chap. XVIII, sect. IV.

⁴⁹¹ On immunities of ambassadors from civil jurisdiction, see C. van Bynkershoek, *De foro legatorum tam in causa civili, quam criminali, liber singularis* (1721), reproduced and trans. in *The Classics of International Law*, *idem* (Oxford, Clarendon Press, 1946) chaps. XIII–XVI and on the immunities of foreign sovereigns and their property, *ibid.*, chaps. III and IV. See also E. A. Gmür, *Gerichtsbareit über fremde Staaten* (Zurich, Polygraphischer Verlag, 1948), pp. 38 *et seq.* [thesis] and the annotated translation into French by J. Barbeyrac of the Bynkershoek work: *Traité du juge compétent des ambassadeurs, tant pour le civil que pour le criminel* (The Hague, Johnson, 1723), pp. 43 and 46.

⁴⁹² Concerning the immunities of personal sovereigns, see E. de Vattel, *Le droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux affaires des Nations et des Souverains*, (1758), *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, book IV, chap. VII, para. 108. De Vattel, however, recognized the principle of independence, sovereignty and equality of States (*ibid.*, vol. I, book II, chap. III, para. 36 and chap. VII, paras. 79 and 81), and the immunity of the local State or sovereign from the jurisdiction of its or his own courts (*ibid.*, chap. XIV, para. 214).

(9) It was in the nineteenth century that the doctrine of State immunity came to be established in the practice of a large number of States. In common law jurisdictions, especially in the United Kingdom and the United States of America, the principle that foreign States are immune from the jurisdiction of the territorial State has to a large extent been influenced by the traditional immunity of the local sovereign, apart altogether from the application of the concept of international comity or *comitas gentium*. In the United Kingdom, at any rate, the doctrine of sovereign immunity has been a direct result of British constitutional usage expressed in the maxim "The King cannot be sued in his own courts". To implead the national sovereign was therefore a constitutional impossibility. As the King personified the State, constitutionally speaking, the courts forming part of the machinery of justice of the central government of that State could not logically exercise jurisdiction over the sovereign, in whose name, and in whose name only, they could act. The immunity of the local sovereign is thus a legacy of legal history. Within the confines of a territory, the domestic sovereign was the fountain of law and justice. He did justice not as a matter of duty but of grace. The immunity of the Crown was later extended to cover also the sovereign heads of other nations, or foreign sovereigns with whom at a subsequent stage of legal development foreign States have been identified. The survival of this ancient constitutional practice in the international domain is illustrated by the fact that it is still common usage for courts in the United Kingdom to refer to foreign States as foreign sovereigns, particularly in the present context of State or sovereign immunity.

(10) The basis of immunity has been the sovereignty of the foreign sovereign in a way analogous to or comparable with that of the local sovereign. In *The "Prins Frederik"* case (1820),⁴⁹⁶ the first English case that contained a pronouncement on the principle of international law relating to jurisdictional immunities of foreign States and their property, as well as in subsequent cases in which jurisdictional immunity was accorded to foreign States,⁴⁹⁷ the court declined jurisdiction on the grounds that the foreign State as personified by the foreign sovereign was equally sovereign and independent and that to implead him would insult his "regal dignity".⁴⁹⁸ In *de Haber v. The Queen of Portugal* (1851), Chief Justice Campbell, basing sovereign immunity on international law, said:

⁴⁹⁶ J. Dodson, *Reports of Cases argued and determined in the High Court of the Admiralty* (London, Butterworth, 1828), vol. II (1815-1822), p. 451.

⁴⁹⁷ See for example the case *Vavasseur v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (London, Incorporated Council of Law Reporting for England and Wales, 1878), p. 351) and that of the "*Parlement belge*" (1880) (*idem*, *The Law Reports, Probate Division* (London, Incorporated Council of Law Reporting for England and Wales, 1880), vol. V, p. 197).

⁴⁹⁸ Lord Justice Esher in the "*Parlement belge*" case (United Kingdom, *The Law Reports, Probate Division* (*op. cit.*), p. 207).

In the first place, it is quite certain, upon general principles . . . that an action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity . . . 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.⁴⁹⁹

(11) A further rationalization of the doctrine of sovereign immunity was given by Lord Justice Brett in his classic dictum in *The "Parlement belge"* case (1880):

The principle . . . is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and everyone 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, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.⁵⁰⁰

(12) That rationale of sovereign immunity appears to rest on a number of basic principles, such as common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority, representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent. Immunities accorded to personal sovereigns and ambassadors as well as to their property appear to be traceable to the more fundamental immunities of States.

(13) A clearer judicial confirmation of the view that these immunities are regulated by rules of international law can be found in the oft-cited dictum of Lord Atkin in the "*Cristina*" case (1938).

The foundation for the application to set aside the writ and arrest of a ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.⁵⁰¹

(14) State immunity is thus translatable in terms of absence of the power of the territorial authorities to implead a foreign sovereign. The concept of impleading relates to the possibility of compelling the foreign

⁴⁹⁹ *Idem*, *Queen's Bench Reports*, new series, vol. XVII (London, Sweet, 1855), p. 207.

⁵⁰⁰ *Idem*, *The Law Reports, Probate Division*, vol. V (*op. cit.*), pp. 214-215.

⁵⁰¹ *Idem*, *The Law Reports, House of Lords* . . . (London, 1938), p. 490; *Annual Digest and Reports of Public International Law Cases 1938-1940* (London, 1942), case No. 86, p. 252.

sovereign against his will to become a party to legal proceedings, or to an attempt otherwise to seize or detain property which is his or in his possession or control.

(15) In a way not dissimilar from developments in the United Kingdom, State immunity in the practice of the United States of America appears to have taken firm root in common ground, where the original doctrine of the common law regarding the prerogative of immunity from suit of the local sovereign had earlier flourished. It may, with some weight of authority, be contended that the legal basis for the immunity from suit accorded to foreign Governments in United States practice lies in a principle which is much more peculiar to the United States Constitution than the common law doctrine of immunity of the Crown. Its strength lies in the impact of the Federal Constitution of the United States of America and the influence it has on the necessity to resolve questions to ensure harmony in the reciprocal relations between the federal union and its member states.

(16) In the case *Principality of Monaco v. Mississippi* (1934), the court endorsed the insistence of Hamilton in *The Federalist* No. 81, saying:

There is ... the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.⁵⁰²

This insistence on the need to safeguard the sovereignty of the member States of the Union finds occasional reinforcement in certain cases in which United States courts have gone to the length of recognizing the same need with regard to member States of a foreign federal union,⁵⁰³ while denying immunity in other cases to other similar entities.⁵⁰⁴

(17) The judicial authorities of the United States were among the first to formulate the doctrine of State immunity, not uninfluenced by the common law concept of the immunity of the domestic sovereign or unaffected by the impact of the United States Constitution. The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice

Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812), as follows:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. 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 jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁵⁰⁵

(18) In this classic statement of the rule of State immunity, the immunity accorded to a foreign State by the territorial State was founded on the attributes of sovereign States, including, especially, the independence, sovereignty, equality and dignity of States. The granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the *opinio juris* underlying that usage.

⁵⁰² See G. H. Hackworth, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1941), vol. II, p. 402.

⁵⁰³ See for example *Sullivan v. State of São Paulo* (*Annual Digest ... 1941-1942* (London, 1945), case No. 50, pp. 178 *et seq.*) Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States of America. The State Department of the United States had recognized the claim of immunity.

⁵⁰⁴ See the case of *Schneider v. City of Rome*, where the court said: "That the City of Rome is a 'political subdivision' of the Italian Government which exercises 'substantial governmental powers' is not alone sufficient to render it immune." (*Annual Digest ... 1948* (London, 1953), case No. 40, p. 132). Judge Learned Hand expressed doubt whether every political subdivision of a foreign State was immune which exercised substantial governmental powers (*ibid.*).

⁵⁰⁵ 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, pp. 135-136. See also J. Hostie, "Contribution de la Cour suprême des Etats-Unis au développement du droit des gens", *Recueil des cours ... 1939-III* (Paris, Sirey, 1939), vol. 69, pp. 241 *et seq.*

(19) Civil law countries have taken a different route from that followed by common law jurisdictions in the history of legal developments of State immunity. Primarily, jurisdictional immunity is closely related to the question of "compétence", which literally means jurisdiction or jurisdictional authority or power. A brief review of nineteenth century practice of a number of European countries can illustrate this point.

(20) In France, for instance, the rule of State immunity received broad application in the nineteenth century, in regard both to foreign States and also to their property. The acceptance of the rule of State immunity is worthy of notice in view of the French legal system under which proceedings could be instituted against its own Government before the various "tribunaux administratifs". A distinction has been drawn between "actes d'autorité", subject to the competence of the "tribunaux administratifs", and "actes de gouvernement", which are not subject to review by any French authority, judicial or administrative. As foreign affairs form a significant part of "actes de gouvernement", acts attributable to foreign States, emanating from the sovereign authority of the Government, could generally be regarded as "actes de gouvernement". Thus, in 1827, the Tribunal civil du Havre decided in *Blanchet v. République d'Haïti*:⁵⁰⁶ that article 14 of the civil code permitting suits in French courts against foreigners did not apply to a foreign State. This principle was reaffirmed by the Tribunal civil de la Seine in 1847, in a case concerning the Government of Egypt,⁵⁰⁷ and by the Cour de cassation, for the first time, in *Le Gouvernement espagnol v. Casaux* (1849).⁵⁰⁸ The Cour de Cassation stated the rule of State immunity in the following terms:

The reciprocal independence of States is one of the most universally recognized principles of the law of nations;—it results from this principle, that a government may not be subjected, in regard to its undertakings, to the jurisdiction of a foreign State;—the right of jurisdiction possessed by each government to judge disputes arising out of acts emanating from it is a right inherent in its sovereign authority, to which another government

may not lay claim without risking a worsening of their respective relations.⁵⁰⁹

(21) The court appears to have founded State immunity on the reciprocal independence and sovereign authority of foreign States. Its formulation led commentators of that time to suggest that State immunity be limited to cases where the foreign State was acting in its "sovereign capacity".⁵¹⁰ This distinction was recognized in regard to ex-sovereigns, but was generally rejected by French courts in the nineteenth century.

(22) In Belgium, articles 52 and 54 of the civil code adopted the principles of article 14 of the French civil code permitting suits against foreigners before the local courts. Following the reasoning advanced by French courts, jurisdictional immunities were accorded to foreign States whenever the exercise of territorial jurisdiction would violate the principles of sovereignty and independence of States. Thus, in a case decided in 1840, the Appellate Court of Brussels disclaimed jurisdiction against the Netherlands Government and a Netherlands public corporation, holding both defendants to represent the Netherlands State. Immunity was based on "the sovereignty of nations" and "the reciprocal independence of States".⁵¹¹ In its reasoning, the court appears to have rationalized State immunity by analogy with the basis of diplomatic immunities. The Court said:

It must therefore be held with the weightiest authorities that the immunities of ambassadors are the consequence of the representative character with which they are invested and stem from the independence of nations, which are deemed to act through them; the principles of the law of nations applicable to ambassadors are applicable *a fortiori* to the nations which they represent.⁵¹²

(23) In Italy, the rule of State immunity was recognized and applied by Italian courts in the nineteenth century. Immunity was viewed as a logical

⁵⁰⁶ *Recueil périodique ... et critique* (op. cit.), part I, p. 6; *Recueil général des lois et des arrêts* (Paris, Sirey, 1849), part I, p. 83. See also the cases *Balguerie v. Gouvernement espagnol* (1825) (*Recueil périodique et critique ...* (op. cit.), p. 5, and *République d'Haïti v. la maison Ternaux-Gandolphe* (1828) and *Gouvernement d'Espagne v. la maison Balguerie de Bordeaux* (1828), Tribunal civil de la Seine, 2 May 1828 (*Recueil général des lois ...* (op. cit.), p. 85, and *Recueil périodique et critique ...* (op. cit.), p. 7).

⁵⁰⁷ *Solon v. Gouvernement égyptien* (1847) (*Recueil périodique et critique ...* (op. cit.), p. 7, and *Journal du Palais* (Paris, 1849), vol. I, p. 172.

⁵⁰⁸ *Recueil périodique et critique ...* (op. cit.), p. 9 and *Recueil général des lois ...* (op. cit.), pp. 81 and 94. See also an interesting foot-note by L. M. Devilleneuve:

"This is the first ruling by the Cour de Cassation on these important questions of international law and extraterritoriality, although they had already been raised in the courts several times." (*Ibid.*, p. 81.)

⁵⁰⁹ *Recueil général des lois ...* (op. cit.), p. 93; *Recueil périodique et critique ...* (op. cit.), p. 9. See also C. J. Hamson, "Immunity of foreign States: The practice of the French courts", *The British Year Book of International Law* 1950 (London) p. 301. Cf. a decision by the French Conseil d'Etat of 2 May 1828 to the effect that art. 14 of the Civil Code did not apply to foreign ambassadors resident in France (*Recueil périodique et critique ...* (op. cit.), p. 6; *Recueil général des lois ...* (op. cit.), p. 89; and *Gazette des tribunaux* (Paris), 3 May 1828).

⁵¹⁰ See for example C. Demangeat, "Les tribunaux français peuvent-ils valider la saisie-arrêt formée, en France, par un Français, sur des fonds appartenant à un gouvernement étranger?", *Revue pratique de droit français* (Paris), vol. I (1856), pp. 385 et seq., and "Conférence des avocats de Paris, 27 décembre 1858" (*ibid.*, vol. VII (1859), pp. 182-186).

⁵¹¹ *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement* (Government of the Netherlands and Belgian Government) case (1840) (*Pasicrisie belge—Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat belge* (Brussels, Bruylant, 1841), vol. II, pp. 33 et seq.). The decision was not altogether uninfluenced by the Treaty of Peace between Belgium and the Netherlands; see E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929), pp. 4-7.

⁵¹² *Pasicrisie belge* (op. cit.), pp. 52-53. [Translation by the Secretariat.]

result of the independence and sovereignty of States. But even at the very outset, in *Morellet v. Governo Danese* (1882), the Corte di Cassazione di Torino distinguished between the State as "ente politico" and as "corpo morale", and confined immunity to the former. The court stated that, "it being incumbent upon the State to provide for the administration of the public body and for the material interests of individual citizens, it must acquire and own property, it must contract, it must sue and be sued and, in a word, it must exercise civil rights in like manner as any other juristic person or private individual".⁵¹³ A similar distinction was made between the State as "*potere politico*" and as "*persona civile*" by the Corte di Cassazione di Firenze in *Gutierrez v. Elmilik* (1886).⁵¹⁴ Jurisdiction was exercised in respect of service rendered to the Bey of Tunis. Another distinction was recognized in 1887 by the Court of Appeals of Lucca, between "*atti d'impero*" and "*atti di gestione*", in another case connected with the same Bey of Tunis.⁵¹⁵

(24) In Prussia, the Minister of Justice was empowered by legislation to authorize certain measures ordered by the judiciary.⁵¹⁶ In 1819, the Prussian Minister of Justice refused an order of attachment made by the Court of Saarbrücken against the Government of Nassau, on the ground that the general principles of sovereign immunity formed part of international law. In a letter to the Advocate-General, the Minister based immunity on the grounds that the exercise of jurisdiction against foreign Governments was not consonant with international law maxims as they had developed, and that the Prussian Government would not brook such an action against itself,

⁵¹³ *Giurisprudenza Italiana* (Turin, Unione tipografico-editrice torinese, 1883), vol. I, pp. 125, 130 *et seq.*

⁵¹⁴ *Il Foro Italiano* (Rome, 1886), vol. I, pp. 920-922, and Corte di appello, Lucca (*ibid.*, p. 490); decision quoted (trans.) in *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), part III, "Competence of courts in regard to foreign States", pp. 622-623.

⁵¹⁵ *Hampson v. Bey de Tunisi*, Corte di Appello, Lucca (1887) (*Il Foro Italiano* (Rome, 1887), vol. I, pp. 485-486; trans. in *Supplement to the American Journal of International Law* (*op. cit.*), pp. 480 *et seq.*). Cf. the decision of the same court in the case *Elmilik v. Mandataire de Tunis*, (*La Legge* (Rome, 1887), part II, p. 569); cited in *Journal du droit international privé* (Clunet) (Paris, 1888) vol. 15, p. 289. The court stated:

"Treasury bonds issued by a foreign Government . . . result from an act of mere administration by the Government and not from the exercise of the right of sovereignty." [*Translation by the Secretariat.*]

⁵¹⁶ The doctrine of State immunity was traceable back to the Prussian General Statute of 6 July 1793, sect. 76, which obliged the courts to notify the Foreign Office whenever the personal arrest of a foreigner of rank was contemplated. A Prussian Order in Council of 14 April 1795 provided for exemption from arrest for German princes as well as foreign princes unless otherwise ordered by a Cabinet Minister. This rule was limited to German princes by the Declaration of 24 September 1798, but was revived by the General Statute of 1815 in respect of foreign princes. See E. W. Allen, *The Position of Foreign States before German Courts* (New York, Macmillan, 1928), pp. 1-3.

thereby recognizing it as in contradiction with the law of nations.⁵¹⁷ This view of the law was adopted by German courts in later nineteenth century cases.⁵¹⁸

(25) Unlike the practice in the common law jurisdictions and the civil law systems already examined, the judicial practice of other countries prevailing in the nineteenth century was not so firmly established on the question of jurisdictional immunities of foreign States and their property. Countries belonging to the developing continents such as Africa, Asia and Latin America were preoccupied with other problems. Peoples were struggling to assert their self-determination and to regain or recover complete political independence. The process of decolonization was to acquire its impetus much later, after the advent of the United Nations and the adoption by the General Assembly of its resolution 1514 (XV) of 14 December 1960.⁵¹⁹ The Asian countries that maintained their sovereign independence throughout the nineteenth century and all through their national history did not escape subjection to a so-called "capitulations" regime, whereby some measure of extraterritorial rights and powers was recognized in favour of foreign States and their subjects. The question of State immunity was relatively insignificant, since even foreigners were outside the competence of the territorial authorities, whether administrative or judicial. It was not until well into the present century that extraterritoriality was gradually and ultimately abolished, leaving behind certain traces of misery and injustice in the memories of territorial States which had had to endure the regime as long as it lasted.⁵²⁰ The Latin American continent was comparatively more recent in its emergence as a new continent of thriving independent sovereign nations. Socialist States had not yet been established in Eastern Europe at that time. There were scarcely any reported cases from those countries in the 19th century on this particular question of State immunity.

(26) It should be observed, at this point, that the rule of State immunity, which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, was later adopted as a general rule of customary international law solidly rooted in the current practice of States.

⁵¹⁷ *Ibid.*, p. 3.

⁵¹⁸ See for example a decision of the Prussian Superior Court in 1832 and a Prussian Order in Council of 1835 (*ibid.*, pp. 4-5).

⁵¹⁹ This resolution was in part an answer to the call made in the final communiqué of the Asian-African Conference held in Bandung, 24 April 1955, sect. D, "Problems of Dependent Peoples": see Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin No. 9* (Jakarta, 1955), pp. 4-5.

⁵²⁰ See for example A. de Heyking, *L'Exterritorialité* (Berlin, Puttkammer and Muhlbrecht, 1889) and "L'exterritorialité et ses applications en Extrême-Orient", *Recueil des cours . . .*, 1925-II (Paris, Hachette, 1926), vol. 7, p. 241, as well as V. K. W. Koo, *The Status of Aliens in China* (New York, Columbia University, 1912).

Thus the rule of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries whose case law in the nineteenth century has already been examined, both in common law jurisdictions⁵²¹ and in civil law systems in Europe.⁵²² Its application seems to be consistently followed in other countries. To give an example, the District Court of Dordrecht in the Netherlands, in the case *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923), upheld State immunity in respect of the public service of tugboats. The Court said:

The principle [of immunity], which at first was recognized in respect of acts *jure imperii* only, has gradually been applied also to cases where a State, in consequence of the continuous extensions of its functions, and in order to meet public needs, has embarked upon activities of a private-law nature; . . . this extension of immunity from jurisdiction must be deemed to have been incorporated into the law of nations . . .⁵²³

(27) Another interesting illustration of current State practice is the recent decision of the Supreme Court of Austria in *Dralle v. Republic of Czechoslovakia* (1950), which confirmed State immunity in respect of *acta jure imperii*. After reviewing judicial decisions of various national courts and other leading authorities on international law, the Court stated that:

The Supreme Court therefore reaches the conclusion that it can no longer be said that under recognized international law so-called *acta gestionis* are exempt from municipal jurisdiction . . . Accordingly, the classic doctrine of immunity has lost its meaning

and, *ratione cessante*, can no longer be recognized as a rule of international law.⁵²⁴

Without, at this stage, attempting to verify the measure or extent of application of State immunity to various types of activities attributable to foreign States, suffice it to restore that there is clear authority in the established practice of States confirming the general acceptance of the rule of State immunity in respect of foreign States and their property.

(28) Illustrations of the current practice of States confirming again the general acceptance of the rule of State immunity have been furnished by replies and information submitted by Governments.⁵²⁵ Thus, in its ruling of 14 December 1948, the Supreme Court of Poland stated:

The question of jurisdiction by Polish courts over other States cannot be based on the provisions of articles 4 and 5 of the Code of Civil Procedure of 1932; a foreign State cannot be considered an alien in the meaning of article 4 of the Code of Civil Procedure nor of the provisions of article 5 of the Code, which applies to diplomatic representatives of such a State . . . Decisions on questions of court immunities with regard to foreign States should be based directly on the generally recognized principles accepted in international jurisprudence, outstanding among which is that of reciprocity among States. The principle consists in one State rejecting or granting court immunity to another State to the very same extent as the latter would grant or reject the immunity of the foreigner.⁵²⁶

The ruling of the Supreme Court of Poland of 26 March 1958 stipulates that, owing to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible, Polish courts, in principle, are not competent to deal with cases against foreign States.⁵²⁷

(29) Similarly, courts on the Latin American continent have reaffirmed the rule of State immunity. Thus, the Supreme Court of Justice of Chile, by a decision of 3 September 1969, upheld the principle of State immunity, stating that:

It is a universally recognized principle of international law that neither sovereign nations nor their Governments are subject to the jurisdiction of the courts of other countries. There are other extrajudicial means of claiming from those nations and their Governments' performance of the obligations incumbent on them.⁵²⁸

⁵²¹ See for example the following cases: the "Porto Alexandre" (1920) (United Kingdom, *The Law Reports, Probate Division*, (op. cit., 1920), p. 30; the "Christina" (1938) (*idem*, *The Law Reports, The House of Lords* (op. cit., 1938), p. 485); *Compañía Mercantil Argentina v. U.S. Shipping Board* (1924) (*idem*, *The Law Journal Reports, King's Bench*, new series (London), vol. 93, p. 816); *Baccus v. Servicio Nacional del Trigo* (1956) (*idem*, *The Law Reports, Queen's Bench Division*, 1957 (London, The Incorporated Council of Law Reporting), vol. 1, p. 438; *Berizzi Bros. Co. v. S.S. "Pesaro"* (1925) (United States of America, *United States Reports: Cases Adjudged in the Supreme Court* (Washington, D.C., U.S. Government Printing Office, 1927), vol. 271, p. 562); the United States of Mexico *et al. v. Schmuck et al.* (1943) (*Annual Digest . . . 1943-1945* (London, 1949), case No. 21, p. 75); *Isbrandtsen Tankers v. President of India* (1970) (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), pp. 1046-1050).

⁵²² See for example the following cases: *Epoux Martin v. Banque d'Espagne* (1952) (*Journal du droit international* (Clunet) (Paris) No. 3 (July-September 1953), p. 654); *Governo francese v. Serra et al.* (1925) (*Rivista di diritto internazionale* (Rome), vol. IV, series III (1925), p. 540); *de Ritis v. Governo degli Stati Uniti d'America* (1971) (*ibid.*, (Milan), vol. LV, No. 3 (1972), p. 483); *Luna v. Repubblica Socialista di Romania* (1974) (*ibid.*, vol. LVIII, No. 3 (1975), p. 597); *Dheiles et Masurel v. Banque centrale de la République de Turquie* (1963) (*Journal des tribunaux belges*, 19 January 1964, p. 44).

⁵²³ *Weekblad van het Recht* (The Hague), No. 11088 (5 October 1923); *Nederlandse jurisprudentie* (Zwollen, 1924), p. 344; *Annual Digest . . . 1923-1924* (London, 1933), case No. 69, p. 133. For a critical note by G. Van Slooten, see *Bulletin de l'Institut intermédiaire international* (The Hague, Nijhoff, 1924), vol. X, p. 2.

⁵²⁴ *Österreichische Juristen Zeitung* (Vienna), No. 14/15 (29 July 1950), case No. 356, p. 341 (included in material submitted by the Austrian Government). See also *International Law Reports* 1950 (London), vol. 17 (1956), case No. 41, p. 163, and *Journal de droit international* (Clunet) (Paris), No. 1 (January-March 1950), p. 747.

⁵²⁵ See paras. 105-109 above.

⁵²⁶ Decision C.635/48: see *Państwo i Prawo* (Warsaw), vol. IV, No. 4 (April 1949), p. 119 (included in material submitted by the Government of Poland).

⁵²⁷ Decision 2 CR.172/56: see *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* (Warsaw), No. 6 (June 1959), p. 60 (*idem*).

⁵²⁸ Included in material submitted by the Government of Chile.

By a more recent decision, of 2 June 1975, in *A. Senerman v. República de Cuba*, the Court declined jurisdiction on the ground that:

foremost among the fundamental rights of States is that of equality, and from equality derives the need to consider each State exempt from the jurisdiction of any other State. It is by reason of this characteristic, erected into a principle of international law, that in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subject to the jurisdictional power of the courts of another State.⁵²⁹

(30) The courts of Argentina have also accepted the rule of State immunity. In *Baima y Bessolino v. el Gobierno del Paraguay* (1915) the court held that a foreign Government could not be sued in the courts of another country without its consent.⁵³⁰ In another case, involving the vessel *Cabo Quilates*; requisitioned by the Spanish Government during the Civil War and assigned to the auxiliary naval forces for government service, the court, recognizing the sovereign immunity of the Spanish Government, observed that it was a fundamental principle of public international law and constitutional law that there could be no compulsion of a State to submit to territorial jurisdiction. The court stated:

The wisdom and foresight of this rule of public law are unquestionable. If the acts of a sovereign State could be examined by the courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed.⁵³¹

(31) Whereas recent African decisions have not been widely known or published for the probable reason that few occasions have arisen for such decisions, Asian courts have had opportunities to express their views on the principle of State immunity. Reported decisions have recently become available from English-speaking Asian countries, following a pattern closely associated with developments in Anglo-American practice. While there is a certain harmony in the case law of Commonwealth countries, owing to the possibility, in some cases, of appeal to the Privy Council, a recent collection of the decisions of the Supreme Court of the Philippines on jurisdictional immunities of the State and its properties⁵³² is most revealing in the emergence of trends and confirmation of practice closely resembling developments in the United States of America, allowing for different circumstances and variations in judicial reasoning. Thus, in *Larry J. Johnson v. Howard M. Turner* (1954),⁵³³ the Court

held that the action was really a suit against the Government of the United States of America, acting through its agents, and that, because the said Government had not given consent thereto, the trial courts had no jurisdiction to entertain the case. In *Donald Baer v. Hon. Tito V. Tizon et al.* (1974),⁵³⁴ the Court held that a foreign Government acting through its naval commanding officer was immune from suit relative to the performance of an important public function of any Government, the defence and security of its naval base in the Philippines under a treaty.

(32) The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in the contemporary period indicates a uniformity in the acceptance of the rule of State immunity. While it would be neither possible nor desirable to review the current case law of all countries, which might uncover some discrepancies in historical developments and actual application of the principle,⁵³⁵ it should be observed that, for countries having few or no reported judicial decisions on the subject, there is no indication that the concept of State immunity has been or will be rejected. The conclusion seems warranted that, in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law.

(33) The practice of States in regard to jurisdictional immunities of foreign States and their property has been established mainly from judicial decisions constituting the jurisprudence or case law of individual nations. As immunities or exemptions from jurisdiction are accorded to foreign States by the territorial authorities, judicial or administrative, which in so doing have decided not to exercise the power normally vested in them, such decisions are to be found in the records of the courts or in the official reports of decided cases more often than in the files or public records of the police or other administrative authorities. On the other hand, in the practice of several countries, the executive branch of the Government has undertaken the task or assumed an active part in the process of decision-making by the courts of law. Thus it is not unnatural to inquire further into the governmental practice of States in order to appreciate the overall practice attributable to States as evidence

⁵²⁹ *Idem.*

⁵³⁰ See R. T. Méndez, E. Imaz and R. E. Rey, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires, Imprenta López), vol. 123, p. 58 (information submitted by the Government of Argentina).

⁵³¹ *Ibid.*, vol. 178, p. 173 (*idem*). See also *Annual Digest* . . . , 1938-1940 (London, 1942), pp. 293-294.

⁵³² Information submitted by the Government of the Philippines.

⁵³³ Decision of the Philippines Supreme Court No. L-6118 of 26 April 1954: see *Philippine Reports* (Manila, Bureau of Printing), vol. 94, p. 807 (information submitted by the Government of the Philippines).

⁵³⁴ Decision of the Philippines Supreme Court of 3 May 1974, No. L-24294: see Republic of the Philippines, *Official Gazette* (Manila), vol. 70, No. 35 (2 September 1974), pp. 7361 *et seq.* (*idem*).

⁵³⁵ For instance, in the case *Secretary of the United States of America v. Gammon-Layton* (1970), an appeal for immunity of a foreign State was dismissed by the Appellate Court of Karachi, which held that sect. 86 of the Code of Civil Procedure, 1908 (Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi, 1966), vol. V, 1908-1910, p. 53) was applicable to foreign rulers and not to foreign States as such, and that it was wrong to hold that the principles of English law had to be followed in the construction of that section (*All-Pakistan Legal Decisions* (Karachi), vol. XXIII (1971), p. 314).

of general custom. This inquiry may reveal an interesting phenomenon. It is not uncommon that, in litigation involving foreign States or Governments, the executive branch of the Government of a certain State may have a more or less active role to play or may intervene or participate, at one stage or another, in legal proceedings before the court. The governmental agencies involved in the process could be the Ministry for Foreign Affairs, the Ministry of Justice, the Attorney General's Office, the Office of the Director of Public Prosecutions, or other like offices of equivalent designation or comparable functions.

(34) In some countries, a legal proceeding against a foreign prince is not legally permissible without prior authorization by a Cabinet Minister or by the Government.⁵³⁶ This requirement of prior governmental authorization is probably attributable to one of the rational bases for State immunity, namely, the fact that the conduct of foreign relations could be jeopardized by uncontrolled or unauthorized proceedings against foreign sovereigns or foreign States. The exercise or assumption of jurisdiction by the territorial court might also, in certain cases, cause political embarrassment to the political branch of the national Government.⁵³⁷ Therefore a decision which, on the face of it, is purely judicial, may have been influenced by political considerations emanating from the territorial Government or its political branch, because the matter may have the potential tendency to affect adversely the conduct of foreign affairs, or the Government may run the risk of political embarrassment in international relations as well as in the internal political arena.

(35) The executive can participate or intervene in legal proceedings before the territorial court in several ways and at various stages. First, it can do so as regards questions of fact or status, such as the existence of a state of war or peace, recognition of a foreign State or Government, official acceptance of the representative character of a delegation or mission, the legal status of an agency or instrumentality of a foreign State or Government, the official text of legal provisions or statutes of a foreign country establishing an entity or incorporating a legal body. The verification and confirmation of such facts can have a direct bearing on

the question of State immunity, whether or not in a given case a claim of immunity is upheld or rejected. In the practice of some countries, where the acceptance of a statement of fact by a foreign Government⁵³⁸ or the determination of the question of status⁵³⁹ by the executive has been regarded as binding on the courts and decisive as to those facts and status, the courts nevertheless retain jurisdiction to decide other questions left open for determination. Thus, where the executive has sustained the claim of immunity, the courts could decide whether there had been a waiver of immunity, or submission to the jurisdiction on the part of the foreign Government.⁵⁴⁰

(36) Apart from the determination of the question of fact or of status, the executive may also have the right to intervene *amicus curiae*, through a responsible governmental agency such as the Attorney General, for example by making a suggestion to the effect that in a given case immunity should be accorded or denied. Since the judiciary, in principle as well as in practice, is generally independent of the executive in matters of adjudication, it appears that the courts are not always bound to follow the lead of the executive in every case. If the executive suggests that immunity should be accorded, the courts are likely to follow suit,⁵⁴¹ although not in every conceivable instance.⁵⁴² If, however, the political branch of the Government

⁵³⁸ See for example the *American Tobacco Co. v. the "Ioannis P. Goulondris"* (1941) (United States of America, *Federal Supplement District Court of New York* (St. Paul, Minn., West Publishing, 1942), vol. 40).

⁵³⁹ See for example the case *E. W. Stone Engineering Co. v. Petróleos Mexicanos* (1945), in which the court declared:

"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 . . . 1946* (op. cit.), case No. 31, p. 78). See also the cases *United States v. Pink et al.* (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1942), vol. 315, p. 203); *Krajina v. The Tass Agency and Another* (1949) (United Kingdom, *The All England Law Reports, 1949* (London, 1950), vol. 2, p. 274); *Compañía Mercantil Argentina v. U.S.S.B.* (see foot-note 521 above); and *Baccus v. Servicio Nacional del Trigo* (*ibid.*).

⁵⁴⁰ See for example the case *United States of Mexico et al. v. Schmuck et al.* (see foot-note 521 above) and *Ulen's Co. v. Bank Gospodarstwa Krajowego* (1940) (*Annual Digest . . . 1938-1940* (op. cit.), case No. 74, pp. 214-215).

⁵⁴¹ See for example Chief Justice Stone's statement in the case *Republic of Mexico et al. v. Hoffman* (1945):

"It is therefore not for 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).

Cf. *Ex parte Republic of Peru* (see foot-note 537 above).

⁵⁴² See for example the cases *Miller et al. v. Ferrocarril del Pacífico de Nicaragua* (1941) (*Annual Digest . . . 1941-1942* (op. cit.), case No. 51, p. 191); *United States of Mexico et al. v. Schmuck et al.* (see foot-note 521 above); *E. W. Stone Engineering Co. v. Petróleos Mexicanos* (see foot-note 539 above). See also A. B. Lyons, "Conclusiveness of the 'suggestion' and certificate of the American State Department", *The British Year Book of International Law* 1947 (London), vol. 24, p. 116.

⁵³⁶ See for example the Prussian practice noted in para. (24) above. The practice of Netherlands courts has also been influenced by intermittent interpositions of the executive either directly or through the legislature. Compare with the Pakistani case *Secretary of State of the United States of America v. Gammon-Layton* (see foot-note 535 above).

⁵³⁷ For example, the Philippines case *Baer v. Tizon* (1974) noted in para. (31) above. For United States cases, see *United States of Mexico et al. v. Schmuck et al.* (1943) (see foot-note 521 above); *Ex parte Republic of Peru* (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1943), vol. 318, p. 578); the "Beaton Park" (1946) (*Annual Digest . . . 1946* (London, 1951), case No. 35, p. 83); the "Martin Behrman" (1947) (*ibid.*, 1947 (London, 1951), case No. 26, p. 75); and *Isbrandtsen Tankers v. President of India* (1970) (see foot-note 521 above).

refrains from suggesting immunity, the courts may still grant jurisdictional immunity, not out of wilful disregard but in principle to assert their independence from other branches of the Government.⁵⁴³

(37) The hesitations entertained by the courts in regard to "suggestions" made by the executive through the Attorney General or other officers acting under the direction of an analogous agency have led the executive to assume a more prominent part in the process of decision-making. It is true that the executive branch of the Government may recognize or allow a claim of immunity, which the courts may be bound to follow, and all questions connected with the claim of immunity may cease to be judicial when the executive has authoritatively recognized the claim of immunity.⁵⁴⁴ However, courts are not always enthusiastic to follow the lead of the executive.⁵⁴⁵ Thus, whenever the necessity arises, the executive might resort to other means to ensure its leading role in this particular connection. It could make a declaration of general policy regarding the application of the rule of State immunity, for instance by imposing certain restrictions or limitations.⁵⁴⁶ It could also advise the State to become party to an international or regional convention on State immunities which would oblige the judicial authorities to observe the new trends.⁵⁴⁷ It could also introduce, or cause to be adopted, legislation more in line with the general direction in which it

considers international law to be progressively developing.⁵⁴⁸

(38) The political branch of the Government may indeed have a more or less significant part to play in the formation of the practice of a given State in regard to the granting of jurisdictional immunities to foreign States. On the other hand, it is the executive that makes a decision whether, in a given case involving its own State or Government or agency or instrumentality or property, it will assert a claim of immunity, including the time and the form in which such assertion will take place. The claim of State immunity is often made through diplomatic or consular agents accredited to the territorial State in which legal proceedings have been instituted involving the foreign State.⁵⁴⁹ It is also possible in certain jurisdictions to assert such claims through diplomatic channels and ultimately via the Ministry for Foreign Affairs of the territorial State.⁵⁵⁰

(39) There are many different forms which participation by the political branch of the Government may take in ensuring that its views are communicated or complied with, and occasionally in ensuring its lead in matters affecting the conduct of foreign relations, including legal proceedings against foreign States which could entail political embarrassment. The views of the Government, expressed through its political branch, are highly relevant and indicative of the general trends in the practice of States. While legal developments in the field of judge-made law may be slow and not susceptible to radical changes, the lead taken by the Government may be decisive in bringing about desirable legal developments through the force-

⁵⁴³ See the case *Berizzi Bros. Co. v. S.S. "Pesaro"* (see foot-note 521 above).

⁵⁴⁴ See for example the cases *United States of Mexico et al. v. Schmuck et al.* (see foot-note 521 above) and *Ex parte Republic of Peru* (see foot-note 537 above.)

⁵⁴⁵ See for example the case *Republic of Mexico et al. v. Hoffman* (see foot-note 541 above); see also Lyons, *loc. cit.* Cf. the role played by various Secretaries of State of the United Kingdom in regard to questions of status of foreign sovereigns, as, for example, in the cases *Duff Development Co. Ltd. v. Government of Kelantan and Another* (1924) (United Kingdom, *The Law Reports, House of Lords* . . . (*op. cit.*, 1924), p. 797), and *Kahan v. Pakistan Federation* (1951) (*idem*, *The Law Reports, King's Bench Division* (London, 1951), vol. II, p. 1003).

⁵⁴⁶ See for example a letter of 19 May 1952 in which J. B. Tate, Acting Legal Adviser to the United States of America Department of State, wrote:

"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).

See also W. W. Bishop, Jr., "New United States Policy Limiting Sovereign Immunity", *American Journal of International Law* (Washington, D.C.), vol. 47, No. 1 (January 1953), pp. 93 *et seq.*

⁵⁴⁷ For example, the European Convention on State Immunity (Basel, 16 May 1972): see Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972). See also I. M. Sinclair, "The European Convention on State Immunity", *International and Comparative Law Quarterly* (London), vol. 22 (April 1973), part 2, pp. 254 *et seq.*

⁵⁴⁸ For example, the United States Foreign Sovereign Immunities Act of 1976 (United States of America, *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, sect. 1330); see also T. Atkeson, S. Perkins and M. Wyatt, "H.R. 11315—the revised State-Justice bill on foreign sovereignty immunity: Time for action", *American Journal of International Law* (Washington, D.C.), vol. 70, No. 2 (April 1976), pp. 298 *et seq.* See the British State Immunity Act 1978 (United Kingdom, *The Public General Acts* (London, H.M. Stationery Office, 1978), part I, chap. 33, p. 715; text reproduced in American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (September 1978), p. 1123), which came into force on 22 November 1978, preceding the ratification by the United Kingdom of the European Convention of 1972.

⁵⁴⁹ See for example the cases *Krajina v. The Tass Agency and Another*, *Compañía Mercantil Argentina v. U.S.S.B. and Baccus v. Servicio Nacional del Trigo* (see foot-note 531 above), and also *Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords* . . . (*op. cit.*, 1953), p. 70), and *Juan Ysmael and Co. v. Government of Republic of Indonesia* (1954), (*idem*, *The Weekly Law Reports, The House of Lords* (London, 1954), vol. 3, p. 531).

⁵⁵⁰ See for example *Isbrandtsen Tankers v. President of India* (see foot-note 521 above), where the United States Department of State had presented a written suggestion of immunity. Contrast the case *Comisaria General de Abastecimientos y Transportes v. Victory Transport Inc.* (1965) (United States of America, *Federal Reporter* (St. Paul, Minn., West Publishing, 1965), 2nd series, vol. 336, p. 354).

ful assertion of its position or through the intermediary of the legislature or by way of governmental acceptance of principles contained in an international convention. Conversely, the Government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another State or to waive its sovereign immunity in a given case. The Government can exert a considerable influence on legal developments in this field, both as grantor and as recipient of immunity in State practice, cannot therefore be gainsaid. As will be seen in the ensuing paragraphs concerning national legislation and international conventions, the efforts of the executive in introducing bills or draft laws on State immunity,⁵⁵¹ its role in securing passage of such bills through parliament,⁵⁵² and its decision to engage governmental responsibility by the signing and ratification of an international convention on the subject,⁵⁵³ clearly reflect its substantial contribution to the progressive development of State practice and ultimately of the principles of international law governing State immunity.

(40) As has been seen, the rule of State immunity was first recognized by judicial decisions of municipal courts. The practice of States has been more preponderantly established and followed by the courts, although its subsequent growth has received some impetus from the executive branch of the Government. Direct contribution by the legislature to legal developments in this field has been a relatively recent occurrence. It is nevertheless not without significance to note that national legislation constitutes an important element in the overall concept of State practice. It is clearly a convenient measure and affords a decisive indication as to the substantive content of the law, and as to the actual practice of States.

(41) An instance of legislation dealing directly with the topic under consideration is the United States *Foreign Sovereign Immunities Act of 1976*. Section 1604 reconfirms the rule of sovereign immunity, or

"Immunity of a foreign State from jurisdiction", as it is entitled. It provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.⁵⁵⁴

(42) Still more recent legislation on the subject is the United Kingdom *State Immunity Act 1978*. Article 1, entitled "Immunity from Jurisdiction", provides:

1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.⁵⁵⁵

(43) The United Kingdom, having adopted the *State Immunity Act 1978*, proceeded to ratify the European Convention on State Immunity (1972), which it had earlier signed. Other countries that have ratified the Convention have likewise made appropriate declarations or passed legislation giving effect to the provisions of the Convention. For instance, Austria, a party to the Convention, has adopted the following legislative measures:

(a) Austrian declaration in accordance with article 28, paragraph 2, of the European Convention;⁵⁵⁶

(b) Federal law of 3 May 1974, concerning the exercise of jurisdiction in accordance with article 21 of the Convention;⁵⁵⁷

(c) Declaration of the Republic of Austria in accordance with article 21, paragraph 4, of the Convention.⁵⁵⁸

(44) Apart from special legislation on State immunity, there are legislative provisions in various statutes and basic laws generally dealing with questions of jurisdiction or competence of the courts, or general regulations concerning suits against foreign States. A typical example is the provision in article 61 ("Suits against foreign States: diplomatic immunity") of a USSR law entitled "Fundamentals of civil procedure of the Soviet Union and the Union Republics, 1961", the first paragraph of which reads:

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

⁵⁵¹ See for example Atkeson, Perkins and Wyatt, *loc. cit.*, and United States of America, *94th Congress, 2nd session, Senate Reports*, vol. 1-11 (Washington D.C., U.S. Government Printing Office, 1976), Report No. 94-1310. This bill (H.R. 11315) came into effect in the United States on 19 January 1977.

⁵⁵² See for example the United Kingdom *State Immunity Act* mentioned in foot-note 548 above.

⁵⁵³ See for example the European Convention on State Immunity (1972) which is in force between Austria, Belgium, Cyprus and the United Kingdom (see foot-note 547 above). The Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland have signed the Convention. The Additional Protocol is not yet in force.

⁵⁵⁴ United States of America, *United States Statutes at Large*, 1976 (Washington, D.C., U.S. Government Printing Office, 1978), vol. 90, part 2, Public Law 94-583, pp. 2891-2892; *idem*, *United States Code, 1976 Edition (op. cit.)* chap. 97, sect. 1604 (text included in information submitted by the Government of the United States of America).

⁵⁵⁵ United Kingdom, *Statutory Instruments 1978* (London, H.M. Stationery Office), part III, sect. 1, No. 1572 (C.44), p. 4775; see also foot-note 548 above.

⁵⁵⁶ "The Republic of Austria declares that, according to Article 28 paragraph 2 of the European Convention on State Immunity, its constituent States Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna may invoke the provisions of the European Convention on State Immunity applicable to Contracting States, and have the same obligations." (Austria, *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 128 (18 August 1976), document No. 432, p. 1840.) (Included in information submitted by the Government of Austria.)

⁵⁵⁷ *Ibid.*, document No. 433, p. 1840 (*idem*).

⁵⁵⁸ *Ibid.*, No. 47 (5 May 1977), document No. 173, p. 711 (*idem*).

USSR may be permitted only with the consent of the competent organs of the State concerned . . .⁵⁵⁹

(45) This law, confirming the principles of State immunity, diplomatic immunity and consent, introduces, in the third paragraph of the same article, an important condition based on reciprocity in practice, with the possibility of recourse to counter-measures of a retaliatory character.⁵⁶⁰

(46) As noted earlier, the principle of State immunity has been established in several countries as a result of judicial interpretation or application of legal provisions, such as the restrictive application of article 14 of the French civil code⁵⁶¹ or articles 52 and 54 of the Belgian civil code,⁵⁶² resulting in non-exercise of territorial jurisdiction.

(47) On the other hand, the relevant laws of many countries may contain provisions exempting some categories of privileged persons, such as foreign sovereigns,⁵⁶³ foreigners of rank⁵⁶⁴ or rulers of foreign States.⁵⁶⁵

(48) Without at this stage going into details of specific aspects of State immunity or the immunity accorded to certain types of property owned, possessed or controlled by or in the employment of a foreign State, such as aircraft and ships, it is interesting to note that in some countries laws have been passed dealing specifically with certain specialized aspects of State immunities. The United States *Public Vessels Act* of 1925⁵⁶⁶ may be cited as an example of such legis-

lation, with provisions on vessels employed solely as merchant vessels. It should also be noted that, by 1938, 13 States had deposited their instruments of ratification of the International Convention for the Unification of Certain Rules Relating to Immunity of State-owned Vessels (Brussels, 1926) and its Additional Protocol (1934),⁵⁶⁷ and that countries have since adopted national legislation to implement the provisions of the Convention.⁵⁶⁸ The United Kingdom is among the latest to have done so.⁵⁶⁹ Other laws have been adopted by various countries following ratification or acceptance of or accession to a number of international conventions relating to the law of the sea, or to diplomatic and consular relations, which have enabled States to fulfil their obligations under the conventions they have signed and ratified or otherwise accepted.

(49) As there are at present no general multilateral conventions of a universal character directly on State immunities, conventions of narrower scope in geographical application and membership may deserve particular attention. In this connection, the 1972 European Convention on State Immunity has a direct bearing on the point under current consideration. The last article of chapter I, "Immunity from jurisdiction", contains the following provision:

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall

⁵⁵⁹ Law of 8 December 1961 of the USSR (*Sbornik zakonov SSSR i ukazov Prezidiuma Verkhovnogo Soveta SSSR 1938-1975* [Compendium of laws of the USSR and of decrees of the Presidium of the Supreme Soviet of the USSR, 1938-1975] (Moscow, Izvestia Sovetov Deputatov Trudiashchikhsia SSR, 1976), vol. 4, p. 53). (Included in information submitted by the Government of the USSR.)

⁵⁶⁰ "Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or the property of that State" (*ibid.*, pp. 53-54).

⁵⁶¹ See for example *Blanchet v. République d'Haïti* (see para. (20) above).

⁵⁶² See for example *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement* (see para. (22) above).

⁵⁶³ For example, the requirement of prior governmental authorization for legal proceedings against foreign princes under Prussian legislation (see para. (24) above).

⁵⁶⁴ For example, the Royal Decree of the Netherlands of 29 May 1917 (Government of the Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, (The Hague), No. 446 (6 June 1917), and Netherlands practice as noted in para. (26) above).

⁵⁶⁵ For example, sect. 86 of the Code of Civil Procedure of Pakistan upholding the immunity of foreign rulers as distinguished from foreign States (see foot-note 535 above).

⁵⁶⁶ See 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, sects. 1, 3 and 5, pp. 1112-1113; *idem*, *United States Code Annotated*, Title 46, *Shipping*, Sections 721

to 1100 (St. Paul, Minn., West Publishing, 1975), sects. 781-799; see also sect. 9 of the United States Shipping Act, 1916 (*idem*, *The Statutes at Large . . . from December 1915 to March 1917* (*op. cit.*, 1917), vol. 39, part 1, chap. 451, pp. 728, 730-731), noted in Hackworth *op. cit.*, vol. II, p. 431), which provides that vessels purchased, chartered or leased from the United States Shipping Board, while employed solely as merchant vessels, "shall be subject to all laws, regulations and liabilities governing merchant vessels". This must in turn be read subject to sect. 7 of the Suits in Admiralty Act, 1920 (United States of America, *The Statutes at Large . . . from May 1919 to March 1921*, vol. 41, chap. 95, pp. 525 and 527; *idem*, *United States Code Annotated . . .* (*op. cit.*), sects. 741-752), and Special Instruction, U.S. Department of State file 195/283, and the inquiry made by the United Kingdom Ambassador as to the interpretation of sect. 7, and the reply thereto (see Hackworth, *op. cit.*, vol. II, pp. 433-434 and 440-441).

⁵⁶⁷ League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 214. See Hackworth, *op. cit.*, vol. II, p. 465.

⁵⁶⁸ For example, the Swedish law implementing the International Convention of 1926 (see foot-note 567 above), as applied in the "Rigmoor" case (1942) (*American Journal of International Law* (Washington, D.C.), vol. 37, No. 1 (January 1943), p. 141, and *Annual Digest . . . 1941-1942* (London, 1945), Case No. 63, p. 240). Compare the Norwegian cases such as the "Frederikstad" (*Norsk Retstidende* 1949 (Oslo), 114th year, p. 881, and *International Law Reports* 1950 (London, 1956), Case No. 42, p. 167).

⁵⁶⁹ United Kingdom, *International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships* (Brussels, 10 April 1926, with Supplementary Protocol, Brussels, 24 May 1934), Cmd. 7800 (London, H.M. Stationery Office, 1980). The legislation entered into force on 3 January 1980.

decline to entertain such proceedings even if the State does not appear.⁵⁷⁰

(50) Also of relevance are certain provisions of the Code of Private International Law (Bustamante Code) annexed to the Convention on Private International Law (Havana, 20 February 1928):

Article 333

The judges and courts of each contracting State shall be incompetent to take cognizance of civil or commercial cases to which the other contracting States or their heads are defendant parties, if the action is a personal one, except in case of express submission or of counterclaims.

Article 334

In the same case and with the same exception, they shall be incompetent when real actions are exercised, if the contracting State or its head has acted on the case as such and in its public character, when the provisions of the last paragraph of article 318 shall be applied.⁵⁷¹

(51) The current treaty practice of States indicates the application of provisions of several conventions of a universal character dealing with some special aspects of State immunity. The following instruments, *inter alia*, may be noted:

(a) The International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels (Brussels, 1926) and its Additional Protocol of 1934,⁵⁷² which is significant as living testimony of treaty endorsement of the rule of State immunity as applied to State-owned or State-operated vessels employed exclusively in governmental and non-commercial service;⁵⁷³

(b) The 1958 Geneva Conventions on the Law of the Sea, notably the Convention on the Territorial Sea and the Contiguous Zone⁵⁷⁴ and the Convention on the High Seas,⁵⁷⁵ which contain provisions confirming the principle of State immunity in respect of warships and State-owned ships employed in governmental and non-commercial service in certain circumstances;

⁵⁷⁰ See Council of Europe, *Explanatory Reports* ... (op. cit.): text, p. 53, and comments, p. 22. See also foot-notes 547 and 553 above.

⁵⁷¹ League of Nations, *Treaty Series*, vol. LXXXVI, pp. 340–342. The last paragraph of art. 318, referred to in art. 334, reads: "The submission in real or mixed actions involving real property shall not be possible if the law where the property is situated forbids it." (*ibid.*, p. 336).

⁵⁷² See foot-note 567 above. See also J. W. Garner, "Legal status of Government ships employed in commerce", *The American Journal of International Law* (Washington, D.C.) vol. 20, No. 4 (October 1926), p. 759.

⁵⁷³ See art. 3, para. 1 of the Convention:

"The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detection by any legal process, nor to judicial proceedings *in rem*." (League of Nations, *Treaty Series*, vol. CLXXVI, p. 207).

⁵⁷⁴ United Nations, *Treaty Series*, vol. 516, p. 205. See, *inter alia*, arts. 21–23.

⁵⁷⁵ *Ibid.*, vol. 450, p. 11. See, *inter alia*, arts. 8 and 9.

(c) The 1961 Vienna Convention on Diplomatic Relations,⁵⁷⁶ which contains an endorsement of the principle of State immunity in respect of State property used in connection with diplomatic missions;

(d) The 1963 Vienna Convention on Consular Relations,⁵⁷⁷ which contains corresponding provisions partly covering the immunities of State property used in connection with consular missions;

(e) The 1969 Convention on Special Missions,⁵⁷⁸ which treats in part some aspects of State immunity in respect of property used in connection with special missions;

(f) The 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of Universal Character,⁵⁷⁹ which contains appropriate provisions maintaining the immunities of State property used in connection with the premises of missions or delegations of States in the territory of a host country to an international organization.

(52) While municipal jurisprudence abounds with decisions indicating general acceptance of the rule of State immunity in the practice of States, there appears to be silence on the part of international adjudication, whether by arbitration or judicial settlement. This singular absence of international judicial pronouncement is no evidence of the principle not being subject to regulation by international law, any more than diplomatic and consular immunities, as enshrined in the Vienna Conventions of 1961 and 1963,⁵⁸⁰ having received little or no international judicial endorsement until the case *United States Diplomatic and Consular Staff in Tehran*, decided by the International Court of Justice on 24 May 1980.⁵⁸¹

(53) The principle of State immunity was widely upheld in the writings of publicists of the nineteenth century, almost without reservation or qualification of any description. Among earlier writers who pronounced a doctrine of State immunity may be mentioned Gabba,⁵⁸² Lawrence,⁵⁸³ Bluntschli,⁵⁸⁴

⁵⁷⁶ *Ibid.*, vol. 500, p. 95. See, *inter alia*, arts. 22, 24 and 27.

⁵⁷⁷ *Ibid.*, vol. 596, p. 261. See, *inter alia*, arts. 31, 33 and 35.

⁵⁷⁸ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex. See, *inter alia*, arts. 25, 26 and 28.

⁵⁷⁹ *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. 75.V.12), p. 207. See, *inter alia*, articles 23, 25, 27, 55 and 57.

⁵⁸⁰ See para. (51), (c) and (d), above.

⁵⁸¹ *I.C.J. Reports 1980*, p. 3.

⁵⁸² C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. XV, No. 3–4 (1888), p. 180; and *ibid.*, vol. XVII, No. 1–2 (1890), p. 27.

⁵⁸³ W. B. Lawrence, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens de Henry Wheaton* (Leipzig, Brockhaus, 1873), vol. 3, p. 420.

⁵⁸⁴ J. G. Bluntschli, *Le droit international codifié* (Paris, Alcan, 1895), art. 139, p. 124.

Chrétien,⁵⁸⁵ and the authorities referred to by de Paepé.⁵⁸⁶ Later publicists advancing an equally strict theory of State immunity include Nys,⁵⁸⁷ de Louter,⁵⁸⁸ Kohler,⁵⁸⁹ Westlake,⁵⁹⁰ Cobbett,⁵⁹¹ van Praag,⁵⁹² Anzilotti,⁵⁹³ Provinciali,⁵⁹⁴ Beckett⁵⁹⁵ and Fitzmaurice.⁵⁹⁶ One opinion that may be viewed as giving an accurate and lucid description of the rule of State immunity is that given by Judge Hackworth, as follows:

The principle that, generally speaking, each sovereign state is supreme within its own territory and that its jurisdiction extends to all persons and things within that territory is, under certain circumstances, subject to exceptions in favor particularly of foreign friendly sovereigns, their accredited diplomatic representatives ... and their public vessels and public property in the possession of and devoted to the service of the state. These exemptions from the local jurisdiction are theoretically based upon the consent, express or implied, of the local state, upon the principle of equality of states in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly

intercourse between members of the family of nations. While it is sometimes stated that they are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e. international law.⁵⁹⁷

(54) On the other hand, even at the outset, another theory of State immunity received some adherence in the writings of early publicists such as Heffter,⁵⁹⁸ Gianzana,⁵⁹⁹ Rolin,⁶⁰⁰ Laurent,⁶⁰¹ Dalloz,⁶⁰² Spée,⁶⁰³ von Bar,⁶⁰⁴ Fauchille,⁶⁰⁵ Pradier Fodéré,⁶⁰⁶ Weiss,⁶⁰⁷ de Lapradelle,⁶⁰⁸ Audinet⁶⁰⁹ and Fiore.⁶¹⁰ This view of State immunity was reflected in the resolution of the Institut de droit international in 1891.⁶¹¹ Contemporary writers are favourably inclined towards a less unqualified principle of State immunity.⁶¹² A few publicists have gone to the length of denying the sound foundation of State immunity in international law, but view it as emanating from the notion of "dignity",

⁵⁹⁷ Hackworth, *op. cit.*, vol. II, chap. VII, p. 393, para. 169.

⁵⁹⁸ A. W. Heffter, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 7th ed. (Berlin, Schroeder, 1881), p. 118.

⁵⁹⁹ S. Gianzana, *Lo straniero nel diritto civile italiano* (Turin, Unione tipografico-editrice, 1884), vol. I, p. 81.

⁶⁰⁰ A. Rolin, *Principes de droit international privé* (Paris, Chevalier-Marescq, 1897), vol. I, pp. 212–213.

⁶⁰¹ F. Laurent, *Le droit civil international* (Brussels, Bruylant-Christophe, 1881) vol. III, p. 44.

⁶⁰² See de Paepé, *loc. cit.*

⁶⁰³ G. Spée, "De la compétence des tribunaux nationaux à l'égard des Gouvernements et des souverains étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 3, No. IX–X (September–October 1876), pp. 329 et seq.

⁶⁰⁴ L. von Bar, "De la compétence des tribunaux allemands pour connaître des actions intentées contre les Gouvernements et les souverains étrangers", *ibid.*, vol. 12, No. XI–XII (November–December 1885) p. 645; *Das internationale Privat- und Strafrecht* (Hannover, Hahn, 1862), vol. II, pp. 412 and 502; *Theorie und Praxis des internationalen Privatrechts* (Hannover, Hahn, 1889), vol. II, pp. 660 et seq.

⁶⁰⁵ P. Fauchille and H. Bonfils, *Manuel de droit international public* (Paris, Rousseau, 1914), case No. 270, p. 169.

⁶⁰⁶ P. Pradier-Fodéré, *Traité de droit international public* (Paris, Durand et Pedone-Lauriel, 1887), vol. III, case No. 1589, p. 514.

⁶⁰⁷ A. Weiss, *Traité théorique et pratique de droit international privé* (Paris, Sirey, 1913), vol. V, pp. 94 et seq.

⁶⁰⁸ A. de Lapradelle, "La saisie des fonds russes à Berlin", *Revue de droit international privé et de droit pénal international* (Paris), vol. 6 (1910), pp. 75 et seq. and 779 et seq.

⁶⁰⁹ E. Audinet, "L'incompétence des tribunaux français à l'égard des Etats étrangers et la succession du duc de Brunswick", *Revue générale de droit international public* (Paris), vol. II (1895), p. 385.

⁶¹⁰ P. Fiore, *Nouveau droit international public* (Paris, Durand et Pedone-Lauriel, 1885), vol. I, case No. 514, pp. 449 et seq.

⁶¹¹ *Annuaire de l'Institut de droit international, 1891–1892* (Brussels), vol. 11 (Hamburg session) (1892), pp. 436 et seq.

⁶¹² See for example P. B. Carter, "Immunity of foreign sovereigns from jurisdiction: Two recent decisions", *International Law Quarterly* (London), vol. 3, No. 1 (January 1950), pp. 78 et seq., and *ibid.*, No. 3 (July 1950), pp. 410 et seq. See also, in foot-note 595 above, the observation by Beckett; and W. H. Reeves, "Good fences and good neighbors: Restraints on immunity of sovereigns", *American Bar Association Journal* (Chicago), vol. 44, No. 6 (June 1958), pp. 521–524 and 591–593.

⁵⁸⁵ A. Chrétien, *Principes de droit international public* (Paris, Chevalier-Marescq, 1893), p. 247.

⁵⁸⁶ See authorities listed by P. de Paepé, "De la compétence civile à l'égard des Etats étrangers et de leurs agents politiques, diplomatiques ou consulaires", *Journal du droit international privé* (Clunet) (Paris), vol. 22, No. I–II (1895), p. 31.

⁵⁸⁷ E. Nys, *Le droit international* (Brussels, Weissenbruch, 1912), t. I, vol. II, pp. 340 et seq.

⁵⁸⁸ J. de Louter, *Het Stellig Volkenrecht* (The Hague, Nijhoff, 1910), part I, pp. 246–247.

⁵⁸⁹ J. Kohler, "Klage und Vollstreckung gegen einen fremden Staat", *Zeitschrift für Völkerrecht* (Breslau, 1910), vol. IV, pp. 309 et seq.; see also P. Laband, "Rechtsgutachten im Helffeldfall", *ibid.*, pp. 334 et seq.

⁵⁹⁰ J. Westlake, *A Treatise on Private International Law*, 6th ed. (London, Sweet and Maxwell, 1922), sects. 190–192, pp. 256 et seq.

⁵⁹¹ P. Cobbett, *Cases on International Law*, 6th ed. (London, Sweet and Maxwell, 1947), vol. I, pp. 102–104.

⁵⁹² L. van Praag, *Juridiction et droit international public* (The Hague, Belinfante, 1915); "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV, No. 4 (1934), p. 652; *ibid.*, vol. XVI, No. 1 (1935), pp. 100 et seq. (see especially pp. 116 et seq.).

⁵⁹³ D. Anzilotti, "L'esonzione degli stranieri dalla giurisdizione", *Rivista di diritto internazionale* (Rome), vol. V (1910), pp. 477 et seq.

⁵⁹⁴ R. Provinciali, *L'immunità giurisdizionale degli stati stranieri* (Padua, Milani, 1933), pp. 81 et seq.

⁵⁹⁵ See the observation by Beckett in *Annuaire de l'Institut de droit international, 1952–II* (Basel, Editions juridiques et sociologiques), vol. 44, p. 54, that:

"the amount of State immunity accorded by the English courts at present is somewhat wider than is required by the principles of public international law and is perhaps wider than is desirable".

For a review of authorities before 1928, see C. Fairman, "Some disputed applications of the principle of State immunity", *The American Journal of International Law* (Washington D.C.), vol. 22, No. 3 (July 1928), pp. 566 et seq.

⁵⁹⁶ G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law* 1933 (London), pp. 101 et seq.

which cannot continue to serve as rational basis of immunity.⁶¹³

Rational bases of State immunity

(55) The preceding review of historical and legal developments of the rule of State immunity appears to furnish ample proof of the foundations of the rule as a general norm of contemporary international law. The rational bases of State immunity could be stated in many different ways, some of which have greater cogency than others. The most convincing arguments in support of the principle of State immunity may be found in international law as evidenced in the usage and practice of States and as expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce, together constituting a firm international legal basis for State immunity. State immunity is derived from sovereignty. Between two co-equals, one cannot exercise sovereign will or authority over the other: *par in parem imperium non habet*.⁶¹⁴

(56) Another possible rational explanation is based on historical development of the analogy with the immunities of the local sovereign.⁶¹⁵ This may be peculiar to common law systems of law and may also be expressed in the proposition that states of a federal union, still possessing attributes of sovereignty, are immune from suits. This may also be designed to facilitate harmonious relations between the federal union and its member states.

(57) If ambassadors and diplomatic agents are accorded immunities under international law in their capacity as representatives of foreign States or foreign sovereigns, it may be argued that *a fortiori* the States or the sovereigns they represent should be entitled to a no lesser degree of favoured treatment. Immunities belong to a category of favourable treatment. Diplomatic immunities may be said to have given an added reason for State immunities. It is true that, in the practice of States, the immunities of ambassadors were well established before those of States, yet the two concepts are not totally unrelated. Diplomatic immunity may be said to be accorded not for the benefit of the individual but for the benefit of the State in whose

service he is. There is no immunity if the diplomat ceases to represent a sovereign State.⁶¹⁶

(58) Political factors or considerations of friendly and co-operative international relations have sometimes been advanced as subsidiary or additional reasons for recognition of State immunity. Reciprocity of treatment, *comitas gentium* and *courtoisie internationale* are very closely allied notions, which contribute in some measure further to enhance the basis of State immunity. Thus Chief Justice Marshall, in *The Schooner "Exchange" v. McFaddon and others*,⁶¹⁷ invoked the concept that "mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates",⁶¹⁸ while Brett, in *The "Parlement belge"* case, referred to State immunity as a "consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State".⁶¹⁹

(59) Closely related to the concept of comity of nations is an ancillary rule that, in the conduct of international relations, domestic courts of law should refrain from passing judgement or exercising jurisdiction which might embarrass the political arm of a Government, especially in areas better reserved for political negotiations.⁶²⁰ Avoidance of political embarrassment in international relations or disturbance of peaceful relations provides a clear additional basis for domestic courts not to exercise jurisdiction in

⁶¹⁶ 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), pp. 1087 and 1086). [Translation by the Secretariat.]

See also *Laperdix et Penquer v. Kouzouboff et Belin* (1926) *Journal du droit international* (Clunet) (Paris) 53rd year (January–February 1926), pp. 64–65, and *Annual Digest ... 1925–1926* (London, 1929), case No. 241, p. 319.

⁶¹⁷ Cranch, *op. cit.*, p. 116.

⁶¹⁸ *Ibid.*, p. 136.

⁶¹⁹ United Kingdom, *The Law Reports, Probate Division* (*op. cit.*, 1880), vol. V, p. 217. The Appeals Court of Leopoldville, in the case *De Decker v. République fédérale des Etats-Unis d'Amérique*, referred to the enjoyment of immunity by foreign States in accordance with international tradition "based on an idea of courtesy towards foreign sovereignty which is indispensable to good understanding between countries, and which is unanimously recognized" (*Pasicrisie belge* (*op. cit.*), 144th year, No. 2 (February 1957), part II, p. 56, and *International Law Reports* 1956 (London, 1960), p. 209).

⁶²⁰ See for example the Republic of Mexico *et al. v. Hoffman* (1945) (for reference, see foot-note 541 above) and the statements of Justices Frankfurter and Black and of Chief Justice Stone, and *Annual Digest ... 1943–1945* (*op. cit.*), case No. 39, p. 143. See also *United States of America v. Lee* (*United States Reports* (New York, Banks Law Publishing, 1911), vol. 106, p. 196) and *Ex parte Republic of Peru* (see foot-note 537 above).

⁶¹³ See for example H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law*, 1951, pp. 220 *et seq.* (in particular, pp. 226–236).

⁶¹⁴ See, in para. (17) above, the language used by Chief Justice Marshall in the case *The Schooner "Exchange" v. McFaddon* and others; cf. Hackworth (para. (53) above). See also the "*Parlement belge*" case and the dictum by Brett in that case (para. (11) above) and the case *Gouvernement Espagnol v. Casaux* (see foot-note 508 above).

⁶¹⁵ See the ruling of Lord Justice Campbell (para. (10) above) in the case *De Haber v. The Queen of Portugal*.

certain circumstances, especially where there has been a suggestion or submission from another department of government.⁶²¹

⁶²¹ See for example *Baima y Bossolino v. el Gobierno del Paraguay* (see para. (30) above), and another Argentine case, involving the vessel "Cabo Quilates" (*ibid.*), in which the court said:

"If the acts of a foreign State could be examined by the Courts of another State . . . friendly relations between Governments would undoubtedly be jeopardized and international Peace disturbed." (*Annual Digest . . . , 1938-1940* (London, 1942), p. 294).

(60) Difficulties or impossibility of execution of judgment against foreign States have sometimes been put forward as an argument for the territorial State to abstain from exercising jurisdiction.⁶²² A better view appears to be that the validity of a judgment does not depend on the possibility or likelihood of its execution.

⁶²² For example, in the *Tilkens* case (1903), the Court said:

"A jurisdiction reflected in unenforceable judgments, in commands having no sanction or in injunctions lacking the force of constraint" would not be in keeping with the dignity of the Judiciary. (*Pasicrisie belge (op. cit.)* (1903), part II, p. 180).

Chapter VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

123. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was placed by the Commission on its general programme of work at its twenty-sixth session,⁶²³ pursuant to a recommendation contained in paragraph 3 (c) of General Assembly resolution 3071 (XXVIII) of 30 November 1973.⁶²⁴ The General Assembly subsequently adopted resolutions 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975 and 31/97 of 15 December 1976, requesting the Commission to take up the topic for study.⁶²⁵

124. At its twenty-ninth session, in 1977, the Commission took the view that the topic should be placed on its active programme at the earliest possible time, having regard, in particular, to the progress made on its draft articles on State responsibility for internationally wrongful acts.⁶²⁶

125. The Commission began its consideration of the topic pursuant to General Assembly resolution 32/151 of 19 December 1977. By paragraph 7 of that resolution, the General Assembly invited the 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 . . .

126. At its 1502nd meeting, on 16 June 1978, the Commission established a Working Group to consider the question of future work by the Commission on the topic and to report thereon to the Commission. The Working Group was composed as follows: Mr. Robert

Q. Quentin-Baxter (Chairman), Mr. Roberto Ago, Mr. Jorge Castañeda and Mr. Frank X. J. C. Njenga.⁶²⁷

127. The Working Group submitted a report to the Commission,⁶²⁸ section II of which contained a general consideration of the scope and nature of the topic and of the method to be followed in the study of the topic.⁶²⁹

128. At its 1527th meeting, on 27 July 1978, the Commission considered and took note of the report of the Working Group and, on the basis of the recommendations contained in paragraph 26 of the report, decided to

(a) appoint a Special Rapporteur for the topic;

(b) invite the Special Rapporteur for the topic to prepare a preliminary report at an early juncture for consideration by the Commission;

(c) request the Secretariat to make the necessary provision within the Codification Division of the Office of Legal Affairs to collect and survey materials on the topic on a continuing basis and as requested by the Commission or the Special Rapporteur appointed for the topic.⁶³⁰

129. At its 1525th meeting, on 25 July 1978, the Commission appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.⁶³¹

130. By paragraph 5 of its resolution 34/141 of 17 December 1979, the General Assembly requested the Commission to continue its work on the remaining topics on its current programme, among them being "International liability for injurious consequences arising out of acts not prohibited by international law."

B. Consideration of the topic at the current session

131. At its current session, the Commission had before it a preliminary report submitted by the Special Rapporteur (A/CN.4/334 and Add.1 and Add.2),⁶³² containing four chapters. Chapter I recalled the origins

⁶²³ *Yearbook . . . 1974*, vol. II (Part One), p. 305, document A/9610/Rev.1, para. 163.

⁶²⁴ By that resolution, the General Assembly recommended that the Commission should undertake, at an appropriate time, a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts.

⁶²⁵ For a summary of the specific recommendations in those resolutions, see *Yearbook . . . 1977*, vol. II (Part Two), p. 129, document A/32/10, para. 108.

⁶²⁶ *Ibid.*

⁶²⁷ *Yearbook . . . 1978*, vol. II (Part Two), p. 6, document A/33/10, para. 9.

⁶²⁸ A/CN.4/L.284 and Corr. 1.

⁶²⁹ For section II of the report, see *Yearbook . . . 1978*, vol. II (Part Two), pp. 150–152, document A/33/10, chap. VIII, sect. C, annex.

⁶³⁰ *Ibid.*, p. 150, para. 177.

⁶³¹ *Ibid.*, para. 178.

⁶³² Reproduced in *Yearbook . . . 1980*, vol. II (Part One).

of the topic and the reasons for according it a measure of priority; it also discussed the use of terms. Chapter II considered the relationship between that topic and the topic of State responsibility for wrongful acts, dwelling upon the distinction which the Commission had already made between primary rules of obligation and secondary rules arising from the breach of an obligation.⁶³³ Chapter III dealt with the theme that a State's relative freedom of action within its own borders was bounded by its duty to respect the rights of other States to enjoy within their borders equal freedom from adverse outside influences. Chapter IV drew upon the preceding chapters for materials that revealed the essential nature of the topic, and raised the question whether the scope of the topic should for convenience be limited to matters arising from the use or management of the physical environment.

132. The topic was discussed by the Commission at its 1630th to 1633rd meetings, held between 10 and 15 July. In introducing the report, the Special Rapporteur observed that there was more need than usual to stress its tentative and preliminary nature, because of the novelty of the topic and the lack of an authoritative description of its nature and content. There were, however, two main points of departure. First, the very title of the topic, settled by the Commission in the course of its twenty-fifth session and used thereafter in General Assembly resolutions relating to the work of the Commission, was an affirmation of a broad principle that States, even when undertaking acts that international law did not prohibit, had a duty to consider the interests of other States that might be affected. Secondly, the torrent of international activity in matters relating to the human environment, and the urgency with which that activity was undertaken, provided convincing evidence that there was place for a normative treatment of the issues involved.

133. The Special Rapporteur also noted that the progress made by the Commission with the topic of State responsibility (part I) had a direct bearing upon its method of approach to the new topic. International liability for injurious consequences arising out of acts not prohibited by international law had often been regarded by learned writers as an alternative or auxiliary system of secondary rules, paralleling and supplementing the system of rules described in the draft articles on State responsibility (part I).⁶³⁴ The Commission, however, had consistently emphasized the universality of the secondary rules of State responsibility, which came into play whenever there was a breach of an international obligation. By contrast, the new topic was expressly concerned with situations in which liability did not depend upon proof of wrongfulness; in other words, the liability with which the new topic dealt must arise directly from a

primary rule of obligation. The distinction could be illustrated by reference to the 1971 Convention on International Liability for Damage Caused by Space Objects, article II of which provided that:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.⁶³⁵

That provision established a primary obligation to pay compensation if the damage in question occurred: failure to pay such compensation entailed wrongfulness and engaged the secondary rules of State responsibility for wrongful acts.

134. As the breadth of its title suggested, the obligations with which the topic dealt always depended upon the occurrence of loss or injury, but were not confined to any particular area of substantive law. The Special Rapporteur noted that the Commission, when dealing with circumstances—such as *force majeure* or state of necessity—precluding wrongfulness, had emphasized that even in such circumstances there might remain a duty, arising under different rules, to compensate for loss or damage. He noted also that, like the questions of environmental hazard that were now the main focus of international attention, the law relating to the treatment of aliens provided examples of situations in which a receiving State, in order to avoid wrongfulness, must fulfil an obligation to furnish some kind of satisfaction in respect of loss or injury sustained. However, it was a distinguishing feature of the present topic that its essential concern was with dangers that arose within the jurisdiction of one State and caused harmful effects beyond the borders of that State. The topic was of practical importance precisely because the act of the State giving rise to the danger was not within the jurisdiction of the State that might suffer the harm.

135. It was submitted by the Special Rapporteur that the relevant primary rule of obligation, stated at the level of greatest generality, was reflected in the maxim *sic utere tuo ut alienum non laedas*. That rule—the duty to exercise one's own rights in ways that did not harm the interests of other subjects of law—was a necessary ingredient of any legal system: it was implicit in the aims and purposes of the United Nations Charter, and explicit in the principle of good-neighbourliness enunciated in the final communiqué of the Afro-Asian Conference held in Bandung in 1955.⁶³⁶ The rule had been expressed in various contexts, including the *Trail Smelter* arbitral award,⁶³⁷ the judgement of the International Court of Justice in the *Corfu Channel* case,⁶³⁸ principle 21 of the Declaration of the United Nations Conference on the Human

⁶³³ *Yearbook* ... 1973, vol. II, pp. 169–170, document A/9010/Rev.1, para. 40.

⁶³⁴ See *Yearbook* ... 1979, vol. II (Part Two), pp. 91–93, document A/34/10, chap. III, sect. B.

⁶³⁵ General Assembly resolution 2777 (XXVI) of 29 November 1971, annex.

⁶³⁶ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

⁶³⁷ *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1905.

⁶³⁸ *I.C.J. Reports* 1949, p. 4.

Environment held in Stockholm in June 1972,⁶³⁹ and article 30 of the Charter of Economic Rights and Duties of States.⁶⁴⁰

136. It was of course evident that a rule of such generality—like the rules that concerned the delimitation of maritime boundaries—required a measure of appreciation when applied to particular situations. The pattern that had seemed to emerge was that, as States became aware of situations in which their activities—or activities within their jurisdiction or under their control—might give rise to injurious consequences in areas outside their territory, they took steps to reach agreement with the States to which the problem might extend about the procedures to be followed and the levels of protection to be covered. In some cases those measures included regimes of liability; in others it was noted that the question of liability had not been covered. So States discharged their duty of care, and ensured that they were not exposed to charges of unlawful conduct. At the same time, they ensured that international law would play its part in accommodating and harmonizing a full range of beneficial activities.

137. In that connection, it was stressed that the main thrust of the new topic should be to minimize the possibility of injurious consequences, and to provide adequate redress in any case in which injurious consequences occurred, with the least possible recourse to measures that prohibited or hampered creative activities. The criterion of “harm” could be regarded as a variable, which States had a duty to define or quantify in any context in which current or projected activities were seen to entail a substantial transnational danger. Existing State practice was sufficient to show that States had at their disposal an unlimited range of solutions that could offer appropriate guarantees without placing any unwarranted burden upon a beneficial activity. The two principles that should be involved in the construction of any regime, and in the ascertainment of liability when no regime applied, were a standard of care commensurate with the nature of the danger, and guarantees related to the occurrence of injury rather than to the quality of the act causing injury.

138. Most members of the Commission present took part in the discussion of the report; and on some major points there was a clear convergence of opinion. In particular, it was not doubted that the Commission’s approach to the subject must be in terms of the elaboration of primary rules, and that attention must be focused upon situations in which a danger arising within the jurisdiction of one State caused—or threatened to cause—damage beyond the borders of that State. There was also broad agreement that the

existing title of the topic, although abstract and rather unwieldy, was at that stage of development an extremely valuable guideline. A number of speakers pointed out that the title enumerated each of the four key elements in the topic, and was in itself a directive endorsed by the General Assembly as well as by the Commission.

139. A majority of speakers took the view that the topic was adequately founded in existing legal doctrine and that the Commission’s task was to develop that doctrine to meet the unprecedented needs of the present day. In general, they considered that the Special Rapporteur should continue to draw upon the full range of applicable doctrine and State practice in order to provide a sound basis for future work, even though the immediate field of application might be that of the physical environment. There were some warnings that in that context the term “environment” should not be interpreted narrowly, because questions of ecological damage were at most a part of the subject-matter. The Special Rapporteur had drawn attention to the description of the topic by the Working Group established at the thirtieth session:

[It] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State.⁶⁴¹

On balance it was considered that any more restrictive description would be unacceptable.

140. On the other hand, some members considered that the new topic had little foundation in existing doctrine, and that it had yet to make good its claim to exist as a separate subject. It was pointed out that, while States had shown increasing willingness to seek agreement about measures of prevention, they were usually not willing to accept a direct linkage between preventive measures and liability for actual or potential damage. In one member’s view, the scope of the principle might be more or less limited to situations in which territorial boundaries did not coincide with natural boundaries, and in which there was also an element of hazard in the chain of causation of injuries occurring transnationally. A number of members, including several who believed that the scope of the topic should not be narrowed, thought it wise to concentrate at the beginning on case studies, either in the area of the environment or in that of *ex gratia* payments for injurious consequences where wrongfulness was precluded or denied, in order to verify the existence of a primary rule of obligation not based upon the duty of reasonable care or due diligence.

141. It was recognized that principles of equity could not in themselves form the basis of such a rule, although they would have an important part to play in its application. It had been noted, in connection with the Commission’s discussion of chapter V of the draft articles on State responsibility (part I), dealing with

⁶³⁹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part I, chap. I.

⁶⁴⁰ General Assembly resolution 3281 (XXIX) of 12 December 1974.

⁶⁴¹ *Yearbook ... 1978*, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex, para. 13.

circumstances precluding wrongfulness, that a residual duty to compensate for injurious consequences would not arise in every case. A number of speakers also referred to the "polluter pays" principle, which had been embodied in measures elaborated by OECD, and to what might be regarded as a refinement of that principle: the concept that the cost of injurious consequences should go together with the opportunity of making a profit. A practical example was given of a case in which a developed country had provided compensation in respect of injurious consequences caused by one of its enterprises both to the foreign country in which that enterprise was situated and to a neighbouring country to which the injurious consequences had extended.

142. Several speakers emphasized the concept of interdependence; one speaker suggested that there might be a hierarchy of norms: an interest that was essential to human survival could conflict with, and override, an economic or social interest which, although intrinsically beneficial, was of a less far-reaching kind. There was broad agreement that, even in the case of injurious consequences that were caused by an act not prohibited, the innocent victim—if, upon a proper evaluation of all the factors, it were indeed an innocent victim—should not merely be left by law to bear its loss. Several speakers noted that that entailed a trend towards stricter standards of liability, and it was recognized that the question of attribution would need further study. It was suggested that the relevant primary rule of obligation might be formulated in terms of conditions attached to the right to engage in activities that produced—or were capable of producing—injurious transboundary effects.

143. Not surprisingly, the main area of divergency of opinion centred upon the relationship between responsibility for wrongful acts and liability in respect of acts not prohibited. One member doubted that there was any real place for the new topic, as its application to a given situation would always be superseded when a specific regime had been elaborated. The opposite viewpoint was also stressed, one member noting that there was a constantly moving "frontier" between

wrongfulness and acts which—at least for the time being—were not prohibited. Another member wondered whether the new topic, by its very nature, was confined to cases of activities that were necessary, but potentially dangerous, as distinguished from activities—such as those that caused pollution—that were always harmful, and therefore wrongful. Other speakers, however, pointed out that "harm" was a relative concept, and that the general trend of learned opinion was not in favour of developing distinctions based upon such concepts as those of "ultra-hazard". In their view, the main justification for the new topic was that interests had to be balanced, and that States should have every inducement to regulate their respective rights and obligations in ways that minimized the need for general prohibitions. One member, in fact, characterized the topic as relating to activities conducted within the framework of international relations.

144. Finally, it was fully recognized that closer attention must be paid to all the issues raised during the Commission's brief discussion of the topic. Several members, however, referred specifically, and in each case with general approval, to the tentative summation contained in paragraph 60 of the Special Rapporteur's preliminary report:

... the elaboration of the rules relating to liability for injurious consequences in respect of acts not prohibited by international law revolves around the variable concept of "harm". Where a State suffers substantial injury, or reasonably believes that it is exposed to a substantial danger arising beyond its own borders from the acts or omissions of other States, there is a new legal relationship which obliges the States concerned to attempt in good faith to arrive at an agreed conclusion as to the reality of the injury or danger and the measures of redress or abatement that are appropriate to the situation. A State within whose jurisdiction such an injury or danger is caused is not justified in refusing its co-operation upon the ground that the cause of the danger was not, or is not, within its knowledge or control. If such an injury or danger is not caused by a breach of a specific international obligation, a State suffering such an injury or danger is not justified in demanding any limitation of the freedom of action of another State in relation to matters arising within that State's jurisdiction, except the minimum needed to ensure the redress and abatement of the injury or danger, taking into account any beneficial, although competing, interests.

Chapter VIII

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

145. At its thirty-first session, in 1979, the Commission reached the following conclusions regarding the future work to be undertaken on this subject:

(1) The Secretariat should continue with the preparation of a comprehensive follow-up report, on the pattern of the latest working paper [A/CN.4/WP.4], analysing the written comments which may be forthcoming as well as the views which may be expressed by Governments during the thirty-fourth session of the General Assembly.

(2) The Commission should appoint a Special Rapporteur on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, who will be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.⁶⁴²

The Commission appointed Mr. Alexander Yankov Special Rapporteur on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.⁶⁴³

146. The General Assembly, in paragraph 4 (f) of its resolution 34/141 of 17 December 1979, recommended that the Commission should:

continue its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly, with a view to the possible elaboration of an appropriate legal instrument.

147. At the current session of the Commission, the Special Rapporteur submitted a preliminary report (A/CN.4/335)⁶⁴⁴ in pursuance of the above-mentioned General Assembly recommendation. The Commission also had before it a working paper (A/CN.4/WP.5) prepared by the Secretariat pursuant to the decision of the Commission quoted above.⁶⁴⁵ The main objective of the preliminary report, as defined by the Special Rapporteur, was to elicit advice and guidance from the Commission on certain topical issues of substance and method before he proceeded to prepare subsequent reports containing draft articles.

148. It was pointed out by the Special Rapporteur that the topic was significant, in view of the ever-increasing dynamics of international relations, in which States and international organizations were engaged in very active contacts through various means of communication, including official couriers and official bags. The drafting and adoption of appropriate rules would therefore promote the development of friendly co-operation in that field and contribute to the prevention or reduction of abuses by either sending or receiving States. By supplementing existing international instruments, the Commission would enhance the precision and effectiveness of the legal framework governing that field of international relations. The adoption of up-to-date international rules would remedy some existing omissions and unsuitable practices, and improve conditions for the application of existing conventions which currently met with daily difficulties, at a time when failure to respect diplomatic privileges and immunities had become a matter of common concern.

149. The preliminary report contained a consolidated account of the consideration of the topic since 1974, when it was first introduced in the General Assembly. That historical background, together with the working papers prepared by the Secretariat,⁶⁴⁶ provided a very sound basis for the Commission's consideration of the topic.

150. The preliminary report also contained a review of sources of international law and other relevant material on the topic. It was noted that those sources were mainly conventional in character and that there was a great scarcity of international judicial practice. The main sources included, first of all, the four codification Conventions concluded under the auspices of the United Nations, namely, the 1961 Vienna Convention on Diplomatic Relations,⁶⁴⁷ the 1963 Vienna Convention on Consular Relations,⁶⁴⁸ the 1969 Convention on Special Missions⁶⁴⁹ and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a

⁶⁴² *Yearbook* ... 1979, vol. II (Part Two), p. 184, document A/34/10, para. 164. For a review of the work of the Commission on the topic up to 1979, *ibid.*, p. 170, paras. 149–155.

⁶⁴³ *Ibid.*, p. 184, para. 165, and p. 189, paras. 197 and 204.

⁶⁴⁴ Reproduced in *Yearbook* ... 1980, vol. II (Part One).

⁶⁴⁵ See para. 145.

⁶⁴⁶ A/CN.4/321 and Add.1–7 (*Yearbook* ... 1979, vol. II (Part One), p. 213), A/CN.4/WP.4 and 5 and A/CN.4/L.311.

⁶⁴⁷ United Nations, *Treaty Series*, vol. 500, p. 95.

⁶⁴⁸ *Ibid.*, vol. 596, p. 261.

⁶⁴⁹ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

Universal Character.⁶⁵⁰ In addition, reference was made to a number of other important multilateral treaties, as well as to bilateral treaties, national legislation, diplomatic correspondence and official communications or statements which provided evidence of State practice on the topic. The report also noted the "travaux préparatoires" for the four codification conferences, the writings of publicists covering the main schools of legal thought on the subject over a relatively wide geographical area, and private codification drafts prepared by individual jurists or learned societies.

151. The problem of the form of the eventual instrument was considered in the light of the relevant resolutions of the General Assembly, which referred to "a protocol" or "an appropriate legal instrument". It was pointed out that, at the current stage of the Commission's work, the main objective should be to prepare a set of draft articles by the consolidated procedure that had evolved in the practice of the Commission, incorporating and combining elements of both *lex lata* and *lex ferenda*. The final decision as to the form of the instrument should be left to be decided by States Members of the United Nations at an appropriate stage in the codification process.

152. The report emphasized the importance of the empirical method as being best suited to a topic of a highly practical character, taking into account the nature, scope and specific functions of the courier and the bag. The facilities, privileges and immunities accorded to the diplomatic courier were not intended to benefit the person concerned, but to establish conditions that would facilitate the performance of his official functions, which were instrumental in the exercise of the right of communication. It was pointed out that flexibility and caution were required in drawing analogies with diplomatic and consular agents, while at the same time any unnecessary limitations that might impair the effective protection of the official courier and the official bag should be avoided.

153. With regard to the scope and content of the draft articles, the Special Rapporteur suggested the adoption of a comprehensive approach that might lead to the elaboration of a more coherent and uniform set of draft articles, embracing all types of official couriers and official bags sent to diplomatic and consular missions, to special missions or to the representations to international organizations. In his preliminary report he therefore intimated that it would be highly desirable for the Commission to decide whether the concepts of "official courier" and "official bag" should be adopted, without exceeding the terms of reference for the present topic.

154. Since the existing codification Conventions did not contain definitions of diplomatic and other official couriers and bags, it was suggested that an attempt to elaborate such definitions might be helpful.

155. Furthermore, it was suggested that the functions of the official courier, his nationality and the possibility of multiple appointment should be determined in greater detail and in more precise terms, since there were no specific provisions on those matters in the existing codification Conventions.

156. The report also noted the need to determine in greater detail the status of the diplomatic courier and the facilities, privileges and immunities accorded to him and to the courier *ad hoc* in the performance of their functions.

157. The status of the diplomatic bag and, in particular, of the unaccompanied diplomatic bag, were given special consideration in the report. In that connection, emphasis was placed on the need to achieve a fair balance and harmony between the secrecy requirements of the sending State and the security and other legitimate considerations of the receiving and transit State, between safe and rapid delivery of the bag and respect for the sovereignty and national laws of the receiving State, and between immunity of the bag from checking and security requirements, particularly where the safety of civil aviation was concerned.

158. Several other questions were considered in the report, relating to the status of the official courier and the official bag, their protection and the prevention of possible abuses by either the sending or the receiving State, and the obligations of transit States and other third States, including their obligations in cases of *force majeure*.

159. The report contained a suggestion that the draft articles should formulate, in some way, the fundamental principles of international law which underlay the four codification Conventions, such as freedom of communication for all official purposes, respect for the laws and regulations of the receiving and transit States and the principle of non-discrimination.

160. The preliminary report made certain tentative suggestions, as a working method, regarding the structure and format of the draft articles, which might consist of general provisions, sections on the status of the official courier, the status of the official courier *ad hoc*, and the status of the official bag, and miscellaneous provisions dealing with certain problems, including the relationship of the draft articles to existing conventions.

161. Emphasizing the significance of the topic, the report pointed out that there were some delicate problems relating to important interests of States, and some difficulties of a political and practical nature which required special attention. At the same time, it was maintained that there was a need for a coherent

⁶⁵⁰ *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.

and uniform rule of international law on the status of the official courier and the official bag to fill the existing legal gaps.

162. The Commission considered the preliminary report at its 1634th, 1636th and 1637th meetings. It engaged in a general debate on the issues raised in the report and on questions relating to the topic as a whole.

163. During the discussions on the report, the practical significance of the topic was emphasized in view of the unprecedented dynamic development of international communications, the need for effective protection of the diplomatic courier and the diplomatic bag and the need for prevention of possible abuses. Reference was made to the political importance of the codification and progressive development of international law in that field, taking into account the impact of sophisticated modern means of checking the bag, which might affect its diplomatic secrecy. Several members of the Commission pointed out the particular significance for developing countries of the need to draw up rules relating to the status of the courier *ad hoc* and the unaccompanied official bag. It was maintained that that was of paramount importance for countries which could not afford to have professional couriers.

164. While recognizing the importance of the four codification Conventions and other multilateral treaties and their proper application, some members of the Commission noted that there was a need to elaborate new rules adapted to the new challenges of modern international communications for all official purposes. However, it was also maintained that there was no need for a new instrument, on the ground that the essential rules were sufficiently codified in existing treaties.

165. It was generally agreed that, in the work of codification and progressive development of international law on the topic under consideration, special emphasis should be placed on the application of an empirical and pragmatic method, aimed at securing a proper balance between provisions containing concrete practical rules and provisions containing general rules determining the status of the courier and the bag. One member of the Commission expressed the view that excessive details might be very dangerous.

166. It was recalled that General Assembly resolution 34/141 of 17 December 1979 referred to "the possible elaboration of an appropriate legal instrument". As to the form of any such instrument, it was considered that at that stage the Commission should start preparing a set of draft articles, following the well-established pattern of the consolidated procedure evolved in the practice of the Commission. Some members of the Commission accepted that the possibility of a convention supplementing the four previous codification Conventions should not be excluded altogether, while others maintained that the "appropriate legal instrument" ought to be of more

modest rank. However, the prevailing view was that the question of the form of any eventual legal instrument should be kept open at that stage. One member of the Commission considered that during its work on the topic the Commission should keep in mind the possible response and reaction of States and the prospects for ratification of any such instrument.

167. A considerable part of the discussion was concentrated on the scope and content of the draft articles. It was generally agreed that a comprehensive approach leading to a coherent set of draft articles should be applied with great caution, taking into consideration the possible reservations of States. The prevailing view was that, while the draft articles should in principle cover all types of official couriers and official bags, the terms "diplomatic courier" and "diplomatic bag" should be maintained. It was also noted that the codification effort should be basically confined to communications between States. It was assumed by several speakers that, while retaining the concepts of diplomatic courier and diplomatic bag, an appropriate solution might be found through an assimilation formula along the lines of the provisions of article III, section 10, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946,⁶⁵¹ and article IV, section 12, of the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly in its resolution 179 (II) of 21 November 1947.⁶⁵² The main objective should be to achieve as much coherence and uniformity as possible in the legal protection of all types of official couriers and official bags, without necessarily introducing new concepts which might not be susceptible of wide acceptance by States. It was also emphasized that the nature and scope of the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag should be in conformity with their specific functions as tools for the realization of the principle of communication for all official purposes.

168. Several members of the Commission referred to the problem of possible abuses and to the role of legal rules in the prevention of such abuses or the enhancement of practical measures of control. Some speakers emphasized the importance of effective interplay between the principles of freedom of communication and respect for the laws and regulations of the receiving or transit State if a reasonable balance were to be established between the secrecy of the diplomatic communication and security and other legitimate considerations. It was suggested that draft articles should be prepared on the problem of abuses, including their legal consequences. The impact of modern and more sophisticated means of checking the bag was also pointed out, and it was recommended that the Commission should try to find acceptable legal

⁶⁵¹ United Nations, *Treaty Series*, vol. 1, p. 20.

⁶⁵² *Ibid.*, vol. 33, p. 270.

formulations to deal with problems arising from the application of modern checking techniques.

169. In response to a question raised in the preliminary report, several members of the Commission expressed their support for the suggestion that legal definitions of the diplomatic courier and the diplomatic bag should be drafted. Some of them considered that there should be more specific provisions defining the functions of the diplomatic courier, including the courier *ad hoc*.

170. The tentative structure of the draft articles set out in the preliminary report as a working hypothesis received general support, with certain observations and suggestions. While several speakers agreed with the suggestion in the report that the draft articles should embody the fundamental principles of freedom of communication for all official purposes, of non-discrimination and of respect for the laws and regulations of the receiving and the transit States, there were some who considered that, at least at the initial stage, there was no need to deal with general principles. It was also noted that some of the items under the heading "Miscellaneous provisions" were too important, as such, to be placed in that unspecified section of the draft. The view was expressed that a more functional approach would justify placing the draft articles on the status of the bag before those on the status of the courier.

171. It was pointed out that the diplomatic bag not accompanied by diplomatic courier had acquired great practical significance as a means of communication and therefore deserved special attention.

172. One member raised the question of the legal meaning of the term "facilities". It was explained that,

within the framework of a set of legal provisions, the term "facilities" would necessarily cover certain rights and obligations of a general nature to facilitate the performance of the functions of the courier or the bag, or more specific matters such as the acquisition of accommodation, obtaining of visas, transportation, etc. Similar provisions could be found in the four codification Conventions.

173. Several members emphasized the particular importance of the status of the courier *ad hoc*, his increasing role in modern international relations, and the very extensive use made of couriers *ad hoc* by all States, especially those States that lacked professional couriers.

174. Certain other points were raised during the discussion, such as the relation of any eventual legal instrument on the status of the diplomatic courier and the diplomatic bag to existing conventions, and the importance of the rights and obligations of the receiving State and the transit State.

175. It was generally recognized that the next step to be undertaken by the Commission should be the consideration of draft articles submitted by the Special Rapporteur.

176. At the conclusion of the discussion, the Special Rapporteur expressed his agreement with the general recommendation to proceed with the elaboration of draft articles on the topic as the next immediate stage of the work, taking into consideration the comments made during the discussions at the thirty-second session of the Commission and during the examination of the Commission's report at the thirty-fifth session of the General Assembly.

Chapter IX

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme and methods of work of the Commission

177. At its 1604th meeting, held on 4 June 1980, the Commission decided to establish a Planning Group of the Enlarged Bureau for the current session. The Group was composed of Mr. Doudou Thiam (Chairman), Mr. Juan José Calle y Calle, Mr. Leonardo Díaz González, Mr. Frank X. J. C. Njenga, Mr. Paul Reuter, Mr. Milan Šahović, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov and Sir Francis Vallat. The Group was entrusted with the task of considering the programme and methods of work of the Commission and of reporting thereon to the Enlarged Bureau. The Planning Group met on 6 and 20 June and on 8 and 21 July 1980. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

178. On the recommendation of the Planning Group, the Enlarged Bureau recommended that the Commission include paragraphs 179 to 195 below in its report to the General Assembly on its work at the current session. At its 1641st meeting, held on 24 July 1980, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs.

179. In considering the question of its programme of work for its thirty-third session, in 1981, the Commission took into account the general objectives and priorities which the Commission, with the approval of the General Assembly, had established at previous sessions and the recommendations contained in General Assembly resolution 34/141 of 17 December 1979, as well as the progress achieved at the thirty-second session in the study of the topics under current consideration. The Commission also took into account the fact that its next session would be the last within the current term of office of the members of the Commission. In the light of those considerations, the Commission intends to devote primary attention at its thirty-third session to the topics upon which the first reading of draft articles has been completed, namely, "Succession of States in respect of matters other than treaties" and "Question of treaties concluded between States and international organizations or between two or more international organizations".

180. As to the topic "Succession of States in respect of matters other than treaties", the Commission, in

accordance with General Assembly resolution 34/141, should at its thirty-third session complete the second reading of all the draft articles on the topic, taking into account the comments and observations of Governments on the draft articles. In this connection, it may be recalled that at its thirty-first session the Commission completed its first reading of the set of draft articles dealing with State property and State debts and requested the Secretary-General to transmit those articles to Governments for their written comments and observations, together with two initial articles dealing with State archives.⁶⁵³ Furthermore, at the current session, the Commission completed, as recommended by the General Assembly in its resolution 34/141, the study of State archives and adopted four additional draft articles thereon.⁶⁵⁴ Governments have also been requested to submit their written comments and observations on the additional articles on State archives adopted at the current session.⁶⁵⁵

181. Regarding the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", the Commission, having completed at the current session the first reading of the relevant draft articles⁶⁵⁶ as recommended by the General Assembly in its resolution 34/141, intends at its thirty-third session in 1981 to commence its second reading of the draft articles on the topic in the light of the comments and observations of the Governments and international organizations concerned. Draft articles 1 to 60, adopted at the thirty-first session on first reading,⁶⁵⁷ were transmitted to Governments and international organizations in 1979 for their written comments and observations.⁶⁵⁸ The request for the submission of such comments and observations was renewed at the current session,⁶⁵⁹ so as to enable the

⁶⁵³ See *Yearbook ... 1979*, vol. II (Part Two), pp. 13–14, document A/34/10, chap. II, sect. B, paras. 44–45, and p. 78, para. 55. For the text of the draft articles and commentaries thereto, *ibid.*, pp. 17 *et seq.*

⁶⁵⁴ For the text of the draft articles and commentaries thereto, see chap. II, sect. B, 2, above.

⁶⁵⁵ See chap. II, para. 15, above.

⁶⁵⁶ See chap. IV, para. 52, above. For the text of the draft articles, *ibid.*, sect. B.

⁶⁵⁷ For the text of the draft articles, see *Yearbook ... 1979*, vol. II (Part Two), pp. 138 *et seq.*, document A/34/10, chap. IV, sect. B.

⁶⁵⁸ *Ibid.*, p. 138, sect. A, para. 84.

⁶⁵⁹ See chap. IV, para. 55, above.

Commission to commence the second reading of those draft articles at its thirty-third session. The draft articles and annex adopted on first reading at the current session have also been transmitted to Governments and international organizations for their written comments and observations and will be the subject of a second reading at a later session of the Commission.

182. On the topic "State responsibility", the Commission at its current session completed the first reading of part I (The origin of international responsibility) of the draft on responsibility of States for internationally wrongful acts,⁶⁶⁰ as recommended by the General Assembly in its resolution 34/141. It also commenced its study of part II (The content, forms and degrees of international responsibility)⁶⁶¹ and intends to begin at its thirty-third session the preparation of draft articles concerning that part of the draft with a view to making as much progress as possible within the current term of office of the members of the Commission, as recommended by the General Assembly in its resolution 34/141. The draft articles constituting part I of the draft have been transmitted to Governments for their written comments and observations.⁶⁶² At its thirty-fourth session, the Commission hopes to proceed, in the light of the written comments and observations of Governments as well as of the views expressed in the General Assembly, to a second reading of the draft articles constituting part I of the draft.

183. Although, as indicated, the Commission will devote primary attention at its thirty-third session to the topics mentioned above, it also intends to continue the study of other topics on its current programme of work, as follows:

(a) Having begun at the current session the preparation of draft articles on the topic "The law of the non-navigational uses of international water-courses",⁶⁶³ the Commission will continue its work on the topic at its thirty-third session, with a view to the preparation of additional draft articles on the basis of reports submitted by the Special Rapporteur.

(b) Concerning the topic "Jurisdictional immunities of States and their property", with respect to which the preparation of draft articles has commenced at the current session,⁶⁶⁴ it is anticipated that the Commission will continue its work on the topic on the basis of reports submitted by the Special Rapporteur.

(c) A preliminary report on the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" was submitted by

the Special Rapporteur at the current session of the Commission.⁶⁶⁵ The Commission intends to continue its work on the topic on the basis of a further report by the Special Rapporteur which will contain proposed draft articles, with a view to the possible elaboration of an appropriate legal instrument.

(d) An initial discussion on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" having been held during the current session on the basis of a preliminary report submitted by the Special Rapporteur,⁶⁶⁶ the Commission at its next session will continue the study of the topic on the basis of a further report, which may include proposed draft articles, to be placed before the Commission by the Special Rapporteur.

(e) The Special Rapporteur for the second part of the topic "Relations between States and international organizations"⁶⁶⁷ will continue his study of the subject and may, should that study so require, submit a preliminary report to the Commission.

184. As to the allocation of time at its thirty-third session for the topics referred to⁶⁶⁸ above, the Commission will take the appropriate decisions at the beginning of that session when arranging for the organization of its work. The Commission is aware, however, that in the time available it may not be possible to take up all the topics mentioned above.⁶⁶⁹

185. At its thirty-first session, the Commission had the opportunity of conducting a comprehensive review of its methods of work and procedures, while preparing its observations on the item "Review of the multilateral treaty-making process",⁶⁷⁰ as requested by the General Assembly in its resolution 32/48 of 8 December 1977. Such an item being on the agenda of the thirty-fifth session of the General Assembly, the Commission at the current session wishes to reaffirm the overall conclusions contained in the said observations, namely, that the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice during a period of more than three decades, are well adapted to the progressive development of international law and its codification. These techniques and procedures have proved, as a whole, to be appropriate for the performance by the Commission of the tasks entrusted to it and, in particular, for its contribution to the treaty-making process through the preparation of draft articles which, following a decision of the General Assembly to that effect, provide the basis for the elaboration and

⁶⁶⁰ See chap. III, A, 4 (a), above.

⁶⁶¹ *Ibid.*, 4 (b).

⁶⁶² *Ibid.*, 4 (a), para. 31.

⁶⁶³ For the text of the draft articles and commentaries thereto, see chap. V, sect. B, above.

⁶⁶⁴ For the text of the draft articles and commentaries thereto, see chap. VI, sect. B, above.

⁶⁶⁵ See chap. VIII above.

⁶⁶⁶ See chap. VII above.

⁶⁶⁷ *Yearbook ... 1979*, vol. II (Part Two), p. 190, document A/34/10, para. 206 (c).

⁶⁶⁸ See paras. 180–183.

⁶⁶⁹ See para. 183.

⁶⁷⁰ *Yearbook ... 1979*, vol. II (Part One), p. 183, document A/CN.4/325.

adoption by States of instruments progressively developing and codifying international law. This general conclusion notwithstanding, the Commission, as in the past, will keep constantly under review the possibility of further improving its present procedures and methods of work, as well as continuing to apply those procedures and methods with the flexibility which the study of particular topics may require, with a view to the timely and effective fulfilment of the tasks entrusted to it by the General Assembly.

186. In addition, the Commission at its current session addressed itself to certain questions which it had been requested to consider by the relevant resolutions of the General Assembly, as well as to other specific questions having, or which might have, a bearing on the methods of work of the Commission and the organization of its sessions. The conclusions and recommendations of the Commission on those questions are summarized below.⁶⁷¹ In calling to the attention of the General Assembly such conclusions and recommendations, the Commission wishes to reiterate, as it has on previous occasions, the need continually to bear in mind the *sui generis* nature of the Commission and of its work when draft proposals on administrative and budgetary matters are submitted to the General Assembly for consideration and adoption. As the Commission has pointed out on a number of occasions,⁶⁷² the application of certain administrative and financial patterns, general in character, to a body having such a position and tasks as has the Commission may in certain instances adversely affect the procedures and methods of work provided for in the Statute of the Commission approved by the General Assembly, and consequently jeopardize the Commission's ability to perform the task of promoting the progressive development of international law and its codification entrusted to it by the General Assembly pursuant to Article 13, paragraph 1 (a), of the Charter of the United Nations.

187. Pursuant to the request addressed to United Nations bodies by the General Assembly in its resolution 33/55 of 14 December 1978, the Commission has reviewed the length and cycle of its sessions. Although the demands of its heavy programme of work would fully warrant a lengthening of the time

allocated to it for the fulfilment of its tasks, the Commission, aware of the concern of the General Assembly relating to the rationalization of the use of resources at the disposal of the Organization, refrains from making any such recommendation. The Commission concluded, however, that there was an absolute need to maintain the existing pattern of an annual session of 12 weeks' duration as the minimum standard period of work required for it to be able to comply with the General Assembly recommendations concerning the implementation its current programme of work. The considerations which led the Commission in 1974 to recommend to the General Assembly the said standard period of work⁶⁷³ are even more valid today. The number of topics included in the current programme of work of the Commission pursuant to recent recommendations of the General Assembly has increased considerably during recent years. In addition, several of the new topics relate to complex subjects whose study requires the devotion of much time, not only by the Special Rapporteurs concerned between sessions but also by the Commission itself during its sessions. Moreover, the codification of the new topics whose study has now been begun by the Commission is to be carried out at a time when the Commission is also in the process of undertaking the completion of the codification of other topics previously included in the programme of work, the respective drafts of which are now entering the stage of second reading in accordance with the relevant provisions of its Statute. The Chairman of the Committee on Conferences has been informed of the conclusion reached by the Commission on this matter.

188. The Commission wishes to convey its appreciation to the General Assembly for having maintained the provision of summary records of the meetings of the Commission by its decision 34/418 of 23 November 1979, concerning summary records of subsidiary organs of the General Assembly, as well as for its reaffirmation, in paragraph 9 of its resolution 34/141 of 17 December 1979, of "the need for continuing provision of summary records of the Commission's meetings".

189. The Commission is aware that the cost of providing records of meetings is not insignificant and it does not at all wish to minimize or discourage generalized efforts by the Organization to effect savings and reduce its financial and administrative burden. The Commission feels obliged, nevertheless, to call to the attention of the General Assembly the fact that the question of continuing to provide the Commission with summary records is not exclusively a budgetary and administrative question because it also, and primarily, involves matters of legal policy affecting the process of the promotion of the progressive development of international law and its codification undertaken by the United Nations pursuant to Article

⁶⁷¹ See paras. 187–195.

⁶⁷² See e.g. *Yearbook ... 1968*, vol. II, p. 226, document A/7209/Rev.1, annex ("Review of the Commission's programme and methods of work: working paper prepared by the Secretariat"); *Yearbook ... 1974*, vol. II (Part One), pp. 308–311, document A/9610/Rev.1, paras. 192–212 ("Remarks on the report of the Joint Inspection Unit"); *Yearbook ... 1977*, vol. II (Part Two), pp. 132–133, document A/32/10, paras. 124–130 ("Form and presentation of the report of the Commission to the General Assembly"); *Yearbook ... 1979*, vol. II (Part One), p. 183, document A/CN.4/325 ("Report of the Working Group on review of the multilateral treaty-making process", containing the observations of the Commission on the said review submitted pursuant to General Assembly resolution 32/48 of 8 December 1977).

⁶⁷³ *Yearbook ... 1974*, vol. II (Part One), p. 305, document A/9610/Rev.1, para. 165.

13, paragraph 1 (a), of the Charter. There is no doubt, in the opinion of the Commission, that the discontinuance of summary records of its meetings would affect its procedures and methods of work and have a negative impact on the performance by the Commission of the tasks entrusted to it by the General Assembly. The need for summary records in the context of the Commission's procedures and methods of work is determined by, *inter alia*, the functions of the Commission and its composition. As its task is mainly to draw up drafts providing a basis for the elaboration by States of legal codification instruments, the debates and discussions held in the Commission on proposed formulations are of paramount importance, in terms of both substance and wording, for the understanding of the rules proposed to States by the Commission. On the other hand, pursuant to the Commission's Statute, members of the Commission serve in a personal capacity and do not represent Governments. States have therefore, it is submitted, a legitimate interest in knowing not only the conclusions of the Commission as a whole as recorded in its reports but also those of its individual members contained in the summary records of the Commission, particularly if it is borne in mind that members of the Commission are elected by the General Assembly so as to ensure representation in the Commission of the main forms of civilization and the principal legal systems of the world. Moreover, the summary records of the Commission are also a means of making its deliberations accessible to international institutions, learned societies, universities and the public in general. They play an important role, in that respect, in promoting knowledge of and interest in the process of promoting the progressive development of international law and its codification.

190. The above-mentioned considerations, which were undoubtedly very much in the minds of delegations when the General Assembly in 1979 adopted its decision 34/418 and its resolution 34/141, lead the Commission to recommend to the General Assembly the continuing provision of summary records of the meetings of the Commission as well as the continued publication of those summary records in volume I of the *Yearbook of the International Law Commission*. The continuance of the present system of summary records corresponds to what has been a consistent policy of the General Assembly since the establishment of the Commission,⁶⁷⁴ and constitutes an

inescapable requirement for the procedures and methods of work of the Commission and for the process of codification of international law in general.

191. With reference to the recent decisions and recommendations on control and limitation of documentation, the Commission wishes, first of all, to make clear its understanding that new regulations on the preparation of documents on the basis of Governments' replies to a questionnaire or of submissions of the agencies and programmes of the United Nations do not affect the obligation of the Secretary-General under the Statute of the Commission to publish *in extenso*, and in the languages of the Commission, all such replies whenever the work of the Commission and its procedures and methods so require. It hardly seems necessary to stress the fundamental and basic role that materials, comments and observations submitted by Governments and, when appropriate, international organizations, play in the codification methods of the Commission. The interaction between the Commission, a permanent body of legal experts serving in their personal capacity, and Governments, through a variety of means including the submission of materials and written comments and observations, is at the core of the system created by the General Assembly for the promotion, with the assistance of the Commission, of the progressive development of international law and its codification. It is an absolute need for the Commission to have at its disposal, *in extenso* and in its working languages, the replies of Governments and international organizations to its requests for materials, comments and observations on international law topics included in its programme of work pursuant to relevant recommendations of the General Assembly. In bringing this matter to the attention of the General Assembly, the Commission is confident that, if necessary, the Secretariat will be provided with appropriate guidance and instructions.

192. The Commission has noted that recent statements concerning paragraph 2 of General Assembly resolution 34/50 of 23 November 1979 may be interpreted as extending the general 32-page maximum length rule for reports of the Secretary-General to the studies and research projects prepared by the Secretariat at the request of the Commission or its Special Rapporteurs,⁶⁷⁵ notwithstanding the recommendation made on this matter by the Commission at its twenty-ninth session⁶⁷⁶ and the endorsement thereof by the General Assembly in paragraph 10 of its resolution

⁶⁷⁴ The system of providing the Commission with summary records began in 1949 with the provision of such records for its first session. On 3 December 1955, the General Assembly adopted resolution 987 (X), entitled "Publication of the documents of the International Law Commission", by which the Secretary-General was requested to arrange as soon as possible for the printing of certain Commission documents, including "the summary records of the Commission". The summary records of Commission meetings are thus printed as volume I of the *Yearbook of the International Law Commission*. In 1968, the Committee on Conferences, in its report (A/7361, para. 35), included the Commission among the bodies which, in its view,

should be provided with summary records. As recently as its thirty-first session, in its resolution 31/140 of 17 December 1976, the General Assembly, in taking note of the application of certain criteria for the provision of meeting records, reaffirmed that "the International Law Commission should continue to receive records in both provisional and final form".

⁶⁷⁵ See for example "Control and limitation of documentation" (A/INF/35/1).

⁶⁷⁶ *Yearbook ... 1977*, vol. II (Part Two), p. 132, document A/32/10, para. 123.

32/151 of 19 December 1977, as well as in paragraph 9 of its resolution 34/141 of 17 December 1979. The studies and research projects prepared by the Codification Division of the Office of Legal Affairs, referred to in paragraph 43 of the observations of the Commission on "Review of the multilateral treaty-making process",⁶⁷⁷ are part and parcel of the consolidated method and techniques of work of the Commission and, as such, constitute an indispensable contribution to the work of the Commission which, as provided in article 20 of its Statute, must be aware of "treaties, judicial decisions and doctrine" as well as of "the practice of States", in order to study the various topics on its programme and formulate commentaries on the drafts it proposes to the General Assembly. It is obvious that the application of the said 32-page rule to the studies and research projects that the Commission or its Special Rapporteurs may request from the Codification Division would render the documents in question unfit for the purpose for which they are intended. The Commission again calls attention to the fact that, in implementing regulations for the control and limitation of documentation originating in the Secretariat, due regard should be paid to the nature of the research projects and studies requested by the Commission from the Codification Division, so as not to jeopardize this contribution to the work of the Commission. As the Commission stated in 1977, "in the matter of legal research—and codification of international law demands legal research—limitations on the length of documents cannot be imposed".⁶⁷⁸

193. As to the manner of considering the report of the Commission in the Sixth Committee of the General Assembly, the Commission wishes to express its appreciation to those delegations which suggested, at the thirty-fourth session of the General Assembly, that the Commission be consulted on the matter. Out of concern to avoid the appearance of interfering in a matter that is within the exclusive competence of the Sixth Committee, the Commission is of the opinion that it should refrain from making any specific suggestion thereon. It wishes only to indicate, as it did in 1977, that a practical way of allowing a sufficient period of time for delegations to examine carefully, reflect upon and prepare statements on the contents of the Commission's report would be to continue the present practice of beginning consideration of the report of the Commission at the end of October.⁶⁷⁹ To begin consideration of the report later in the session could lead, unavoidably, to interruptions for debate on other items and, eventually, to the reduction in fact of the number of meetings initially allocated by the Sixth Committee to consideration of the Commission's report. From the standpoint of the Commission, what

actually matters is that delegations should be able to participate fully in the consideration of the report of the Commission and that their views and the results of the debate should continue to be conveyed to the Commission to the maximum possible extent, well in advance of its next annual session. In this connection, the Commission would like to thank the Secretariat for preparing the topical summary of the discussion held in the Sixth Committee, at the thirty-fourth session of the General Assembly, on the report of the Commission on the work of its thirty-first session. That document (A/CN.4/L.311), requested in paragraph 12 of General Assembly resolution 34/141 of 17 December 1979, provided the Commission with a detailed and digested presentation of views, comments and observations expressed in the Sixth Committee, adequately filling the gap created by the absence of a summary of the debate in the relevant report submitted by the Sixth Committee to the General Assembly.

194. In its report on the work of its thirty-first session, the Commission referred to the question of the level of the honoraria paid to its members, including its Special Rapporteurs, for the performance of their tasks and noted, *inter alia*, that,

while the subsistence allowance of members had been adjusted periodically to reflect in some measure the changes in the cost of living, no corresponding adjustment had been made in their honoraria for the past twenty years".⁶⁸⁰

The Commission wished to bring that matter to the attention of the General Assembly, but consideration of the item on the payment of honoraria, deferred from the thirty-third to the thirty-fourth session of the General Assembly, was postponed to the thirty-fifth session. The Commission authorizes its Chairman when attending the thirty-fifth session of the General Assembly to present the views of the Commission to the appropriate officials and representatives at Headquarters, bearing in mind, in particular, the need to maintain the independence and integrity of the Commission in accordance with its Statute.

195. The Commission also noted that it was sometimes necessary for Special Rapporteurs to provide their own research and other assistance out of their own resources. The Commission considers that it is wrong that they should have to pay for such assistance and wishes to bring this matter to the attention of the General Assembly with a view to having some budgetary provision made to permit expenses properly incurred by Special Rapporteurs to be covered out of United Nations funds. It is also necessary that Special Rapporteurs should have access to adequate libraries and other sources of information and should, on occasion, be able to travel to New York, and possibly elsewhere, for consultation with appropriate officials of the Codification Division and others. This need may be particularly acute for Special Rapporteurs from more remote parts of the world,

⁶⁷⁷ *Yearbook ... 1979*, vol. II (Part One), p. 197, document A/CN.4/325.

⁶⁷⁸ *Yearbook ... 1977*, vol. II (Part Two), p. 132, document A/32/10, para. 123.

⁶⁷⁹ *Ibid.*, p. 133, para. 129.

⁶⁸⁰ *Yearbook ... 1979*, vol. II (Part Two), p. 190, document A/34/10, para. 210.

especially those where library and similar sources are less well developed. The Commission also wishes to bring this matter to the attention of the General Assembly so that the required facilities may be extended to Special Rapporteurs.

B. Publication of the third edition of the handbook “The Work of the International Law Commission”

196. The Commission took note, with satisfaction, of the publication, at its request, of the third edition of the handbook, *The Work of the International Law Commission*,⁶⁸¹ incorporating a summary of the latest developments of the work of the Commission, as well as the texts of new Commission drafts and codification conventions recently adopted on the basis of Commission drafts. The Commission expresses its appreciation to the Secretariat for the new edition of the handbook, which will be of great use to members of the Commission and to delegations, and will serve as an excellent means of achieving the dissemination and wider appreciation of the work of the Commission among learned societies, universities and the public at large.

C. Tribute to the Deputy-Secretary of the Commission

197. At its 1635th meeting, held on 17 July, the Commission paid a tribute to Mr. Santiago Torres-Bernárdez, Deputy-Director of the Codification Division of the Office of Legal Affairs of the United Nations, and Deputy-Secretary to the Commission, who had served the Commission with high distinction and exemplary dedication since 1960 and who was to resign following his appointment as Registrar of the International Court of Justice.

D. Relations with the International Court of Justice

198. On behalf of the International Court of Justice, Judge Abdullah El-Erian paid a visit to the Commission and addressed it at its 1622nd meeting, on 30 June 1980.

E. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

199. Mr. Milan Šahović, Chairman of the Commission at its thirty-first session, attended, as an observer for the Commission, the twenty-first session of the Asian-African Legal Consultative Committee held at Djakarta from 24 April to 1 May 1980, and made a statement before the Committee.

200. The Asian-African Legal Consultative Committee was represented at the thirty-second session of the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1606th meeting, held on 6 June 1980.

201. Mr. Sen said that, although the competence of the Asian-African Legal Consultative Committee lay primarily in the field of international law, the Committee had expanded its activities in the previous 10 years to meet the practical needs of its members and to carry out the task, entrusted to it by the Asian-African Conference held at Bandung in 1955, of promoting Asian-African co-operation. He noted that the Committee was accordingly focusing its attention particularly on the promotion of consultations between Asian and African States and on the organization of discussions among developed and developing countries as a means of assisting in the negotiations for the conclusion of conventions acceptable to all nations. Such attention had been directed by the Committee, for example, to negotiations for the conclusion of the comprehensive Law of the Sea Convention by the Third United Nations Conference on the Law of the Sea, to other uses of the oceans and their resources under the competence of United Nations specialized agencies such as FAO and IMCO, and to the question of the protection of the environment. In assessing the work of the Committee in the 1980s, he cited as the most important activity the fostering of regional economic co-operation, including industrialization, which would require the preparation of complex legal instruments to establish a balance between the interests of developing States and industrialized nations and the formulation of new rules and patterns of investment protection. In the economic field, he observed that the Committee's most spectacular achievement was the adoption of its integrated scheme for the settlement of disputes relating to economic and commercial matters, which was designed to create stability and confidence in economic transactions in the Asian-African region. In conclusion, he observed that the Committee remained deeply interested in the work of the Commission, particularly since most of the items on the Commission's agenda were of vital importance to the States members of the Committee, and thus looked forward to continued close co-operation between the Commission and the Committee in those areas.

202. The Commission, having a standing invitation to send an observer to the sessions of the Asian-African Legal Consultative Committee, requested its Chairman, Mr. C. W. Pinto, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

2. INTER-AMERICAN JURIDICAL COMMITTEE

203. Mr. Milan Šahović, Chairman of the Commission at its thirty-first session, attended, as an observer for the Commission, the session of the Inter-American

⁶⁸¹ United Nations publication, Sales No. E.80.V.11.

Juridical Committee held in January-February 1980 at Rio de Janeiro, and made a statement before the Committee.

204. The Inter-American Juridical Committee was represented at the thirty-second session of the Commission by Mr. S. Rubin, who addressed the Commission at its 1611th meeting, held on 13 June 1980.

205. Mr. Rubin said that one of the main items on the agenda of the Inter-American Juridical Committee was work in the field of private international law, in connection with which two specialized inter-American conferences had been held in 1979. The conferences had taken up topics such as letters rogatory, the taking of evidence abroad and proof of judgements. The Committee had also considered a suggestion for the adoption of an additional protocol to the Inter-American Convention on the Taking of Evidence Abroad, aimed at reconciling differences between the two systems of law of the American continents, namely, common law and civil law. He also observed that, at its most recent session early in 1980, the Committee had completed work on a draft convention defining torture as an international crime. As to the Committee's future programme, among the 11 items on its agenda he mentioned the question of revision of the inter-American conventions on industrial property, the settlement of disputes relating to the law of the sea and jurisdictional immunities of States. Referring to the method of work of the Committee, he said that the Committee had recognized the great value of the technique of convening meetings of experts to deal with specific issues within the broad areas in which the Committee generally worked. It was his opinion that the technique of convening committees of experts should be used more widely, because members of the Committee had the problem of dealing with difficult technical issues with which they were not always entirely familiar. In conclusion, he cited the topics whose consideration was already reflected in the agenda of both the Commission and the Committee, and suggested that a more regular liaison be established between the two bodies to enable them to exchange documentation and information on their programmes of work. Such exchange would if possible take place well in advance of the annual sessions of both the Commission and the Committee, in order to enable their respective observers to make substantive suggestions while taking part in those annual meetings.

206. The Commission, having a standing invitation to send an observer to the sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. C. W. Pinto, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

3. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

207. Mr. Willem Riphagen, on behalf of the Commission, attended the thirty-first session of the Euro-

pean Committee on Legal Co-operation, held in November 1979, and made a statement before the Committee.

208. The European Committee on Legal Co-operation was represented at the thirty-second session of the Commission by Mr. Erik Harremoes, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1628th meeting, on 8 July 1980.

209. Mr. Harremoes explained the law-making activities of the Council of Europe, dealing first with the Conventions concluded since 1979 and secondly with the draft conventions still in process of elaboration. Of those already concluded, the Convention on the Conservation of European Wild Life and Natural Habitats had been opened for signature at Bern on 19 September 1979. The aim of that Convention was to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation required the co-operation of several States. He also mentioned the Convention on the Recognition and Enforcement of Decisions concerning Custody and on Restoration of Custody of Children, opened for signature at Luxembourg on 20 May 1980. That Convention had a twofold purpose: first, recognition and enforcement of decisions relating to the custody of and accession to children; secondly, restoration of custody in the case of removal of the child to another contracting State. He mentioned lastly the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, which had been opened for signature during the Fourth Conference of European Ministers responsible for Local Government, held in Madrid from 21 to 23 May 1980. The Convention laid down the conditions for international co-operation between local authorities and contained in its appendices a series of model agreements for facilitating such co-operation. As to the conventions still in course of elaboration, he mentioned the draft convention for the protection of individuals with regard to automatic processing of personal data. The convention was expected to be approved by the Committee during 1980 and would be opened for signature early in 1981. Apart from the law-making activities of the Council of Europe, he also discussed the work of the Council as an organization in the wider context of the legal activities of the United Nations and the Council's relationship with other international organizations. In conclusion, he outlined the programme being undertaken by the Council of Europe, which represented a combined political, informational and scientific approach to international co-operation. The programme emphasized three main activities: first, harmonization of substantive law and promotion of international co-operation; secondly, exchange of views and information between member States on their respective legislative activities; thirdly, encouragement of the study of comparative law.

210. He announced that the next session of the Committee would be held at Strasbourg, starting on 24 November 1980, and expressed the hope that it would be possible for the Commission to be represented by an observer. The Commission, having a standing invitation to send an observer to the sessions of the Committee, requested its Chairman, Mr. C. W. Pinto, to attend that session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

4. ARAB COMMISSION FOR INTERNATIONAL LAW

211. The Arab Commission for International Law was represented at the thirty-second session of the Commission by Mr. Mahmoud Al Baccouche.

F. Date and place of the thirty-third session

212. The Commission decided to hold its next session at the United Nations Office at Geneva from 4 May 1981 to 24 July 1981.

G. Representation at the thirty-fifth session of the General Assembly

213. The Commission decided that it should be represented at the thirty-fifth session of the General Assembly by its Chairman, Mr. C. W. Pinto.

H. International Law Seminar

214. Pursuant to paragraph 11 of General Assembly resolution 34/141 of 17 December 1979, the United Nations Office at Geneva organized, during the thirty-second session of the Commission, the sixteenth session of the International Law Seminar for advanced students of that subject and junior government officials who normally dealt with questions of international law in the course of their work.

215. A Selection Committee met under the chairmanship of Mr. Quijano-Caballero, Director of External Relations and Inter-Agency Affairs at the United Nations Office at Geneva. It comprised three other members, former participants in the Seminar: Mrs. Diklić-Trajković (Permanent Mission of Yugoslavia), Mr. Chaudhry (Secretariat, United Nations High Commissioner's Office for Refugees) and Mr. Ramcharan (Secretariat, Division of Human Rights).

216. Twenty-four participants, all of different nationalities, were selected from almost 60 candidates; two were unable to attend, but three fellowship holders under the United Nations/UNITAR programme participated in the session.

217. Participants had access to the facilities of the United Nations Library and were able to attend a film

show given by the United Nations Information Service. They were given copies of the basic documents necessary for following the discussions of the Commission and the lectures at the Seminar and were also able to obtain, or to purchase at reduced cost, United Nations documents that were unavailable or difficult to find in their countries of origin. At the end of the session, participants received an attendance certificate, signed by the Chairman of the Commission and the Director-General of the United Nations Office at Geneva.

218. Between 2 and 20 June, the Seminar held 12 meetings, at which lectures were given, followed by discussions.

219. The following eight members of the Commission gave their services as lecturers: Mr. M. Bedjaoui (The legal aspects of the new international economic order); Mr. S. P. Jagota (Recent developments in the law of the sea); Mr. R. Q. Quentin-Baxter (International liability for injurious consequences arising out of acts not prohibited by international law); Mr. P. Reuter (Is there a law of international organizations?); Mr. W. Riphagen (The content, forms and degrees of State responsibility); Mr. S. M. Schwebel (The law of the non-navigational uses of international water-courses); Mr. S. Sucharitkul (The legal aspects of regional co-operation, with special reference to Asia and the Pacific); Mr. S. Verosta (Towards permanent neutrality in Austria); Mr. A. Yankov (The Third United Nations Conference on the Law of the Sea and the regime for the protection and preservation of the marine environment). In addition, Mr. M. Šahović led the discussion at the meeting held to evaluate the work of the Seminar and Mr. T. van Boven, Director of the Division of Human Rights, spoke on United Nations efforts to promote and protect human rights. As at previous sessions, the introductory talk on the Commission and its work was given by Mr. P. Raton, the Director of the Seminar.

220. As in the past, none of the costs of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Austria, Denmark, Finland, the Federal Republic of Germany, Kuwait, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. For the first time, a private body, the Dana Fund for International and Comparative Legal Studies (of Toledo, Ohio, United States of America) also granted fellowships. With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from participating, solely by lack of funds.

221. Of the 353 participants, representing 105 nationalities, accepted since the beginning of the Seminar in 1965, fellowships have been awarded to 153, not including UNITAR fellowship holders. It is to

be hoped that the aforementioned Governments will continue their efforts and that other Governments will be able to contribute to this movement of solidarity with nationals of developing countries. Particular thanks are due to the Governments of the Netherlands and Sweden, which followed the example set in 1979 by the Government of Norway, for having tripled their contribution in 1980. It is the invariable practice of the

organizers of the Seminar to inform donor Governments of the beneficiaries' names, and the beneficiaries themselves are always told who has provided their fellowships.

222. The Commission wishes to express its thanks to Mr. P. Raton and his assistant, Mrs. A. M. Petit, for their efficient organization of the Seminar.

CHECK LIST OF DOCUMENTS OF THE THIRTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/318/Add.5–7	Eighth report on State responsibility, by Mr. Roberto Ago: The internationally wrongful act of the State, source of international responsibility (<i>concluded</i>)	Reproduced in vol. II (Part One).
A/CN.4/326	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 6 above (A/35/10, para. 8).
A/CN.4/327 [and Corr.1]	Ninth report on the questions of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur (<i>concluded</i>)	Reproduced in vol. II (Part One).
A/CN.4/328 and Add.1–4	State responsibility: Comments and observations of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts	<i>Idem.</i>
A/CN.4/329 and Add.1	The law of the non-navigational uses of international watercourses: Replies of Governments to the Commission's questionnaire	<i>Idem.</i>
A/CN.4/330 [and Corr.1 and 3]	Preliminary report on the content, forms and degrees of international responsibility, by Mr. Willem Riphagen, Special Rapporteur: Part 2 of the draft articles on State responsibility	<i>Idem.</i>
A/CN.4/331 and Add.1	Second report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem.</i>
A/CN.4/332 [and Corr.1] and Add.1	Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	<i>Idem.</i>
A/CN.4/333	Twelfth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: Succession to State archives (<i>continued</i>)	<i>Idem.</i>
A/CN.4/334 and Add.1 [Add.1/Corr.1] and Add.2	Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem.</i>
A/CN.4/335	Preliminary report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.311	Topical summary, prepared by the Secretariat, of the discussion on the report of the International Commission in the Sixth Committee, during the thirty-fourth session of the General Assembly	Mimeographed.
A/CN.4/L.312	Draft articles on treaties concluded between States and international organizations or between international organizations: Texts adopted by the Drafting Committee of articles 61–80 and Annex	Texts reproduced in the summary record of the 1624th meeting (vol. I), para. 30.
A/CN.4/L.313	Draft articles on succession of States in respect of matters other than treaties—draft articles on succession to State archives: Texts adopted by the Drafting Committee of articles C, D, E and F	<i>Idem.</i> , 1627th meeting (vol. I), para. 27.
A/CN.4/L.314 and Add.1 and Add.1/Corr.1	Draft report of the International Law Commission on the work of its thirty-second session: Chapter IV (Question of treaties concluded between States and international organizations or between two or more international organizations)	Mimeographed. For the final text, see A/35/10 (p. 1 above).
A/CN.4/L.315	<i>Idem.</i> : chapter II (Succession of States in respect of matters other than treaties)	<i>Idem.</i>
A/CN.4/L.316	Draft articles on the law of the non-navigational uses of international watercourses: Texts of articles 1–5. X, and explanatory note adopted by the Drafting Committee	Text reproduced in the summary record of the 1636th meeting (vol. I), para. 24.
A/CN.4/L.317	Draft articles on jurisdictional immunities of States and their property: Texts of articles 1–6 adopted by the Drafting Committee	<i>Idem.</i> , 1634th meeting (vol. I), para. 43.
A/CN.4/L.318	Draft articles on State responsibility: Texts of articles 33–35 adopted by the Drafting Committee	<i>Idem.</i> , 1635th meeting (vol. I), paras. 42, 53 and 62.
A/CN.4/L.319	Draft report of the International Law Commission on the work of its thirty-second session: Chapter I (Organization of the session)	Mimeographed. For the final text, see A/35/10 (p. 1 above).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.320 and Add.1-4	<i>Idem.</i> : Chapter III (State responsibility)	<i>Idem.</i>
A/CN.4/L.321 and Add.1	<i>Idem.</i> : Chapter V (The law of the non-navigational uses of international watercourses)	<i>Idem.</i>
A/CN.4/L.322	<i>Idem.</i> : Chapter VI (Jurisdictional immunities of States and their property)	<i>Idem.</i>
A/CN.4/L.323	<i>Idem.</i> : Chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.324	<i>Idem.</i> : Chapter VIII (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem.</i>
A/CN.4/L.325 and Add.1	<i>Idem.</i> : Chapter IX (Other decisions and conclusions)	<i>Idem.</i>
A/CN.4/SE.1584-SR.1642	Provisional summary records of the 1584th to 1642nd meetings of the International Law Commission	Mimeographed. For the final text, see vol. 1.

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