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Justitia et Pace

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Aspects juridiques de la création de superports et d'îles artificielles

(Troisième Commission)[1]

Rapport provisoire

Fritz Münch

I

A la suite de mon exposé préliminaire et du questionnaire du 3 décembre 1976 je n'ai reçu que quatre observations et réponses. S'il est permis de supposer que les confrères qui ne se sont pas manifestés sont d'accord sur les grandes lignes de l'exposé, je peux établir le rapport provisoire sur les bases suivantes :

1. Pour terminer le travail sur le sujet, il ne convient pas d'attendre la fin de la Conférence des Nations Unies sur le droit de la mer. En effet, un seul confrère s'est prononcé pour ce délai.

Néanmoins, on devra observer la marche de la Conférence, et s'il se dessine une tendance influençant essentiellement notre matière, on pourra remettre la conclusion des travaux de la commission jusqu'à ce qu'on sache évaluer la force réelle et la portée juridique de la réforme proposée.

2. Le texte à établir par la commission sera une résolution présentant le droit des superports et des îles artificielles. Ce droit peut s'appuyer sur quelques principes formulés à la Conférence de 1958 ; il reste à voir si, depuis, de nouvelles règles ont pu se former. Deux confrères voudraient que nous proposions une *lex ferenda*.

[1] La Troisième Commission est ainsi composée : M. F. Münch, *rapporteur* ; MM. Bos, Fawcett, Jennings, de La Pradelle, Monaco, Ruda, Scerni, Tunkin, Udina, Verzijl et, jusqu'en 1977, M. Zemanek ; MM. Caflisch et Caminos sont devenus membres de la commission en 1980.

Je pense qu'il faudrait suivre les directives que nos statuts nous donnent en leur article premier, al. 2 lit. a-c. Il y est question des principes du droit, de son progrès, de la conscience juridique du monde civilisé et des besoins des sociétés modernes. En vue du travail pratique je voudrais interpréter cet ensemble de propositions dans ce sens : Il faudra rechercher d'abord des textes et des règles non écrites qui paraissent établies, et ensuite évaluer si ces normes représentent, en toute conscience, un bon ordre international.

3. Il y a pourtant, dans la matière qui nous occupe, une limite à la deuxième étape de la procédure. Certains peuvent estimer que le principe essentiel du droit actuel de la mer doit être modifié, c'est-à-dire que la formule de l'héritage commun de l'humanité qu'est la mer ne doit plus être entendue dans le sens traditionnel que lui assigne encore *Sir Kenneth Bailey* : « The international customary law of the sea took for its starting point and foundation the idea that the sea, and all its resources, were the common heritage of mankind » (Australia and the Geneva Conventions, in : International Law in Australia, 1965, p. 229). Certains voudraient donner un nouveau sens à la formule et proposent que la mer soit administrée par un organe international qui, en même temps, déciderait de la distribution des usages dans un intérêt général. Réaliser cette modification toucherait à un grand nombre de règles sur le droit de la mer qui sont actuellement encore en vigueur, et abrogerait des institutions desquelles sont dérivées ces règles. Ce serait une modification structurelle de tout le droit de la mer, et une question d'organisation, qu'on ne peut introduire que par acte explicite.

Il n'est pas probable que pareil nouveau système puisse être mis sur pied à courte échéance, et c'est pourquoi je pense que nous ferons encore toujours œuvre utile en discutant notre problème sur les bases traditionnelles du droit de la mer.

4. Je ne pense pas qu'il y ait lieu de classifier la mer soit comme *res nullius*, soit comme *res communis*, domaine public ou héritage commun. Déjà l'autorité de *Gilbert Gidel* nous a mis en garde contre pareilles tentatives qu'il considère comme inutiles (Le Droit international public de la Mer, vol. I, 1932, p. 213 ss., voir aussi 497 ss.). Pareille classification ne pourrait être que le résultat de la recherche sur son statut, mais elle n'est pas une question préjudicielle pour connaître le statut. Aussi je ne crois pas que les confrères qui

parlent de la mer comme d'un domaine public ou d'un héritage commun aient en vue autre chose qu'une analogie ou un résumé aux fins de la didactique ou de la systématique.

Le régime de la mer paraît assez bien développé pour se faire comprendre par lui-même ; un point important est réglé par l'art. 2 al. 1, phr. 1, de la Convention de 1958 sur la Haute Mer qui y exclut une souveraineté territoriale.

5. La commission paraît également d'accord pour prendre comme base de ses réflexions la liberté de la mer telle qu'elle est acceptée à l'art 2 précité. Cette liberté signifie l'usage de la mer pour tous et pour toutes les utilisations qui peuvent s'imaginer, et certains ont pu croire que c'est là une notion périmée de nos jours. Cependant chaque liberté générale comporte des limitations inhérentes, ce qui se manifeste maintenant explicitement dans l'alinéa 2 de l'art. 2 de la Convention sur la Haute Mer.

Ce n'est pas seulement le conflit concret de deux usagers qui se règle d'après ce principe (p. ex. dans le cas où une flottille de pêcheurs obstrue une voie de navigation), mais aussi le conflit de l'action individuelle avec l'intérêt général.

On a pu, dans le passé, perdre de vue ces limitations, parce que la protection des ressources et la pollution ne posaient pas encore des problèmes aigus. Mais on trouve des traces de la sollicitude des membres de la communauté internationale longtemps avant le début des tendances actuelles pour réformer le droit de la mer. Elles se manifestent dans des législations nationales et dans des conventions internationales, bi- et plurilatérales ; *Gidel* (*op. cit.* I, livres IV à VI) les a décrites. Ce ne serait donc pas une révolution que de formuler les limitations à la liberté de la mer qui dérivent de l'intérêt général de la communauté internationale comme des obligations *erga omnes*, et d'étendre leur contenu selon les besoins du bon ordre de chaque époque.

D'autre part, je ne trouve pas justifiée l'idée qu'il faudrait abandonner toute l'idée de la liberté de la mer pour la raison que la théorie du caractère inépuisable de ses ressources s'est révélée erronée. D'autres règles du droit international ont été expliquées par des suppositions qui, en réalité, n'ont pas contribué à leur formation mais ont répondu, dans leur temps, au goût de l'argumentation quasi-philosophique. Ainsi on a vu que la portée du

canon, qui joue un si grand rôle dans la doctrine de la mer territoriale, n'a pu réellement soutenir la règle des trois milles, laquelle a cependant été effective jusqu'au milieu de notre siècle.

6. Quelques confrères ont pu ressentir un certain malaise à la lecture du passage qui va du dernier alinéa de la page 8 au second alinéa de la page 9 de l'exposé préliminaire. Je persiste à croire que l'intérêt général qui s'attache au régime de la mer n'a pas de protecteur attitré, et que l'*actio popularis* n'est pas une institution reconnue du droit international public actuel. Cependant, je ne perds pas de vue qu'un certain développement en ce sens se dessine dans le droit procédural, ainsi qu'en témoignent les deux affaires des *Essais nucléaires*.

Les deux mémoires, néo-zélandais du 29-10-1973 et australien du 23-11-1973, invoquent non seulement une violation de droits propres aux requérants, mais aussi un droit à voir observer le droit international général *in abstracto* (para. 191 resp. para. 437, 440, 448, 458, 462, 468). Cette idée est exprimée par la C.I.J. dans l'arrêt *Barcelona Traction* (Rec. 1970 p. 32) ; elle trouve l'assentiment de *Ch. De Visscher*, Aspects du droit procédural de la C.I.J., 1966, p. 70 s. ; et de *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la C.I.J., 1967, p. 142.

La Cour ne s'est pas prononcée sur ce point dans l'affaire des *Essais nucléaires* (Rec. 1974), et elle avait rejeté l'*actio popularis* dans son arrêt sur le fond du *Sud-Ouest Africain* (Rec. 1966, p. 47). Notre confrère *Jessup* a consacré à cette question des passages de ses opinions individuelle et dissidente (Rec. 1962, p. 425 ss., 1966, p. 373 ss.) et a relevé qu'il n'y a pas d'*actio popularis* générale, mais que l'idée en a été exprimée dans maints textes et qu'elle peut servir à en interpréter d'autres.

Pour ma part, je ne vois pas non plus dans le projet de convention sur le règlement des différends, élaboré à la Conférence sur le droit de la mer (Revised Single Negociating Text A/Conf. 62/WP 9/Rev. 1), l'admission de ce moyen. L'étude des art. 62 et 63 du Statut de la C.I.J., de leurs commentaires et de leur pratique ne nous avance pas non plus, l'art. 62 renvoyant aux principes réglant la recevabilité des plaintes.

En résumé, je propose de ne pas s'abstenir de formuler pour les Etats des obligations générales d'intérêt général, de laisser au

développement de la jurisprudence la question de l'*actio popularis*, et de joindre à la résolution le vœu que ce développement se réalise et que la Conférence, si elle met sur pied un système de règlement des différends, admette expressément le droit pour chaque Etat de saisir la juridiction sans devoir justifier d'un intérêt concret.

II

1. Il reste à compléter l'exposé préliminaire, dans sa relation des cas et projets (I 1) par deux indications :

a) Il faut se rappeler que les Alliés, pour débarquer en Normandie, ont utilisé des ports artificiels flottants, composés de pièces remorquées (*Mulberries*).

b) A propos du leck Ekofisk on a appris que la société exploitante projette d'établir, à proximité des sondages, une île artificielle à part pour le logement du personnel.

2. Les confrères paraissent accepter les définitions que j'avais proposées dans l'exposé préliminaire. L'un d'eux note que le superport n'est rien d'autre qu'un assemblage d'îles artificielles. En effet, j'avais utilisé les éléments de la définition de celles-ci pour définir le superport.

Je propose de maintenir, sauf retouches rédactionnelles, la définition de l'île artificielle dans ces termes :

« Toute construction fixée au sol de la mer ou flottant en permanence à un endroit, entourée d'eau, qui reste découverte à marée haute ».

Les explications qui se trouvent au § 6, a) de l'exposé préliminaire peuvent être sous-entendues, et elles devront sans doute figurer au rapport définitif. Il faudra notamment répéter que la construction est un fait de l'homme, autre qu'un navire ou une bouée, que l'étendue de l'île artificielle est sans influence, ainsi que le matériel qui la compose.

Pour le superport on pourrait simplifier la définition en disant qu'il est une île artificielle ou un assemblage d'îles artificielles, servant de port.

3. A ce propos, votre rapporteur voudrait revenir sur les observations qu'il a faites à l'avant-dernier alinéa du § 6, b) de l'exposé

préliminaire. Non seulement les superports, mais aussi les autres îles artificielles, peuvent comporter des parties n'émergeant pas continuellement de l'eau, et même des parties submergées en permanence, et ceci en dehors de la circonférence de la partie émergeant de manière permanente. On pourrait dire en commentaire que ces parties d'une île artificielle ou d'un superport doivent être comprises dans la définition et dans le régime légal.

Mais la question se pose du régime à reconnaître aux constructions isolées qui ne sont pas des îles artificielles mais, — dans la terminologie courante, — des élévations artificielles, parce qu'elles ne se découvrent que temporairement, et aux constructions qui n'émergent jamais mais sont assez proches de la surface pour gêner la navigation et la pêche dans la même mesure que les îles artificielles. Votre rapporteur ignore si la Commission des travaux a voulu réserver ce cas à une étude ultérieure. Les « maisons sous la mer » que l'I.L.A. a fait figurer comme un thème à part semblent se placer, selon le rapport de M. *du Pontavice*, à des profondeurs plus grandes ; cependant rien n'empêche *a priori* des constructions à courte distance de la surface dont certains problèmes seront identiques à ceux des îles artificielles.

Pour le moment cependant, votre rapporteur se bornera à envisager les accessoires découvrants ou submergés des îles artificielles et des superports.

III

Le silence de la plupart des membres de la Troisième Commission et les réponses des autres confrères paraissent révéler une grande mesure d'accord sur les thèses énoncées dans l'exposé préliminaire. La contestation principale concerne la mesure de liberté que le régime actuel de la mer admet pour la construction d'îles artificielles en haute mer et dans les zones à prérogatives limitées. Pour y répondre, ce rapport provisoire va s'écarter du plan qui gouverne l'exposé préliminaire et considérer tout d'abord le statut de la haute mer.

1. Les membres de la commission qui se sont exprimés acceptent le principe de la liberté de la mer et admettent qu'aucune liberté particulière n'a besoin d'être mentionnée ou reconnue expressément.

Il y a cependant des dissensions sur deux points pertinents pour notre étude. La liberté, dit-on, d'une part, ne peut pas aller jusqu'à détruire la liberté même, et d'autre part, il est douteux que le particulier soit bien titulaire de la liberté de la mer.

Quant au premier point, il est certain que les projets d'îles artificielles hébergeant des dizaines de milliers d'habitants peuvent nous effrayer. Votre rapporteur persiste néanmoins à penser que ce sont des cas à régler dans le cadre habituel, c'est-à-dire en évaluant les dommages et les gênes causés aux autres usagers de la mer. Il ne croit pas que tout fait qui résulterait d'une occupation *de facto* d'une partie de la mer ou de son sol soit en contradiction avec le principe de la liberté de la mer ou avec son statut, pour parler en termes plus généraux. C'est cependant ce que dit M. *du Pontavice* dans son rapport déjà mentionné sur les maisons sous la mer, présenté à l'International Law Association (2e rédaction pour le 57e Congrès, 1976, p. 12 s.). L'exposé préliminaire, aux alinéas 3 et 4 de son § 4, et à l'alinéa 2 de son § 6, a), a mentionné des cas où des surfaces de mer ont été désaffectées ; à l'alinéa 1er du § 4 il a rappelé les utilisations privatives durables de la mer, et il ne faut pas oublier que la communauté internationale a légalisé, il n'y a pas vingt ans, les installations servant à exploiter le plateau continental bien qu'elles soient semi-permanentes et très nombreuses en certains parages.

Il ne semble donc pas qu'en principe une occupation de fait soit nécessairement illicite. M. *du Pontavice* suggère le remède d'une administration internationale de la mer qu'il voit proche et qui aurait à octroyer des concessions ou permis de construire. Cependant notre étude part de l'état actuel des choses, état de transition si l'on veut, dans lequel on ne peut que formuler des obligations des Etats en faveur de l'intérêt général, et espérer l'introduction, par la pratique de la juridiction internationale, de l'*actio popularis* (voir ci-dessus I 5 et 6).

2. L'autre point concerne la position de l'individu dans ses activités en mer. Votre rapporteur ne voudrait à aucun prix ranimer la discussion dogmatique sur les sujets du droit international public, car elle ne servirait guère un but pratique dans cette étude. Il s'agit du fait qu'au stade actuel du droit international on ne réussit pas à établir le monopole des Etats pour la construction d'îles artificielles ou même de superports et que des cas spectaculaires d'îles

artificielles sont dus à l'initiative privée agissant au mépris des autorités. Il se peut que les droits nationaux créeront pareil monopole, ou bien soumettront les activités individuelles y relatives à une réglementation étatique, à l'instar du *Deepwater Port Act* de 1974 ; les confrères auraient beaucoup de mérite à signaler les textes semblables.

Mais même alors, des contraventions se produiront en dehors des juridictions territoriales, et il faudra savoir comment en traiter les produits. Faudra-t-il appliquer, par analogie, les principes développés à l'égard de la piraterie ?

Il ne paraît pas indiqué à votre rapporteur d'appliquer un système tellement exceptionnel à la répression des actes individuels qui contreviennent au régime international des îles artificielles et des superports. La police des activités individuelles en haute mer continue, en principe, à être organisée sur la base de la juridiction personnelle des Etats sur leurs nationaux et sur les navires battant leur pavillon (ou enregistrés auprès d'eux). Ce principe est consacré expressément par les articles 11, alinéa 3, et 22 de la Convention de 1958 sur la Haute Mer.

On peut penser de nos jours que la liberté de la mer comporte *eo ipso* le respect de l'intérêt général, c'est-à-dire que la pollution de la mer et l'exploitation excessive de ses richesses sont contraires au droit international général (voir art. 25 de la Convention de 1958 sur la Haute Mer et art. 1 al. 2 de la Convention de 1958 sur la Pêche). Néanmoins, les Conventions de 1958 elles-mêmes, sauf pour le cas de la piraterie, et les conventions multilatérales relatives à la pollution de la mer, à la protection des espèces marines, même celles sur l'exercice de la pêche, recourent, pour la répression envers les individus, à l'action de l'Etat du pavillon. Les Etats parties à pareils textes s'obligent à édicter des lois et à poursuivre les contrevenants sous leur juridiction qui est personnelle en principe et territoriale seulement lorsque le fait s'est produit dans une zone maritime placée sous leur souveraineté. Rares sont les conventions qui permettent aux cocontractants de visiter et de saisir les navires contrevenants ; et même alors la poursuite pénale est réservée au pavillon.

Le régime de la haute mer est donc défectueux, en tant que l'individu ne peut être discipliné que lorsque l'Etat auquel il ressortit (ou duquel le navire bat le pavillon) a édicté des lois défendant les actes interdits par le droit international. Exception est faite de

nouveau quant à la piraterie qui ne tient pas compte de la loi nationale du pirate.

Cela ressemble au plus pur dualisme, mais ne dérive d'aucun argument dogmatique. Cela reflète simplement la situation de l'individu dans un Etat qui tout normalement adhère au principe *nulla poena sine lege.*

3. La question sera donc celle de savoir si tout Etat est obligé, en droit international public général, d'établir un système de sanctions au profit du droit international général, et s'il encourt une responsabilité lorsque sa législation est insuffisante. En matière de délit international cet argument nous est familier. Rappelons aussi que dans des textes datant du siècle passé les cours suprêmes de justice ont été parfois chargées de connaître des infractions au droit des gens. Mais ces formules sont trop vagues pour être opérantes, et le fait est qu'en matière de la protection de la mer les textes conventionnels imposent comme une nouvelle obligation celle de légiférer.

On ne voit pas que cette obligation soit déduite du droit international général ; elle apparaît comme due au bon vouloir des gouvernements qui se décident à faire quelque chose en faveur du milieu marin. Les conclusions auxquelles est arrivé le colloque de 1973 de l'Académie de La Haye sur la protection de l'environnement et le droit international ne vont pas au-delà de cette position, et *L. Caflisch* (International Law and Ocean Pollution, Revue Belge de Droit international 1972 p. 7-33) est franchement sceptique à cet égard.

Il faudrait cependant se demander si la conscience juridique contemporaine peut considérer cet état de choses comme un ordre juridique satisfaisant. Pourrait-on dans la négative établir à charge de tout Etat l'obligation de droit international général d'interdire à ses sujets et navires la construction d'îles artificielles et de superports en des endroits où ils gêneraient sensiblement l'usage particulier des ressortissants d'un autre Etat déterminé ou l'usage général ?

Il faut encore faire observer que la législation seule, et même les efforts d'atteindre les coupables, ne garantissent pas suffisamment le bon ordre. La responsabilité de l'Etat pour les faits de ses sujets et navires en haute mer dépend de l'intervention d'un fait de

l'Etat lui-même — excepté lorsque l'Etat a nationalisé les industries usant et exploitant la mer et que les individus se trouvent être des agents gouvernementaux de ce fait.

La conclusion est donc que le système traditionnel de la juridicité de la mer est encore en pleine évolution et que les conventions multilatérales récentes l'affirment davantage. Tout au plus, pourrait-on formuler un vœu en faveur d'une action générale des Etats pour imposer à leurs sujets et navires le respect des intérêts généraux de la communauté internationale sur mer.

4. A ce propos votre rapporteur voudrait répéter qu'il existe un moyen pour empêcher qu'en matière d'îles artificielles et de superports l'individu agissant sans protection gouvernementale n'échappe à toute discipline. Ce moyen consiste en l'occupation et l'annexion de ces particules de surface solide par l'Etat le plus diligent.

Cette proposition (voir exposé préliminaire § 10, al. 4 ss.) ne doit pas être prise comme une critique de l'attitude du gouvernement néerlandais dans l'affaire REM, attitude dont votre rapporteur a reconnu le motif recommandable (§ 10 l.c. al. antépénult.). Mais il lui a paru dangereux d'étendre la compétence substantielle que l'Etat riverain possède sur son plateau continental. D'autre part, il fallait penser aux îles artificielles qui pourraient être construites en dehors de tout plateau continental.

Le rappel ou la reconnaissance du droit d'occupation et d'annexion des surfaces solides en haute mer, y compris dans les eaux surjacentes aux plateaux continentaux, peut servir utilement d'avertissement aux intéressés de se procurer, dès le début de leurs entreprises, l'assentiment et la protection d'un gouvernement. Celui-ci alors se rend internationalement responsable, et la question de savoir si la construction de l'île ou du superport est licite, se discute par les voies diplomatiques normales, et se résout éventuellement dans les procédures normales du règlement des différends.

5. C'est ainsi d'ailleurs que la propriété privée de la construction pourra être sauvegardée. Votre rapporteur, au § 10 de l'exposé préliminaire, était allé rechercher des analogies dans le régime des îles naturelles occupées par des particuliers et ensuite seulement par un Etat. Il a cru pouvoir constater que les droits des particuliers ne sont pas invariablement maintenus en droit anglo-saxon ; très

probablement leur sort est encore plus incertain dans les régimes socialistes. Votre rapporteur n'a pas connaissance de l'existence ou du succès de réclamations des intéressés dont les îles artificielles en haute mer ont été saisies ou même détruites par les autorités, mais il tâchera d'obtenir des renseignements pour le rapport définitif.

6. Le cas d'une communauté politique se formant sur une île artificielle ressortit de la théorie générale de l'Etat. Il soulève cependant le problème de déterminer la limite entre une utilisation privative durable de la mer et une désaffectation permanente d'une partie de la mer. Le même problème est d'ailleurs posé par une grande île artificielle sur laquelle serait installée une population de quelques milliers d'hommes, cas évoqué par un autre membre de la commission.

Votre rapporteur ne sait pas si pareil cas ne devrait pas être assimilé à ces travaux qui depuis des siècles ont fait avancer, en Hollande et en Frise, la terre ferme aux dépens de la mer, et qui, pour autant qu'il sache, n'ont pas suscité des protestations de droit international.

IV

1. Le projet provisoire de résolution, annexé à ce rapport, consiste en un préambule, sept articles et deux vœux. Dans sa tendance générale il se base sur l'exposé préliminaire, modifié légèrement dans les développements de ce rapport. La forme de résolution semble être acceptable à la commission. On pourrait encore envisager une retouche rédactionnelle au titre, en disant « îles artificielles et superports », car le superport apparaît comme une île artificielle spécialisée ou bien comme une agglomération d'îles artificielles.

Quant aux détails, les observations suivantes peuvent servir d'exposé des motifs.

2. Le préambule doit refléter la situation transitoire dans laquelle l'Institut s'occupe de son objet. Il doit expliquer pourquoi l'Institut n'attend pas la fin des travaux de la Conférence sur le droit de la mer, et pourquoi il ne s'avance pas lui-même plus loin vers une

réforme du droit maritime. Faute d'organisation administrative internationale de la mer, on ne peut pas proposer de changements radicaux des règles matérielles.

Le quatrième alinéa, par la formule « en attendant », signale les réserves dont l'Institut lui-même doit accompagner son œuvre.

Le cinquième alinéa, lorsqu'il évoque les besoins actuels, vise l'affirmation, à l'art. 4, des obligations des Etats envers l'intérêt général, et les deux vœux qui suggèrent, dans l'état présent du droit de la mer, des améliorations qui peuvent être introduites en dehors de la grande réforme. Car il semble à votre rapporteur que l'*actio popularis* est en voie de naissance et que la jurisprudence internationale pourrait, de par sa propre initiative, en légitimer la pratique (supra I 6). La réalisation de l'autre vœu, la mise sous contrôle efficace de la construction d'îles artificielles par leurs sujets, se recommande aux Etats pour des raisons assez évidentes.

3. Votre rapporteur a hésité à faire figurer les définitions du superport et de l'île artificielle en tête des articles. Cependant il le propose parce que les définitions ne découlent pas forcément des textes en vigueur, et parce qu'il existe une convention (celle de Londres, du 2 novembre 1973, contre la pollution des mers) qui comprend les plates-formes fixes ou flottantes sous la notion des navires (art. 2, al. 4).

Par ailleurs la discussion, dans les années 1924 à 1935, sur les aéroports flottants à installer au service de l'aviation transatlantique, a souffert passablement de l'absence d'une définition claire de ces objets. Certains y voyaient des navires, d'autres des îles, d'autres encore en faisaient une nouvelle catégorie d'usagers de la mer.

Il paraît nécessaire de réserver le statut des installations construites sur le plateau continental en vue de l'exploration et de l'exploitation de celui-ci. On ne doit pas hésiter, semble-t-il, de formuler cette réserve comme si le statut de ces installations était devenu de droit commun international.

4. Les art. 2 et 3 laissent à l'Etat riverain la faculté de prohiber la construction, par d'autres, d'îles artificielles et de superports. Cette formule est plus flexible et laisse à l'Etat riverain la liberté de déterminer lui-même son attitude à l'égard des particuliers intéressés à de pareilles constructions.

La formule choisie n'empêcherait pas l'Etat riverain d'instituer

un contrôle préventif de toutes les constructions projetées dans les eaux visées aux deux articles.

Dans l'art. 3, est respecté l'état actuel du droit de la mer d'après lequel les zones à prérogatives ne sont soumises qu'à certaines compétences de l'Etat riverain.

5. A l'art 4, dans la troisième hypothèse, la responsabilité de l'Etat riverain est fondée sur sa compétence territoriale (renvoi à l'art. 1er) et quasi-territoriale (renvoi à l'art. 2), et elle résulte alors de son inaction. Votre rapporteur pense que c'est un cas licite de codification progressive.

6. Votre rapporteur n'étant pas convaincu d'un effet indirect de la souveraineté riveraine dans les zones à prérogatives — elles ne sont pas des zones « d'attraction juridique » —, a admis, à l'art. 5, al. 2, la souveraineté possible d'un autre Etat sur une île artificielle ou un superport.

Est-il nécessaire de dire que les Etats en cause peuvent par convention régler la souveraineté ?

Pour le dernier membre de phrase qui concerne les constructions établies par des particuliers sans appui gouvernemental quelconque, voir le § 8 al. 6 de l'exposé préliminaire et le no. III 4 ci-dessus.

Il ne semble pas nécessaire de se prononcer dans le projet sur les droits privés rattachés aux îles artificielles et aux superports. Ce sont des questions de droit national, éventuellement naturel, mais tombant sous l'empire de l'Etat qui s'empare d'un objet qui est, en droit international et quant à la souveraineté, *nullius*.

Pour le reste, votre rapporteur a cru que la réserve énoncée à l'art. 1, al. 2, pour les installations servant à l'exploration et à l'exploitation du plateau continental suffisait ; il s'est donc abstenu d'en reparler à l'art. 5.

7. Le dernier membre de phrase de l'art. 6 ne détermine pas le statut des eaux portuaires du superport. Il paraît que ces eaux ne conservent pas le statut antérieur à la construction. En vue des développements au § 13 al. 3 de l'exposé préliminaire, votre rapporteur ne croit pas qu'on puisse dire davantage.

Heidelberg, 14 juin 1977.

V

Projet provisoire de résolution

L'Institut de Droit international

constatant l'activité croissante dans la construction de superports et d'îles artificielles ;

ne trouvant pas, dans les textes actuellement en vigueur, un régime assez bien défini des superports et des îles artificielles ;

estimant que malgré les efforts déployés pour une réforme du droit international public de la mer, l'instauration d'une administration collective de la mer ne paraît pas prochaine ;

jugeant nécessaire de clarifier, en attendant, le régime des superports et des îles artificielles à partir des principes qui constituent la base du droit actuel de la mer ;

s'inspirant en même temps des besoins de la société internationale moderne ;

propose les articles suivants comme régime légal approprié des superports et des îles artificielles :

Article premier

Au sens de cette résolution :

Une île artificielle est toute construction fixée au sol de la mer ou flottant en permanence à un endroit, entourée d'eau, et qui reste découverte à marée haute ;

un superport est une île artificielle ou un assemblage d'îles artificielles, servant de port.

Les îles artificielles servant d'installations pour explorer ou exploiter le plateau continental restent soumises au régime décrit à l'art. 5 de la Convention de 1958 sur le Plateau continental.

Article 2

L'Etat peut prohiber dans ses eaux intérieures et territoriales, ainsi que dans sa zone contiguë, s'il en a, la construction d'îles artificielles et de superports.

Article 3

L'Etat peut prohiber sur son plateau continental et dans sa zone économique, s'il en a, la construction d'îles artificielles et de superports lorsqu'il en résulterait une gêne considérable pour l'exploitation des richesses soumises à sa prérogative.

Article 4

L'Etat qui construit une île artificielle ou un superport, qui en autorise la construction ou qui, dans les hypothèses des articles 1 et 2, n'en prohibe pas la construction, doit veiller à ce que ni la construction ni l'utilisation de ces îles n'entravent sensiblement la navigation internationale, ne nuisent sensiblement aux ressources de la mer, ou ne causent des pollutions sensibles.

Article 5

Les îles artificielles et les superports construits dans les eaux intérieures et territoriales sont sous la souveraineté de l'Etat riverain. Dans les autres eaux maritimes ils sont sous la souveraineté de l'Etat qui les a construits ou qui a autorisé leur construction, éventuellement sous la souveraineté de l'Etat qui les aura occupés.

Article 6

Les îles artificielles et les superports ne comportent ni mer territoriale, ni plateau continental ni zone à prérogative ; cependant les articles 4, al. 3, 8 et 11 de la Convention du 29 avril 1958 sur la Mer territoriale et la Zone contiguë sont réservés. L'Etat auquel échoit la souveraineté peut établir des zones de sécurité telles qu'elles sont décrites à l'art. 5, al. 2 à 7, de la Convention du 29 avril 1958 sur le Plateau continental, et un régime pour les superports et les rades qui éventuellement y seraient attachées.

Article 7

L'existence d'îles artificielles ou de superports ne change pas les limites des zones d'eaux maritimes entre Etats voisins ou se faisant face.

Vœux :

L'Institut de Droit international,

I. *estimant* qu'il existe des obligations des Etats envers la communauté internationale qui sont d'intérêt général,

regrettant que les procédures et les sanctions du droit international ne sont pas d'application certaine dans pareils cas,

émet le vœu

que la jurisprudence internationale développe le moyen procédural de l'*actio popularis*.

II. *trouvant* insuffisants les remèdes dont dispose la communauté internationale envers les actes des particuliers lorsque ceux-ci lèsent l'intérêt général par la construction inconsidérée d'îles artificielles ou de superports en mer,

émet le vœu

que chaque Etat adopte des mesures législatives et administratives pour empêcher que des particuliers construisent en mer des îles artificielles ou des superports sans qu'il soit constaté au préalable que l'intérêt général de la communauté internationale n'ait à en pâtir.

Annexe I

Aspects juridiques de la création de superports et d'îles artificielles

(Troisième Commission)

Exposé préliminaire

Fritz Münch

I

1. Le thème proposé à la Troisième Commission prend une importance croissante à mesure que la technique de la construction se perfectionne et que les activités sur mer augmentent. Depuis longtemps des ouvrages de port se sont étendus vers la mer ; des phares, des signaux et des fortifications ont été érigés sur des rocs, mais les problèmes de droit international qui s'y rattachent n'ont pas été beaucoup discutés, l'envergure de pareilles constructions ne portant guère atteinte aux intérêts d'autres Etats.

De nos jours il en est autrement, et il suffira de rappeler quelques affaires, projets et textes :

a) En 1963, une entreprise se mit à construire des maisons sur des récifs au large de la Floride, en dehors des eaux territoriales, mais l'établissement fut détruit par un cyclone. Les intéressés poursuivirent néanmoins leurs plans et un groupe de concurrents revendiqua même des droits antérieurs. Les Etats-Unis firent cesser ces activités. L'histoire est succinctement relatée dans les décisions *U.S. v. Ray*, 294 F. Supp. 532, et *Atlantis Development Corporation v. United States*, 379 F. 2d 818, du 2 janvier 1969 et du 12 juin 1967 respectivement US Ct. of Appeals 5th Circuit.

b) En 1964, les Pays-Bas se trouvaient importunés par une plateforme artificielle érigée — en dehors de leurs eaux territoriales — par une entreprise « *R.E.M.* » qui diffusait des émissions radiophoniques.

Les Pays-Bas, par une loi du 3 décembre 1964 (Wet installaties Noordzee, Staatsblad 1964 p. 1129) ont soumis les installations artificielles, construites sur leur plateau continental, à leur juridiction et se sont emparés de ladite plate-forme. Pour les détails, qui ont été discutés dans une vaste littérature, on peut renvoyer aux travaux préparatoires de cette loi (Staten Generaal, 1963-64 et 1964-65, Bijlagen 7643, et notamment au nr. 8 : consultation sur les questions de droit international d'un comité de juristes, traductions en français de quelques pièces voir dans Nederlands Tijdschrift voor internationaal Recht vol. 12, 1965, p. 202 s.).

c) En 1965, une entreprise britannique installa un poste de radiodiffusion au *Red Sands Tower*, une fortification désaffectée, construite sur le fond de la mer devant la côte du Kent. L'entreprise se vit condamnée pour gestion non autorisée de ce poste. La question essentielle était de savoir si la tour était située dans les eaux territoriales britanniques, et les juges l'affirmaient parce qu'elle était à une distance de moins de trois milles d'un banc de sable qui, pour sa part, se trouve à moins de trois milles de la laisse de basse mer de la terre ferme (*R. v. Kent Justices ex parte Lye* e.a. [1967] 1 All E.R. 560). Il est à remarquer que personne n'a considéré ce fort comme une île faisant partie du Royaume[1]. *M. Haucke*, Piratensender auf See, 1969, p. 187, mentionne deux cas analogues : *Radio Essex* et *Radio City*.

d) En 1968 un groupe de citoyens italiens construit, sur un banc en dehors des eaux italiennes, devant Rimini, recouvert de 12 m d'eau, l' « *île des Roses* » avec un établissement de tourisme. La police italienne est venue occuper l'île artificielle et mettre fin aux activités de ses fondateurs, (*P. Paone*, Il caso dell « Isola delle Rose », Rivista di Diritto Internazionale vol. 51 (1968) p. 505 ss.). Par la suite, les autorités ont encore exigé la démolition de la plate-forme, et les intéressés en ont appelé en vain au Conseil d'Etat (Consiglio di Stato, 14.11.1969, no. 718, *ibid.* vol. 55 [1972] p. 728, et voir *P. Mengozzi*, *ibid.* p. 612 pp.).

[1] Dans l'affaire parallèle *Post Office v. Estuary Radio Ltd.* [1967] 3 All ER 663, [1968] 2 QB 740 les juges ont constaté que la tour se trouve dans les eaux intérieures britanniques de l'estuaire de la Tamise (l.c.p. 684 D, 760 B).

e) En 1971, des individus groupés dans une société nommée Ocean Life Research Foundation ont rehaussé les atolls *Minerva* dans le Pacifique et y ont proclamé une prétendue république indépendante (*Lawrence A. Horn*, To Be or Not to be : The Republic of Minerva - Nation Founding by Individuals, Columbia Journal of Transnational Law vol. 12 [1973] p. 520-556. Par proclamation du 15.6.1972 le Royaume de Tonga a annexé ces îles artificielles sous le nom de Teleki Tokelau et Teleki Tonga (U.N. Legislative Series, ST/LEG/SER B/18 p. 32).

Signalons encore toute une série d'entreprises et de projets semblables — quelques-uns allant jusqu'à prévoir l'installation de villes entières sur une île artificielle — chez *Craig W. Walker*, San Diego Law Review, vol. 10 (1973) p. 638 ss.. C'est dire que l'idée de fonder des îles artificielles et d'y établir de nouvelles communautés paraît assez séduisante au public. On trouve même des fonds importants pour réaliser de pareilles affaires.

Parmi les projets présentant un intérêt technique et même d'utilité publique, notons-en deux qui ont été discutés par la doctrine :

f) L'installation d'une centrale nucléaire sur une île artificielle dans les eaux territoriales ou sur le plateau continental de la Belgique : lire *J. Gol*, Annales de la Faculté de droit de Liège, 1976 pp. 125-149.

g) La création par les Pays-Bas d'une île artificielle pour y déposer et exploiter des déchets (*A.H.A. Soons*, Nederlands Juristenblad 1972 pp. 1009-1018).

Ce projet paraît prendre des dimensions plus vastes sous le nom de « Sea-Island Project », élaboré par le North Sea Group, aux Pays-Bas. MM. *Bouchez*, *Jaenicke* et *R.Y. Jennings* ont écrit une étude fort intéressante concluant à la possibilité de créer cette île sous l'autorisation des Pays-Bas en tant que titulaires des droits souverains sur le plateau continental.

Mentionnons encore qu'il existe au Brésil, à 8 milles de la terre ferme, un « Artificial Island Trans-Shipment Terminal ». Des renseignements sont donnés par les ingénieurs P. Soros et B. Koman dans un communiqué de l'Offshore Technology Conference, à Dallas (Texas) OTC 2099, de 1974.

Les emplacements susceptibles de convenir à l'installation d'îles artificielles sont assez nombreux. La Mer Baltique et la plus grande partie de la Mer du Nord, cette dernière avec de nombreux bancs, se prêteraient facilement à l'activité de leurs riverains industrialisés. Des configurations analogues se trouvent devant les côtes orientales de l'Amérique. Il existerait en outre dans le Pacifique soixante-dix montagnes submergées s'élevant jusqu'à 200 m. et moins de la surface (*S.K. Eaton jr.* et *J. Judy*, San Diego Law Review, vol. 10 (1973) pp. 599-637).

Quant aux superports, les indications les plus complètes parues dans la littérature juridique semblent être celles de *Williams H. Lawrence*, Journal of Maritime Law and Commerce vol. 6 (1974/75) p. 577. Un projet belge « Zeestad » est discuté par *J. Levy-Morelle*, Revue Belge de Droit international 1975, pp. 161-174. Les plans développés aux Etats-Unis sont mentionnés dans les travaux préparatoires du *Deepwater Port Act* de 1974 (US Code, Congressional and Administrative News 1974 vol. 4 p. 7529 ss., en particulier p. 7534, 7540, 7551), et ils sont commentés par *Kath. A. Graham*, Virginia Journal of International Law, vol. 15 (1975) p. 930 ss.

Il existe déjà des superports aux Caraïbes et au Koweit, mais apparemment dans des eaux intérieures ou territoriales. Comme les ports des Etats-Unis ne suffisent pas aux très grands bateaux-citernes modernes et qu'il serait impraticable de les draguer, on songe à placer des installations de types divers assez loin de la côte. La législation américaine s'est occupée surtout des aspects anti-trust ; les problèmes de droit international ont été considérés comme faciles à résoudre.

Pour être complet, au risque de me voir reprocher une digression, je mentionne les projets danois et danois-suédois de jeter des ponts sur les détroits reliant la Mer Baltique à la Mer du Nord. Notre confrère *Sorensen* les discute dans sa contribution aux Mélanges Eberhard Menzel, Recht im Dienst des Friedens, 1975 (Brückenbau und Durchfahrt in Meerengen, pp. 551-563). Ces ponts paraissent poser des problèmes connexes à ceux qui nous occupent en tant qu'on pourrait qualifier leurs piliers, sinon leur construction entière, d'îles artificielles, et que pareils ponts pourraient se joindre aux superports. En tout cas, les auteurs de ces projets ont réfléchi aux entraves que ces ponts pourraient mettre à la navigation des pavillons étrangers, donc un point à considérer dans nos recherches.

2. Les questions essentielles qui paraissent se poser sont :

a) Est-il permis d'établir des îles artificielles et des superports ?

b) Des particuliers peuvent-ils exercer ce droit éventuel ?

c) Faut-il demander, et à qui, le consentement ?

d) Quel sera le statut juridique des îles artificielles et des superports ?

e) Quelles seront les répercussions légales de ces constructions sur le statut des eaux environnantes ?

f) L'existence de ces constructions peut-elle modifier les limites des zones de mer d'un Etat voisin ?

g) Quelles sont les obligations des Etats qui construisent, autorisent, occupent ou utilisent ces constructions ?

Chaque question se subdivise selon le statut de la zone de mer dans laquelle les constructions vont se situer.

3. Ces questions ne trouvent pas des réponses immédiates dans le corps de droit international tel que nous le connaissons. Les attitudes des Etats et les opinions émises dans les discussions récentes sont divergentes.

A côté de la doctrine qui s'est occupée de cas déterminés et qui, en partie, est citée au premier § de cet exposé, il y a celle qui, sans plaider pour ou contre un projet particulier, examine le thème de manière plus générale. Il faut mentionner notamment :

Hub. Charles : Les Iles artificielles, Revue Générale de Droit International Public, vol. 71, 1967, p. 342-368 — *Mich. Haucke :* Piratensender auf See, 1969, p. 82-88, 157-184 — *Rapport sur la situation juridique d'îles artificielles créées en haute mer* (Margue) 1971, Doc. 3054 de l'Assemblée Consultative du Conseil de l'Europe — *A.M.J. Heijmans :* Artificial Islands and the Law of Nations, Nederlands Tijdschrift voor International Recht, 1974 p. 139-161[2] — *L.J. Bouchez* : Kunstmatige Eilanden en het mariene Milieu, Tijdschrift voor Milieu en Recht, 1975 p. 97-108 — *Rainer Lagoni :* Künstliche

[2] Le texte néerlandais : Kunstmatige Eilanden en het Volkenrecht, dans Mededelingen van de Nederlandse Vereniging voor Internationaal Recht n° 68, 1974, n'en diffère que peu.

Inseln und Anlagen im Meer, Jahrbuch für Internationales Recht, vol. 18, 1975, p. 241-282 — *D. Chr. Dicke :* Die völkerrechtliche Problematik von Bohrinseln, Berichte der Deutschen Gesellschaft für Völkerrecht, Hft 15, p. 285-301.

Dans ces circonstances, on voudrait bien chercher des points acquis de droit positif à partir desquels on pourrait argumenter les questions de détail. Il faut pourtant se demander d'abord si le système établi par les textes de Genève de 1958 et qu'on aurait à compléter en tenant compte de :

Sir Cecil Hurst : Whose is the Bed of the Sea ? B.Y.B. vol. 4 (1923/24) p. 34-43 — *M.F. Lindley :* Acquisition and Government of Backward Territory in International Law, 1926, p. 65-71 — *Gilbert Gidel :* Le Droit international public de la Mer, 3 vol. 1932-1934 — *D.H.N. Johnson :* Artificial Islands, I.L.Q. vol. 4, 1951, p. 203-215, tient encore. Les aspirations et les exigences envers un droit nouveau de la mer telles qu'elles se sont manifestées dans les discussions des derniers quinze ans, surtout à la Troisième Conférence des Nations Unies sur le droit de la mer, ont-elles déjà pu avoir pour effet de faire tomber en désuétude les règles traditionnelles ? Ne ferait-on pas œuvre plus utile si l'on attendait le résultat des délibérations en cours et si l'on répondait aux questions posées par la création des îles artificielles et des superports sur la base de ce qu'on suppose que sera le droit futur ?

Votre rapporteur devra consulter les confrères sur ces points qui sont préjudiciels pour tout son travail. Il s'est pourtant engagé dans la voie de la discussion du thème du point de vue du droit encore existant et d'y joindre, comme en annexe, une esquisse de ce qui résulterait des éléments qui sont proposés comme *lex ferenda.*

4. Le droit existant ne devra pas être compris comme une construction dogmatique. On ne gagne rien, de l'avis de votre rapporteur, à discuter sur la mer ou son fond comme *res nullius, res communis* ou héritage commun. Si l'on veut une formule ou plutôt une institution du droit de la mer qui couvre les phénomènes à traiter, ce serait celle de « l'utilisation privative durable » à laquelle *Gilbert Gidel* a consacré le livre septième de la première partie de son œuvre. En effet, quelques-uns des auteurs récents s'en sont souvenus (*Margue, Mengozzi, Gol*).

Or, *Gidel* s'est opposé à toute définition d'un statut juridique

réel de la mer, soit comme *res nullius*, soit comme *res communis*, soit comme condominium (vol. I, p. 213-224, voir encore p. 497 ss.).

Ce qu'il importe de voir est que le droit actuel de la mer ne garantit pas l'intangibilité absolue de sa substance. On ne connaît pas de cas où l'on ait mis en doute le droit des Etats riverains d'étendre les ouvrages de leurs ports, ce qui entraîne une avance de la ligne de base et, par conséquent, une extension de la mer territoriale. Au cours de cette génération, on a vu les Etats s'approprier le plateau continental, des zones supplémentaires de mer territoriale ou des zones économiques, avant que le droit international général ne les ait sanctionnés, et ils n'ont rencontré aucune réaction sérieuse.

Autre argument : lorsque, en haute mer, une nouvelle île naît par activité volcanique ou par consolidation d'alluvions, elle peut être occupée et soumise à une souveraineté étatique. Elle sera pourvue, dans ce cas, d'une zone d'eaux territoriales et même d'un plateau continental, sans que les autres Etats puissent exiger que cette superficie conserve un statut d'usage commun comme lorsqu'elle était couverte d'eau.

Cette absence de statut réel est probablement le corollaire d'un principe constitutionnel de la société internationale actuelle. La mer, pour être *res communis* dans un sens quelconque, devrait avoir une personne ou une instance qui la protège. Mais tous les efforts qui sont devenus nécessaires pour éviter l'exploitation exagérée des ressources vivantes ou la pollution des eaux n'ont pu aboutir qu'à des conventions collectives qui restreignent l'usage de la mer. Même les réformes discutées actuellement ne semblent pas devoir aboutir à l'administration totale de toutes les mers par un organe international.

Si donc un Etat abusait de la mer, en outrepassant la mesure d'usage commun qui lui revient, seul un autre Etat, réellement privé de l'usage ou gêné dans son exercice, serait légitimé à lui en demander raison. Le nombre des réclamants peut devenir important, mais en principe il n'y a pas d'*actio popularis*, et en principe chaque réclamant doit démontrer qu'il est lésé ou menacé dans sa participation égale à l'usage de la mer.

Le critère qui paraît rester pour juger des utilisations privatives est celui de la compatibilité avec l'usage libre des autres Etats et de leurs ressortissants. Pourtant, il ne faudrait pas être trop strict. Le droit d'usage commun respecte les activités du premier venu ; on

en trouve les traces dans les détails des règles de route et de la police de la pêche. Les pêcheries sédentaires p. ex. ne sont pas seulement celles que *Gidel* énumère (vol. I p. 489-495) ; les pêcheurs au homard au large de la Nouvelle Angleterre demandent respect pour leurs engins fixes (à propos de l'affaire du *Suleyman Stalskiy*, lire *Windley et Blondin*, Journal of Maritime Law and Commerce vol. 4, 1972/73, p. 141 ss.). Le principe que tout navigateur, et surtout le pêcheur, doit respecter les câbles provient de la même idée ; le compromis entre les installations pour exploiter le plateau continental et les intérêts des navigateurs et des pêcheurs tel qu'il a pris forme dans l'art. 5 de la Convention sur le Plateau continental prouve que des usages nouveaux de la mer ne sont pas exclus, mais peuvent réclamer une place égale à celle des usages traditionnels.

Si l'on admet que cette vue est correcte, la question des îles artificielles et des superports ne tourne que sur l'évaluation relative des avantages pour ceux qui établissent ces constructions ou qui s'en servent contre les inconvénients qui en résultent pour les autres usagers de la mer.

Il y a encore une considération générale à discuter ici. Quelques auteurs disent que l'installation d'îles artificielles n'est pas une des libertés de la mer et n'est pas un usage consacré par le droit international. Les utilisations de la mer ne paraissent cependant jamais avoir été déterminées limitativement. Chaque usage nouveau se développant par des techniques nouvelles a été pratiqué et admis d'abord implicitement, plus tard réglé explicitement. Ainsi en fut-il de la pose de câbles, étendue comme allant de soi aux pipe-lines, du survol et de l'exploitation du sol et du sous-sol de la mer. Du moment que la majorité de l'opinion ne comprit plus la définition du plateau continental dans la convention de 1958 comme divisant toute la mer en secteurs nationaux, l'exploitation au-delà du plateau continental appartient de nouveau aux libertés de la mer. On cherche à la régler, et même à l'abolir au profit d'une organisation internationale. Ceci est *lex ferenda* ; au demeurant, jusqu'à l'établissement d'un appareil de contrôle et d'administration, l'exploitation du sol et du sous-sol compte parmi les libertés. Le nommé moratorium de la résolution 2574 (XXIV) D de l'Assemblée Générale des Nations Unies ne constitue qu'un programme politique dont l'efficacité dépend de considérations politiques que chaque Etat intéressé apprécie selon sa propre situation.

Ainsi on ne peut pas dire que l'installation d'îles artificielles ou de superports soit exclue *a priori*.

5. Il est de tradition à l'Institut de récapituler, pour la discussion d'un thème, les prises de position antérieures. Or, pour les îles artificielles et les superports, on verra qu'aucun des textes adoptés par l'Institut n'en fait mention, et que, même au cours des débats, les allusions y sont bien rares. Un enseignement pourtant se dégage de la rétrospective de notre problème, c'est que les règles du droit sur des points de détail se forment lentement. Les détails sont saisis successivement par l'esprit des juristes et par la curiosité des chercheurs au fur et à mesure que des problèmes se posent dans la pratique.

Ceux de nos confrères italiens qui affirment l'existence d'un droit spontané trouveraient ici un bel exemple historique à l'appui de leur théorie, exemple qui serait d'ailleurs un parallèle au droit des étrangers si l'on veut croire avec notre confrère *Doehring* que c'est la casuistique qui développe les règles de détail (Die allgemeinen Regeln des Fremdenrechts und das deutsche Verfassungsrecht, 1963, p. 37).

Or, la résolution du 31 mai 1894, session de Paris (voir Résolutions 1873-1956 p. 121), ne parle de la ligne de base pour mesurer l'étendue de la mer territoriale (lieu systématique pour parler des îles et des élévations) que dans les articles 2 et 3. Le premier désigne la laisse de basse marée comme ligne de base, l'autre règle le fait des baies. Donc, aucune question des îles même naturelles.

C'est que le rapporteur, *Thomas Barclay*, estima inutile d'en parler, bien que la Convention du 6 mai 1882 sur la police de la pêche dans la Mer du Nord y fasse allusion. D'autre part, l'Institut rejeta à une faible majorité la proposition d'assimiler au territoire les bancs et rocs découvrant à basse marée (*Annuaire*, éd. nouv. vol. 3 p. 460). Pour M. *Desjardins* (*ibid.* p. 465) le sens de ces votes n'était pas clair ; il mit en doute l'explication de M. *de Martens* pour qui tous les îlots et rochers émergeant de manière permanente étaient assimilés au territoire. C'était pourtant la thèse établie par la décision « The Anna » en 1805.

Lorsque l'Institut revint sur les problèmes de la mer territoriale en 1911, *Barclay* comme rapporteur continua à se taire sur les îles et bancs dans son avant-projet, mais il posa trois questions y rela-

tives (*loc. cit.* vol. 6 p. 382). *Oppenheim,* co-rapporteur, plus positif, affirma que toute île appartenant à un Etat possède une mer territoriale à partir de sa laisse de basse marée (*ibid.* p. 991). Pour les phares bâtis sur un rocher ou un banc submergé, il vint contredire son compatriote *Sir Charles Russell* qui, en 1893, plaidant l'affaire des phoques, avait prétendu que pareils phares étaient entourés d'une mer territoriale (*Moore,* International Arbitrations, vol. 1 p. 900 s.) — thèse rejetée d'ailleurs aussi par *Westlake* (International Law, vol. I, 1910, p. 190) et par la pratique, car *Gidel* (vol. III, p. 696) nous apprend que les Français ont pu exercer la pêche dans les trois milles autour du phare d'Eddystone. *Oppenheim* proposa en conséquence un alinéa statuant expressément que les phares ne comportent pas de zone de souveraineté (*Annuaire,* éd. nouv. vol. 6 p. 991 ss.).

La première guerre mondiale vint interrompre ces travaux. Les discussions, reprises aussitôt après, progressèrent lentement, pour notre thème en effet les Annuaires de 1919 et 1925 s'avèrent sans intérêt. Dans le rapport *Barclay-Alvarez,* reproduit à l'Annuaire de 1927 (vol. 33) I, il est fait mention d'un questionnaire qui comprenait le problème des îlots et rochers inhabités et sans maître (p. 63, lit. 2f), mais qui fut écarté (p. 67). Cependant ce problème resurgit au cours des discussions sur la ligne de base (p. 79) et la commission se rallia à l'opinion que toute île a sa zone de mer territoriale ; *A. de La Pradelle,* qui voulait en exclure les très petites ou du moins réduire leur zone, se contenta finalement d'une observation pour le procès-verbal. Le projet élaboré par la commission reprend, à l'art. 4, la thèse de la majorité (p. 99) et c'est ce texte qui fut adopté sans discussion l'année suivante à Stockholm (*Annuaire* 1928, vol. 34, p. 645, 756).

On ne peut s'empêcher d'observer que deux ans plus tard, à la Conférence de Codification organisée par la Société des Nations, la distinction entre îles et élévations sera établie et que ces dernières seront traitées de manière différente selon qu'elles se trouvent près ou loin de la terre ferme, système qui a été consacré à l'art. 11 de la Convention sur la Mer Territoriale de 1958.

Ainsi les îles artificielles n'ont été envisagées que partiellement (pour les phares) et indirectement (bancs et rochers) car ceux-ci sont susceptibles de servir de base à des constructions émergeant de manière permanente.

Il faut cependant ajouter qu'*Alejandro Alvarez,* membre de

l'Institut, prit une part active aux délibérations de l'International Law Association. Il avait introduit, à la session de 1924, un projet (ILA 33d Report p. 267) qui, en principe, interdit assez sévèrement aux Etats d'entraver la navigation par des travaux plus ou moins permanents (art. 9 et 15 al. 2 — d'ailleurs en conformité avec le projet de la commission art. 7 et 10, *ibid.* p. 262) ; mais, selon l'art. 17, il serait permis aux Etats et à de grandes entreprises « d'occuper l'étendue de haute mer nécessaire à l'établissement d'installations plus ou moins durables » avec des buts d'intérêt général, énumérés limitativement, à condition pour ces installations de ne pas être fortifiées et d'être autorisées et contrôlées par la Commission internationale maritime dont il était beaucoup question à l'époque (art. 17-19, 28 ss.).

Alvarez avait surtout en vue les îles flottantes, escales pour l'aviation transatlantique, discutées de son temps. Mais l'ILA ne voulut pas insérer des dispositions y relatives dans son règlement pour la mer et laissa la matière à une éventuelle convention spéciale (33d Report p. 279, 34th Report p. 93).

Il nous reste donc de cet incident le souvenir d'une suggestion intéressante qui cependant présupposait un régime international de la mer qui n'est pas encore réalisé.

6. Pour définir les objets de cet exposé, il conviendrait d'employer autant que possible les termes de textes officiels.

a) La Convention de 1958 sur la Mer territoriale dans son art. 10 veut qu'une île soit naturelle, et c'est le cas de quelques législations indiquées dans la documentation préparée par les Nations Unies : ST/LEG/SER.B/15 p. 96 Kuwait, p. 102 Nouvelle-Zélande, p. 129 Grande-Bretagne, B 16 p. 4 Canada, B. 18 p. 33 Samoa Occidentales. Cet élément, évidemment, ne saurait nous convenir ici, mais on pourrait retenir qu'une île est une superficie entourée d'eau qui reste découverte à marée haute. Cette superficie devrait être relativement stable et permanente, mais pas nécessairement appuyée sur le sol de la mer.

L'élément d'artificiel pourrait être exprimé par le terme « du fait de l'homme » si l'on entend que ce fait de l'homme est la cause exclusive de la naissance de l'île, tandis qu'on prendrait comme naturelle une île due à des alluvions dirigées ou retenues au moyen

de digues ou de clayonnages. En effet, on ne voudrait pas discriminer *a posteriori* les terrains qui ont été gagnés sur la mer par pareils travaux aux Pays-Bas ou en Frise, et qui ne partent pas nécessairement de la terre ferme.

D'autre part, il n'y a pas lieu de distinguer selon que le matériel qui constitue l'île artificielle est une construction (métallique, en bois, en ciment) ou bien un amas de terre ou de pierre, même draguée à proximité de l'emplacement.

Dans les discussions antérieures, même sur les îles naturelles, certains ont voulu distinguer selon l'importance de la superficie utilisable. Mais le droit actuel paraît n'en tenir aucun compte, pourvu qu'un Etat ait incorporé l'objet dans son territoire ou qu'il puisse être considéré comme une dépendance. Certes, des rocs sans superficie utilisable (p. ex. en forme de menhir) ne sauraient être occupés au sens usuel du mot. Néanmoins je pense qu'ils comptent parmi les îles au sens de l'art. 4, al. 1, de la Convention sur la Mer territoriale de 1958 pouvant former le « chapelet d'îles » qui donne lieu au système des lignes avancées de base. D'ailleurs il faudrait admettre qu'une formation de cette sorte puisse être occupée par la construction d'un phare, d'un signal ou de tout autre appareil. Des installations sont même aptes à modifier le statut d'une élévation en lui donnant celui de point d'appui pour ces lignes de base en vertu de l'alinéa 3 de l'art. 4 cité, voir aussi ST/LEG/SER.B/15 p. 101 et B/18 p. 28 s. Mexique : Acte général sur la propriété nationale de 1941, art. 17 II et de 1969 art. 18 II ; B 15 p. 114 Arabie Saoudite, décret du 16 février 1958 art. 1 lit. c.

Il n'est cependant ni nécessaire ni peut-être utile de tenir compte, pour la définition des îles artificielles, des distinctions éventuelles qui pourraient résulter du régime juridique qu'il conviendra de leur appliquer. Evidemment, le juriste cherche à déterminer avec le plus de précision possible l'objet de la règle qu'il propose. Mais on risque des conséquences fâcheuses lorsqu'on veut surcharger, voire déformer une notion du langage non-légal avec des significations de droit, ainsi qu'il est arrivé au plateau continental. Lorsqu'une distinction en droit s'impose, on aura moyen de trouver le critère additionnel correspondant. C'est pourquoi votre rapporteur suggère de comprendre dans la définition de l'île artificielle :

« toute construction (ce terme impliquant le fait de l'homme et excluant le navire et la bouée) fixée au sol de la mer ou flottant

en permanence à un endroit, entourée d'eau qui reste découverte à marée haute ».

Sans vouloir modifier cette définition, on pourrait ajouter quelques observations en guise de commentaires :

Toute île artificielle qui serait intégrée dans un système portuaire traditionnel tomberait sous le coup de l'art. 8 de la Convention de 1958 sur la Mer territoriale et ferait partie de la côte.

La question se pose alors de savoir si une île artificielle, reliée à la terre ferme par une longue jetée en surface, et ne servant pas de port ou d'installation accessoire à un port, doit être considérée comme partie de la côte. Il paraît que non, *a contrario* ex art. 8 précité.

Mais faut-il assimiler une île naturelle, élargie par des constructions, à un territoire agrandi sur la mer par les digues, et par conséquent comptant ses nouveaux contours comme sa côte ?

Les deux cas, de l'avis de votre rapporteur, doivent être résolus d'après le statut qu'on donnera aux îles artificielles sans avoir recours à telle ou telle interprétation de la Convention de 1958.

b) Le terme « superport » est un néologisme pour désigner un nouveau type de port construit non pas sur la côte, mais au large, dans des eaux profondes, pour servir aux bâtiments à grand tirant. Comme définition quasi-officielle on n'a guère que celle du *Deepwater Port Act of* 1974 des Etats-Unis, à la section 3, no. 10, dont l'essentiel est « *fixed or floating manmade structures other than a vessel* » servant de ports pour charger, décharger et expédier du pétrole. Cette dernière caractéristique ainsi que certaines autres encore s'expliquent par l'objet limité de l'Acte et de ses préoccupations particulières, et votre rapporteur propose de les laisser de côté.

En effet, les problèmes posés par les superports en droit international sont les mêmes quel que soit le commerce auquel ils sont destinés. On voit d'ailleurs que les superports, par définition, ne sont rien d'autre que des îles artificielles ou des groupes d'îles artificielles aménagées pour un service particulier.

Il y aurait encore une observation à faire : En prenant l'île artificielle et par conséquent aussi le superport pour un objet émergeant à haute marée, on semble exclure les installations n'émergeant qu'à marée basse ou n'émergeant jamais. L'International Law Association

s'est occupée, en 1976, d'une partie de ce problème sous le titre « des maisons sous la mer », sur la base d'un rapport de M. *du Pontavice*. Ces constructions peuvent cependant être rattachées, comme auxiliaires, aux îles artificielles et aux superports et constituer des obstacles aux autres utilisations de la mer, à la même enseigne que ceux-ci. Votre rapporteur vous propose cependant de ne les considérer que pour autant qu'elles constituent un ensemble technique et fonctionnel avec les objets dont nous nous occupons.

On pourrait donc définir le superport à l'aide de la définition de l'île artificielle comme suit :

> « tout assemblage de constructions fixées au sol de la mer ou flottant en permanence à un endroit, entouré d'eau, dont les parties essentielles restent découvertes à marée haute, et qui sert de port ».

II

Pour discuter maintenant les aspects juridiques de la création de superports et d'îles artificielles, il y aurait en principe deux méthodes. L'une consisterait à considérer successivement chacune des zones maritimes auxquelles le droit de la mer attribue un statut légal distinct, l'autre traiterait à part chacune des sept questions formulées au § 2 par rapport aux différentes zones.

Votre rapporteur ayant fait des essais dans les deux sens, s'est décidé pour la seconde méthode. Mais, si au cours des travaux ultérieurs il s'avérait plus pratique d'en suivre une autre, ou si la majorité de la commission le désirait, il serait facile d'adapter le rapport en conséquence.

Il est d'ailleurs entendu qu'entre Etats peuvent exister des conventions particulières modifiant le régime général.

7. Dans toutes les eaux se trouvant sous la souveraineté territoriale de l'Etat riverain, celui-ci est en droit de construire des superports ou des îles, et il est interdit à tout Etat non riverain de le faire. Une restriction cependant existe : lorsque le droit international accorde aux pavillons étrangers le droit de passage inoffensif dans ces eaux sous souveraineté (donc eaux intérieures récemment intégrées et mer territoriale — art. 5, al. 2 et 14 de la Convention

de 1958 sur la Mer territoriale), il faut laisser l'espace nécessaire pour que la navigation puisse continuer.

Dans les zones soumises à des droits limités de l'Etat riverain, i.e. zone contiguë, plateau continental, éventuellement zone économique ou semblable, l'Etat riverain est légitimé à créer des installations qui servent au but pour lequel la zone est instituée et il est interdit aux autres Etats d'en créer.

L'Etat riverain, titulaire des droits spéciaux, doit respecter les usages qui sont restés libres, et ceci peut conduire à des inhibitions dans la construction de superports et d'îles. Le système qui a été adopté pour les installations d'exploitation du plateau continental (art. 5, al. 2-7 de la Convention de 1958 sur le Plateau continental) peut servir de modèle et d'analogie.

Des installations, servant à d'autres buts que ceux auxquels ces zones sont destinées, peuvent être créées par l'Etat riverain sous les mêmes conditions. Les autres Etats ne sont pas exclus, mais ils doivent observer des limites d'abord à l'égard de l'Etat riverain, ensuite à l'égard des usagers de la mer en général.

Cette restriction de construire, existant par égard à l'Etat riverain, signifie que les usages spécifiques, actuels ou potentiels, de la zone en question ne doivent pas être empêchés ou sensiblement gênés. Par exemple, il serait inadmissible d'installer un superport ou même une île artificielle dans la zone contiguë d'un autre Etat, car cela rendrait plus difficile le contrôle que, d'après l'art. 24 de la Convention de 1958 sur la Mer territoriale et la Zone contiguë, l'Etat riverain est en droit d'exercer sur la navigation. Des constructions sur le plateau continental d'un autre Etat sont interdites lorsqu'elles viennent obstruer ou gêner l'exploitation des richesses du sol et du sous-sol ; ce serait cependant à établir dans chaque cas concret.

Comme d'après le droit actuel les eaux de ces zones continuent d'être ouvertes aux usages non attribués à l'Etat riverain, tous les Etats doivent respecter l'égalité de principe qui existe entre ces usages, mais rappelons que le nouvel usage de construire en mer n'est pas discriminé *a priori*.

Evidemment on se demande s'il ne serait pas plus pratique d'interdire carrément à tout Etat non riverain toute construction dans les zones à prérogatives limitées. Sans doute on éviterait des frictions et des incidents, mais ce serait une proposition *de lege*

ferenda. Egalement *de lege ferenda* serait la proposition purement procédurale d'exiger une consultation préalable entre l'Etat titulaire de la zone et l'Etat intéressé à construire, avec éventuellement des procédures appropriées pour la solution du différend. Si une autorité internationale venait à être instituée pour administrer la mer, on pourrait lui conférer la tâche de connaître de tous les projets de construire en mer, non seulement dans les zones intermédiaires, mais aussi dans les zones nationales et dans la haute mer libre. Tel auteur pense qu'à l'heure actuelle déjà on ne peut pas construire en mer sans pareille autorisation ; ce serait imposer un moratoire de durée illimitée sur un usage de la mer qui, en principe, n'est pas interdit mais qui certes peut susciter des conflits bien plus graves que les usages connus dans le passé.

En haute mer, en dehors de toutes prérogatives en faveur des Etats riverains, on n'aurait qu'à respecter l'égalité de principe des usages de la mer. Les données du cas concret décident le point de savoir si l'équilibre, exigé par l'al. 2 de l'art. 2 de la Convention de 1958 sur la Haute Mer, est gardé. Rappelons qu'au dernier alinéa du § 4 ci-dessus nous avons proposé la thèse que la construction en mer n'a pas besoin d'être reconnue spécialement comme une des libertés. D'autre part, les problèmes ne sont pas écartés par la constatation générale et faisant autorité que la construction d'un superport est un « *reasonable use of the sea* ».

La difficulté pratique est de nouveau d'ordre procédural : Qui est-ce qui peut se plaindre dans la présente constitution du monde international qui ne connaît pas d'*actio popularis* ?

8. Malgré les formules étatistes employées dans les textes du droit international public de la mer, l'usage de la mer a toujours appartenu au particulier. Les usages par l'Etat sont quantitativement moins importants. Les marines de guerre sont plus récentes que la guerre maritime conduite par des corsaires, le commerce d'Etat et la pêche nationalisée étaient rares dans le passé, les services administratifs occupent une place peu importante parmi les usagers de la mer.

D'autre part, il est vrai que chaque Etat réglemente l'attribution de son pavillon aux navires des particuliers et le comportement des particuliers sur les navires battant son pavillon. La nationalité du navire est le moyen technique d'organiser la « juridicité » de la haute

mer (*Gidel*, I, p. 230, voir aussi p. 235 s. sur cette notion). C'est ainsi que le droit international conventionnel de la mer devient obligatoire en pratique pour les usagers de la mer. L'Etat peut aussi prescrire des comportements qu'il juge utiles pour le bon ordre sur mer ; il y a eu des lois nationales pour la préservation des ressources vivantes avant toutes les conventions en la matière. Le système peut cependant s'avérer insuffisant, comme on l'a vu à propos des radiodiffusions pirates, tant qu'il n'existe pas des règlements multilatéraux à participation très large .

Dans les zones de mer placées sous la souveraineté de l'Etat riverain, les particuliers sont sujets à la loi de celui-ci. Cette loi peut être stricte ou libérale, elle peut p. ex. ouvrir les eaux à l'usage commun et ne pas tenir compte des inconvénients résultant de la libre construction. Les restrictions à observer en faveur du droit de passage sont de la responsabilité de l'Etat riverain et, à moins que le rapport entre droit interne et droit international tel qu'il s'est établi dans cet Etat n'attribue automatiquement les obligations internationales aux individus, c'est à l'Etat d'instituer un contrôle efficace sur les activités individuelles dans ses eaux.

Les mêmes observations valent pour les zones à compétence limitée en tant qu'il s'agit des usages réservés à l'Etat riverain. Pour en maintenir le monopole et pour se garder des entraves, il peut légiférer valablement contre les particuliers étrangers, mais autrement il n'est pas souverain.

Les zones à compétence limitée ne sont pas ce que *Margue* dans son rapport du 9 décembre 1971, para. 30, désigne comme « zones d'attraction juridique de l'Etat riverain ». La solution que les Pays-Bas ont trouvée à l'affaire *REM* pèche par le principe sur lequel elle est bâtie — on reviendra sur le motif pour lequel elle semble cependant correcte à votre rapporteur. — Pareillement, on ne voit pas comment les Etats-Unis peuvent, par le *Deepwater Port Act* 1974, sec. 15, menacer de poursuites pénales et civiles indistinctement « *any person* » (citoyen ou étranger), attendu que le rayon d'action de cette loi n'est pas limité vers le large et ne correspond à aucune des zones maritimes connues. La relation au territoire consiste dans la destination du superport d'importer du pétrole aux Etats-Unis. Cela implique, de par la nature des choses, une distance peu importante de la côte, mais néanmoins le problème essentiel reste posé.

En haute mer, sans aucune compétence spéciale de l'Etat rive-

rain, le particulier doit donc être considéré comme libre de créer des constructions à condition de ne pas entraver ou gêner sensiblement les autres usagers de la mer. Cette faculté pourrait être abolie par sa législation nationale, celle de l'Etat de sa résidence ou bien celle du pavillon du navire qu'il emploie, notamment lorsqu'un traité collectif viendrait à interdire ces activités aux particuliers ressortissants d'une des Parties contractantes. Dans un tel cas, c'est du droit national que dépend la question de savoir si le particulier possède un remède contre l'Etat qui supprime une liberté découlant du droit international — question que votre rapporteur propose de ne pas discuter.

On voit bien les inconvénients que cette thèse comporte. Mais c'est une des difficultés inhérentes au système actuel que le fait du particulier n'entraîne pas *eo ipso* la responsabilité d'un Etat, surtout pas lorsque le particulier agit en dehors du territoire étatique. Dans le cas que nous considérons ici, il s'y ajoute l'absence d'un protecteur de la *res communis* comme telle. Seul un Etat pourrait agir qui serait effectivement atteint ou sensiblement gêné dans son usage de la mer ou qui le serait dans le chef d'un de ses ressortissants.

Le remède doit être cherché ou bien dans la modification du statut de la mer ou bien dans l'établissement de procédures, peut-être même d'organisations, qui permettent un contrôle international de la mer. Nous connaissons d'ailleurs une analogie dans les mesures contre la piraterie et la traite, mesures qui se fondent sur un consensus, qui dans l'opinion des juristes cadrent avec la liberté de la mer, et qui sont devenues parties du droit international général. On ne saurait cependant dire que l'interdiction pour les particuliers de construire en mer ait atteint un degré d'évidence tel qu'il s'incorpore dès à présent dans le droit international général.

9. Les Etats ne recherchent point de consentement pour créer des superports ou des îles artificielles. Si pour des raisons exceptionnelles, ils voulaient le faire dans une zone de souveraineté ou dans la zone contiguë d'un autre Etat, il s'agirait d'une dispense du droit établi. Pour le reste, ils agissent sous la responsabilité de respecter les droits spéciaux de l'Etat riverain dans les zones à prérogatives, et les droits généraux des autres usagers de la mer.

Il est évidemment sage d'entreprendre des consultations lorsqu'un conflit entre droits et intérêts paraît possible, ainsi, les Danois

et les Suédois se proposent d'entamer des pourparlers avec les usagers des détroits danois qui devront être traversés par des ponts. Il se recommande en outre de rechercher un accord formel sur des projets importants de construction en mer, mais même s'il ne peut parvenir à un tel accord, l'Etat intéressé peut les réaliser.

La faculté du particulier de construire en mer dépend, pour les zones sous souveraineté, de la législation de l'Etat riverain. Lorsque celle-ci ne réserve pas toute activité de ce genre à l'Etat ou à ses mandataires, elle peut exiger que le particulier demande une autorisation. Ce système se recommande parce que l'Etat peut ainsi s'assurer que la construction projetée respecte le droit international de passage.

Même raisonnement pour les zones à prérogatives et les constructions servant les buts monopolisés. On dira même que pour la zone contiguë (art. 24 de la Convention de 1958 sur la Mer territoriale et la Zone contiguë), là où elle existe, toute construction est susceptible de gêner le contrôle concédé par le droit international à l'Etat riverain (v. *supra* p. 31) ; car en principe chaque superport et même chaque île artificielle pourrait être utilisée comme point d'appui pour des agissements illégaux. On devrait donc dire que l'Etat riverain peut soumettre à une procédure d'autorisation tout projet de construction dans la zone contiguë.

Dans les autres zones à prérogatives, les constructions des particuliers servant à d'autres buts que ceux monopolisés pourront être sujettes à autorisation lorsqu'elles sont projetées par des ressortissants ou habitants de l'Etat riverain. Pour les projets d'étrangers, la question se pose de savoir si les droits spécifiques de l'Etat riverain impliquent un droit de contrôle préventif.

Les avantages pratiques que présenterait un pareil contrôle aussi pour les particuliers en cause sont évidents, surtout s'il était pourvu d'une voie de recours qui, pour les étrangers, pourrait conduire jusqu'à une instance internationale. Pourtant cet exemple « d'attraction juridique » (cf. *supra* p. 34) peut susciter la jalousie des partisans de la liberté des mers, liberté que ce contrôle restreindrait.

En haute mer, au-delà des zones à prérogatives, ce n'est que l'Etat dont les particuliers sont ressortissants qui pourrait leur interdire de construire ou imposer l'autorisation préalable. Les contraventions pourraient être sanctionnées de poursuites et même

d'interventions directes par la force. Un Etat se flattant d'obéir à la « *rule of law* » tiendra à obtenir les pouvoirs nécessaires par voie de législation.

Même munis d'une autorisation, les particuliers courent le risque de s'exposer à des voies de fait de la part d'Etats qui, directement ou dans le chef de leurs ressortissants, seraient atteints dans la jouissance de la mer selon un standard raisonnable d'équilibre entre les différents usages, au sens de l'art. 5, al. 2, de la Convention de 1958 sur la Haute Mer. L'autorisation accordée par leur Etat national leur procurera peut-être sa protection diplomatique, mais ne constitue pas un titre valable en droit international. L'Etat intervenant et l'Etat autorisant discuteront la question de savoir si la construction empiète ou non sur l'usage commun de la mer.

Les particuliers auront donc intérêt à rechercher une entente avec les Etats qui se trouveraient éventuellement lésés dans leurs droits ; mais les formes que pourrait revêtir pareille entente ne sont pas à considérer ici.

10. Une fois construits dans les zones de souveraineté de l'Etat riverain, les superports et les îles artificielles sont sous la souveraineté de celui-ci. Il dépend de sa législation et de ses actes administratifs que ces constructions fassent ou non partie de son domaine public comme de préciser la situation des particuliers qui auraient pris une part active à ces installations.

En dehors des zones de souveraineté, nous trouvons une catégorie d'installations dont le statut est réglé par la Convention de 1958 sur le Plateau continental et qu'on devra accepter comme acquis. Ce sont les installations fixes servant à explorer ou à exploiter les ressources du plateau (art. 5, al. 2-6) et qui, lorsqu'elles émergent perpétuellement à marée haute, sont des îles artificielles selon notre définition (*supra* p. 28). Elles sont soumises à la juridiction de l'Etat riverain, qu'elles aient été construites par l'Etat, sur les ordres de l'Etat, ou bien par des particuliers avec ou sans autorisation de l'Etat.

Toutes les autres constructions, soit en mer libre, soit en zones à prérogatives, licites ou non d'après les propositions avancées ci-dessus aux §§ 7-9, seront sous la juridiction de l'Etat qui les aura créées, fait créer ou autorisées. Là également un Etat riverain, qui estimerait qu'une construction établie dans une de ses zones à

prérogatives par un autre Etat lèse ses droits, en discutera avec lui pour lui faire abandonner ou enlever l'objet ; mais jusque là, le statut ne dépendra pas des droits ou des torts de cet autre Etat.

Les constructions créées par des particuliers sans aucune intervention d'un Etat dans une zone à prérogatives ou en haute mer libre, sont, de l'avis de votre rapporteur, dépourvues de tout statut de droit public. La conséquence en est qu'elles peuvent être occupées par n'importe quel Etat qui, du fait de l'occupation, les soumettrait à sa juridiction.

La question se pose de savoir si l'Etat riverain peut faire valoir un droit préférentiel à l'occupation des constructions créées dans une de ses zones à prérogatives. Lui donner une réponse affirmative serait supposer que ces zones exercent en effet une attraction juridique, et c'est en somme la thèse qui est à la base de la loi néerlandaise « Installaties Noordzee ». Des raisons pratiques militent en sa faveur, mais cette thèse reste douteuse. En pratique d'ailleurs, l'Etat riverain sera toujours le plus diligent, et c'est la solution correcte de l'affaire *REM*. Les constructions qui ne sont pas créées par un Etat, sur ordre ou avec autorisation d'un Etat, sont en droit international *nullius*, et elles sont assez similaires aux îles naturelles pour qu'on puisse leur appliquer les règles du droit international concernant l'acquisition par occupation.

La propriété des particuliers intéressés se réglera selon le droit national de l'Etat occupant. Il paraît que pour les Etats anglo-saxons l'occupation établit simultanément la souveraineté territoriale et le domaine, et que les particuliers sont réduits à obtenir un titre dérivé au moyen d'une concession. Par exemple, la loi des Etats-Unis de 1856 sur les « *guano islands* » (actuellement US Code Tit. 48 §§ 1411-1419) habilite les Etats-Unis, selon la discrétion du Président, à soumettre ces îles à leur juridiction sans les incorporer à leur territoire, et elle laisse uniquement, aux citoyens qui les auront découvertes et occupées, une concession pour extraire le guano (Renseignements détaillés dans *Moore Digest* I 556-580).

D'autre part, il y a dans *Johnson v. M'Intosh*, 21 US 543, 595, un *obiter dictum* supposant un principe de droit universel d'après lequel un territoire non habité, découvert par des particuliers sans attaches à un gouvernement, devient la propriété de ceux-ci. Dans l'affaire *Carino v. Insular Government of the Philippine Islands*, 212 US 449, on a respecté la propriété foncière indigène, basée sur la pos-

session immémoriale de la famille, même lorsqu'elle n'a été enregistrée ni par les autorités espagnoles ni par les autorités américaines.

Ailleurs, on est plus enclin à admettre un droit de propriété en dehors d'un ordre étatique reconnu. L'Acte de Berlin du 26 février 1885, art. 35, impose à la puissance qui occupe de nouveaux territoires en Afrique le respect des droits acquis. Le Traité du 9 février 1920 sur le Spitzberg (*Martens* N.R.G. 3 Sér. vol. 13 p. 473) stipule également le respect des droits acquis avant l'attribution de l'archipel à la Norvège (art. 6), et son annexe institue une procédure qui est plutôt de vérification que d'attribution de la propriété. En Norvège encore, un particulier qui s'était établi à Jan Mayen avant l'occupation de cette île par la Norvège, s'est vu protégé dans ses droits à l'encontre d'une agence gouvernementale (*Jacobsen c. Gouvernement Norvégien*, Cour Suprême 3.5.1933, Norsk Retstidende vol. 98, 1 [1933] p. 511, Ann. Dig. vol. 7 [1933-34] no. 42).

C'est pourquoi votre rapporteur pense que le particulier créant des constructions en mer, sans autorité étatique et en dehors des zones de souveraineté, se constitue un domaine naturel qui ne sera pas nécessairement éteint si un Etat vient occuper l'objet et y établir sa souveraineté. Son sort dépendra du droit en vigueur dans cet Etat ; d'autre part, l'occupation par l'Etat est un acte de gouvernement qui ne présuppose pas nécessairement l'autorisation par une loi. Si les Pays-Bas ont fait précéder l'occupation de l'île *REM* d'un acte législatif, c'était dans un souci louable de moralité gouvernementale, mais il paraît que l'occupation de la plate-forme comme *terra nullius* aurait pu devancer toute législation ou même s'en passer. Votre rapporteur croit ne pas être en désaccord, sur ce point, avec ce que notre confrère *François* a écrit sur l'« Ile de la « REM », Nederlands Tijdsch. voor internationaal Recht 1965 p. 113 ss., 120 § 5.

Une autre question est celle de savoir si un groupe de particuliers créant une construction en mer peut lui-même en revendiquer la souveraineté de droit international. Vu que des mini-communautés vivant sur des mini-îles ont fait valoir avec succès des prétentions à l'indépendance et à un degré de personnalité politique, on ne saurait écarter *de plano* le problème. Il faut se rappeler les communautés religieuses qui ont émigré dans des terres vierges et s'y sont constituées en corps politiques. Dans le cas des récifs Minerva, le groupe actif a certainement montré des intentions politiques de ce genre. Est-ce qu'il y aurait une différence essentielle selon qu'un

pareil groupe s'établirait sur une île naturelle (qui peut manquer de ressources) ou artificielle ?

Il faudrait donc dire que, d'après le droit existant, il n'est pas impossible qu'un groupe assez important pour s'organiser en corps politique indépendant puisse se constituer sur une île artificielle.

11. La tendance de ne pas attribuer une zone de mer territoriale aux constructions artificielles est certainement prépondérante. Les nombreux textes internationaux et nationaux qui définissent l'île comme une formation naturelle visent tous à priver les constructions artificielles de la faculté de servir de bases à des zones de mer territoriale. Le *Deepwater Port Act de* 1974, sec. 19 (a, 1) *in fine,* est explicite dans ce sens. On a mentionné le précédent des installations servant à explorer et à exploiter le plateau continental auxquelles on n'accorde qu'une zone restreinte de protection ; on a rappelé l'opposition qui s'est élevée contre la thèse de Sir *Charles Russell* selon laquelle les phares sont entourés de mer territoriale (ci-dessus p. 26 s.).

Le droit positif n'est cependant pas sans contradictions. On peut rappeler l'art. 4, al. 3, de la Convention de 1958 sur la Mer territoriale qui habilite une élévation munie de constructions émergeant à marée haute à servir de point d'appui pour une ligne de base droite. D'autre part, la décision *US v. Henning* (7 F 2d 488 et 13 F 2d 74) paraît être approuvée par la doctrine lorsqu'elle dit qu'une simple balise ne peut être entourée d'une zone de mer territoriale.

Certains auteurs cherchent à distinguer selon l'importance de la construction, selon qu'elle est habitée ou habitable, fortifiée ou susceptible de l'être. Ce qui déconseille ces distinctions est le fait que, pour les îles naturelles, elles sont sans importance. L'île de Clipperton a été reconnue territoire français, et il semble qu'elle est entourée d'une mer territoriale ; sur la carte montrant la division du sol des océans d'après le principe de l'équidistance (publiée fin 1967 par Law of the Sea Institute, University of Rhode Island) Clipperton sert de point de départ pour dessiner une extension du plateau continental de l'Océanie française.

Notre confrère *François* constate qu'il existe en mer, au large de Sumatra, des villages construits sur pilotis, et il revendique pour eux une mer territoriale (Grondlijnen van het Volkenrecht, 3e éd., 1967, p. 76). Cependant il ne voudrait pas étendre ce statut à tout objet

qui se trouverait en permanence au-dessus du niveau de la mer, mais il voudrait le réserver à celui qui présente les caractéristiques essentielles d'une île. Il sera difficile de formuler clairement la distinction. Les installations sur le plateau continental peuvent être habitées par des teams qui sont relevés, et le phare classique était habité en permanence par son gardien.

Il nous répugne évidemment d'exposer le tracé extérieur de la mer territoriale aux manipulations, mais on n'éviterait pas les difficultés en privilégiant les îles artificielles sur lesquelles une population permanente subsiste. On pourrait imaginer un groupe de pêcheurs construisant une île artificielle pour mieux exploiter une pêcherie traditionnelle, localisée, d'organismes mobiles (non pas de perles, coraux, éponges, car ces ressources sont visées à l'art. 2, al. 4, de la Convention de 1958 sur le Plateau continental, et l'île artificielle serait une installation au sens de l'art. 5, al. 2, *ibidem*). Veut-on leur accorder une mer territoriale et par conséquent étendre sensiblement le privilège qu'ils possédaient auparavant à titre de pêcherie sédentaire ?

Comme dans le droit actuel les élévations peuvent donner lieu à des extensions de la mer territoriale, on pourrait songer à traiter de la même manière les îles artificielles créées près de la terre. Il y aurait des arguments en faveur de pareille thèse. On invoquerait le besoin de protection des constructions et l'aspect visuel qu'elles prêtent au navigateur s'approchant de la côte.

Cependant, tout considéré, votre rapporteur ne trouve pas assez de raisons valables pour aller au-delà de ce qui est dit, en faveur des constructions, à l'art. 4, al. 3, de la Convention de 1958 sur la Mer territoriale. On pourra même laisser la protection des îles artificielles au principe général du droit de la mer qui exige de chaque usager de la mer le respect des droits et intérêts des autres.

Les superports ressemblent, par leur situation, aux rades, par leur fonction aux ports. Parce qu'ils ne sont pas encadrés par la terre ferme, ils ne sont pas « eaux intérieures » et pourraient bénéficier, comme les rades, du statut d'eaux territoriales d'après l'art. 9 de la Convention de 1958 sur la Mer territoriale. Si l'on adoptait cette thèse, il faudrait ajouter que l'Etat surveillant ou gérant le superport a des droits de pleine souveraineté sur les quais et constructions émergeant de l'eau, et que, pour régler la fonction du port il jouit de compétences spéciales, ainsi que la Commission

du Droit international l'a expliqué dans son rapport de 1956 ad art. 9 de son projet. Il s'en suit que les navires étrangers n'auraient pas, au titre de droit de passage, libre accès aux superports. Celui-ci dépend d'autres normes (voir ci-dessous au § 13).

D'après l'art. 9 précité, les eaux territoriales comportent l'ensemble du superport, donc y compris éventuellement les ouvrages ne découvrant pas.

12. Encore moins que sur la limite extérieure des eaux territoriales, les constructions artificielles ne devraient avoir une influence sur la limite entre les eaux d'Etats voisins. Cela va de soi lorsque les limites des eaux sont fixées par des lignes convenues. Mais le même principe vaut pour les limites qui sont des lignes médianes entre des données géographiques sur chaque côte.

On observe d'ailleurs que même les îles naturelles, lorsqu'elles sont insignifiantes, ne sont pas toujours prises en compte par les parties contractantes pour tracer des lignes médianes entre les zones de souveraineté ou de prérogatives. *Northcutt Ely*, dans son article « Seabed Boundaries between Coastal States », The International Lawyer vol. 6 (1972), p. 219 ss., donne un tableau de ces cas.

13. Les obligations générales qui se rattachent à la création de superports et d'îles artificielles et qui incombent aussi bien aux Etats y exerçant leur autorité qu'aux particuliers agissant sous leur seule responsabilité, sont de les signaler à l'attention du public par des avis, par des signaux et feux, et par l'inscription dans les cartes de navigation. Cela découle de l'obligation de tenir compte des intérêts des autres usagers de la mer.

Une interdiction de fortifier les constructions ne résulte pas du droit actuel de la mer.

Il y a lieu de mentionner un autre problème. L'accès aux ports pour tous les pavillons sans distinction semble être une pratique, mais l'obligation n'existe que pour les Parties contractantes de la Convention et du Statut international des Ports de Mer, du 9 décembre 1923, ou des traités de commerce stipulant l'accès. Comme on ne voit pas de raison suffisante pour ne pas appliquer les règlements internationaux sur le trafic aux superports, l'accès à ceux-ci se déterminera selon les textes pertinents, multilatéraux et bilatéraux. Il paraît que les Etats-Unis qui, avec la grande majorité des Etats américains et avec les Etats socialistes ne sont pas partie au Statut

des Ports de 1923, admettent que les gérants des superports pratiquent des restrictions d'accès pour autant que les principes anti-trust ne soient pas touchés.

III

14. Les idées prépondérantes à la Troisième Conférence des Nations Unies sur le droit de la mer, en tant qu'exprimées dans le *Revised Single Negociating Text* du 6 mai 1976, ne semblent pas encore être partout bien cohérentes.

D'une part, l'art. 76 de la II° partie nomme expressément, parmi les libertés de la haute mer, la construction d'îles artificielles et d'installations. D'autre part, on ne sait pas si l'interdiction de s'approprier une parcelle de l' « Area » (art. 4, al. 1, de la I^re^ partie) empêchera la construction. En tout cas, la construction sera soumise à un contrôle bien strict de la part de l'autorité internationale (art. 22 *ibid.*). Les zones à prérogatives seront généralement monopolisées pour les constructions de l'Etat riverain (art. 48 et 69 de la II° partie). A part cela, l'art. 16 de la I^re^ partie et les autres dispositions relevantes correspondent assez bien au droit actuel.

Si ces propositions étaient adoptées, beaucoup de doutes discutés dans cet exposé seraient sans objet, et en pratique le régime des constructions en mer serait de beaucoup simplifié. On aurait une autorité responsable, et si la IV° partie était adoptée, on disposerait d'un système suffisant pour la solution des différends.

Heidelberg, le 3 décembre 1976

Questionnaire

1. L'Institut doit-il attendre, avant de prendre une résolution,

a) la fin de la Conférence actuelle sur le Droit de la Mer,

b) l'entrée en vigueur des textes éventuellement élaborés par cette Conférence,

c) l'acceptation de pareils textes par la communauté internationale en tant que droit international général ?

2. Sinon, doit-il :

a) essayer d'établir les règles générales actuellement en vigueur pour la matière ?

b) remplir les lacunes éventuelles dans les propositions en discussion ?

c) proposer un système complet *de lege ferenda ?*

3. Dans toutes ces alternatives, faut-il s'attacher à une base dogmatique, en prenant la mer (ou le fond de la mer) comme :

a) *res nullius,*

b) *res communis omnium,*

c) héritage commun, dans le sens moderne ?

4. Ou bien convient-il de traiter le thème seulement sous l'aspect d'une collision d'utilisations de la mer ?

5. Peut-on prendre comme point de départ le droit de la mer :

a) d'avant 1958,

b) des conventions de 1958,

c) d'après les manifestations les plus récentes ?

6. Approuvez-vous, pour la *lex lata,* la tendance générale de cet exposé qui retient le principe de la liberté de la mer ?

7. a) Est-ce que les libertés de la mer sont limitées par catégories malgré la formule ouverte de l'art. 2, al. 2, de la Convention de 1958 sur la Haute Mer ?

b) Est-ce qu'il faut une reconnaissance distincte (bien que tacite) pour admettre un nouvel usage de la mer parmi les libertés assurées ?

c) Est-ce que l'exercice des libertés de la mer revient originairement aux particuliers ?

8. Etes-vous d'accord sur les définitions de l'île artificielle et du superport données au § 6 ?

9. Est-ce que vous proposez de traiter encore d'autres questions que celles formulées au § 2 ?

10. Avec quelles opinions exposées aux §§ 7-13 êtes-vous en désaccord (exposez s.v.p. la motivation et les réponses que vous proposez de donner dans vos observations) ?

11. Proposez-vous de prévoir l'obligation pour l'Etat d'ouvrir une voie de recours aux particuliers qui se voient refuser ou retirer l'autorisation d'installer ou d'user des îles artificielles ou des superports ou qui se verraient privés de leurs droits par l'intervention d'un Etat ?

12. Proposez-vous d'ajouter un système pour régler les différends internationaux qui pourraient naître sur des questions d'îles artificielles et de superports ?

13. Quelle forme devrait prendre le texte à voter par l'Institut ?

Annexe II

Observations des membres de la Troisième Commission en réponse au questionnaire annexé à l'exposé préliminaire

1. Observations de M. Maarten Bos

Zeist, le 10 mars 1977

Cher Confrère,

C'est avec le plus grand plaisir que j'ai lu votre Exposé préliminaire des aspects juridiques de la création de superports et d'îles artificielles. Je vous félicite de cette première tentative d'orientation. Elle nous rappelle des questions de la plus haute importance théorique et pratique touchant à un domaine qui plus que n'importe quel autre sujet se trouve pris dans l'engrenage d'un développement historique qui semble devoir changer la face du monde. Mais précisément puisqu'il s'agit de problèmes si fondamentaux, on peut s'attendre à des divergences d'opinion plus profondes que celles qui d'habitude séparent les esprits dans notre compagnie. Si ici et là, je me vois obligé de m'écarter moi-même d'une position adoptée par vous, ce n'est donc point attribuable à ce que vos compatriotes appellent *der Geist der Verneinung*, mais plutôt au fait que votre exposé si clair et plein d'informations a osé mettre en évidence les liens entre le problème traité, d'une part, et les bases mêmes de notre discipline, d'autre part.

Votre questionnaire tel qu'il fut ajouté en annexe à votre Exposé nous soumet treize questions. Je les reprends ici une par une, tout en suivant votre numérotation.

1. Ma réponse est négative : la doctrine a une tâche autonome qu'on fait bien de distinguer de celle du « législateur ». Le droit, à mon avis, est le résultat du dialogue entre le législateur, la doctrine, et, si possible, le juge. Le juge par l'état des choses faisant déjà trop souvent défaut en droit international, il importe d'autant plus que la doctrine engage le dialogue avec le « législateur ». L'on peut même considérer cela comme notre raison d'être.

2. Etant donné ma réponse sous le chiffre (1), je penche pour la proposition par l'Institut d'un système complet *de lege ferenda*. Ce système, toutefois, ne

serait pas à développer « dans le vide », mais, encore, dans un dialogue avec la Conférence sur le droit de la mer. Ce dialogue se ferait de notre part en tenant compte, au cours de nos débats, des grandes tendances se manifestant à cette Conférence, ainsi que des propositions pratiques qu'elle établirait. Mais puisque rien ne garantit que les propositions finales de la Conférence (qui s'annoncent fort générales) soient acceptées telles quelles et qu'en toute probabilité le débat restera donc ouvert pour un temps indéterminé, il ne devrait nullement nous être interdit de suivre, en fin de compte, ce que notre conscience professionnelle nous prescrit. L'expression « système complet » devrait, d'ailleurs, être entendue *cum grano salis.*

3. Personnellement, j'ai toujours défendu le caractère de domaine public de la haute mer. Cette conception semble être la plus proche de celle de l'héritage commun.

4. Si l'alternative envisagée ici est celle d'un pragmatisme pur et simple, je serais contre cette approche. Peu à peu, le monde doit s'acheminer vers un ordre juridique maritime tenant compte des intérêts de la collectivité mondiale et non plus seulement des intérêts des Etats riverains. Bien qu'il soit difficile de voir quel sera ce régime, il me semble que le seul fait de se montrer sensible à pareil changement de climat ne suffit pas pour s'attirer le reproche éventuel de dogmatisme.

5. J'opte pour les manifestations les plus récentes comme point de départ de nos discussions.

6. En tant que domaine public, la haute mer doit profiter à tout le monde. En réalité, elle est en train de devenir *res ripuariorum.* Une liberté de la mer qui ne ferait que sanctionner ce développement — déjà un fait en matière de pêche et d'exploitation du sous-sol — ne doit pas trouver grâce aux yeux de l'Institut. Certes, on ne peut plus annuler le tournant pris par l'histoire à ce propos, mais il y a lieu de freiner le cours qu'elle va prendre en ce qui concerne les îles artificielles et les superports. « Liberté » ne veut plus rien dire quand l'expression confère au plus fort ou au plus rapide la capacité d'exclure à tout jamais les autres. Or, c'est là ce qui, une fois de plus, menace les usagers de la haute mer : la liberté d'occupation.

7. En principe, les libertés de la mer ne sont pas limitées, mais n'y a-t-il pas des usages plus envahissants que les autres et ne s'agit-il pas d'arriver à l'identification, notamment, des usages admissibles uniquement sous des conditions extrêmement sévères ?

Ici, je songe en particulier aux plans de construire en Mer du Nord, à une distance de 20 à 30 milles marins de la côte néerlandaise, une île hébergeant éventuellement 30.000 personnes à côté de nombre d'installations portuaires et autres. Les influences d'une île de cette grandeur sur le milieu marin, ainsi que sur l'état des côtes maritimes avoisinantes, peuvent être incalculables.

En pareil cas, il me semble inéluctable de soumettre le nouvel usage (nouveau surtout par l'ampleur des problèmes qu'il suscite) à un système d'auto-

risations, ou tout au moins de normes juridiques réglant avant tout la responsabilité selon le droit international public.

La responsabilité de qui ? Il n'y a qu'un destinataire imaginable dans ce contexte : l'Etat. C'est l'Etat riverain qui doit être au centre de toute notre réglementation. Si déjà en droit international positif c'est à l'Etat et non pas aux particuliers que reviennent les libertés de la mer, c'est bien dans le contexte de votre Exposé qu'on trouve une preuve de plus de la nécessité absolue de cette règle.

8. Oui.

9. Surtout celle de la responsabilité de l'Etat riverain autorisant ou non la construction d'une île artificielle ou d'un superport. Dans le cadre de cette responsabilité, il s'agit aussi de déterminer les conditions auxquelles ces constructions sont censées satisfaire et à la réalisation desquelles l'Etat riverain doit veiller.

Un sujet qui également ne doit pas échapper à notre attention est celui de l'administration desdites constructions par l'Etat riverain. Tel que je le vois, une île artificielle portant 30.000 personnes ne se passera pas d'une administration normale comme elle se pratique sur n'importe laquelle des îles néerlandaises du Waddenzee.

10. Au paragraphe 7, vous prévoyez le droit pour d'autres Etats que l'Etat riverain de construire des installations dans une « zone soumise à des droits limités » de ce dernier. Pourtant, si l'on se rend compte de la nécessité de préserver un minimum d'ordre, il est difficile de s'enthousiasmer pour ce qui pourrait devenir un archipel d'îles artificielles et de superports consistant en des entités plus variées encore les unes que les autres sur le plan de leurs ordres juridiques. Je crois toucher ici une conséquence quasi-naturelle de l'admission de ce genre d'usage de la haute mer, savoir de limiter la « liberté » des autres d'en faire autant.

Au paragraphe 10, vous admettez le droit de l'Etat riverain d'occuper des îles artificielles ou des superports créés « par des particuliers sans aucune intervention d'un Etat » dans sa zone à prérogatives ou en haute mer libre (une position contestée, comme vous le savez !) et de les soumettre à sa juridiction. Quant à des constructions de cette nature en haute mer libre, j'avoue ne pas très bien voir le motif juridique de votre pensée. Ne sont-elles pas, en effet, la propriété privée de ces particuliers, et quel droit l'Etat dont ces derniers ne sont pas les ressortissants a-t-il d'étendre sa juridiction à ce qui leur appartient et se trouve en haute mer libre ? D'ailleurs, le terme d' « occupation » ne me paraît pas toujours exact, dans ce contexte. Ce que les Pays-Bas ont fait par rapport à la tour de télévision de la R.E.M. se caractérise moins par ce terme que par celui de « visite » dans l'exercice d'une compétence qu'ils s'étaient d'abord attribuée à eux-mêmes. Mais je conviens que dès qu'il s'agit d'une île ou superport quelque peu considérable exigeant une administration permanente, le terme « occupation » est plus approprié que celui de « visite ».

Quant à une éventuelle mer territoriale autour d'une île artificielle ou d'un superport, je partage en général l'opinion que vous exprimez au paragraphe 11.

C'est une illusion, me semble-t-il toutefois, de croire qu'une île portant 30.000 personnes (pour reprendre cet exemple) puisse jamais exister sans mer territoriale. Ici encore, c'est la taille de l'objet qui change les données.

Au paragraphe 13, finalement, vous évoquez les obligations qui incombent aux Etats exerçant leur autorité sur les îles artificielles et les superports. J'y ajoute volontiers celles dont il est question sous le chiffre 9 ci-dessus.

11. Non, si ce n'est le recours administratif national d'habitude.

12. Oui.

13. Celle d'une « Déclaration du droit international *à appliquer* aux îles artificielles et aux superports ».

Croyez, mon cher Confrère, à l'expression de mes sentiments entièrement dévoués.

Maarten Bos

P.S. — L'un des historiens du droit à la Faculté d'Utrecht, le Professeur Van den Bergh, me dit que l'expression *res ripuariorum*, chiffre 6 ci-dessus, suscite des doutes chez lui. Pour sa part, il préférerait *res litorosa*, chose appartenant à la côte (ou aux Etats côtiers).

2. *Observations de M. Mario Scerni*

Gênes, le 28 mars 1977

Cher et honoré Collègue,

Je me réfère à ma lettre du 11 de ce mois et je vous confirme toute mon appréciation pour votre admirable exposé préliminaire qui couvre d'une façon si claire et si complète toute la matière des aspects juridiques de la création des îles artificielles et des superports.

Je suis tout à fait d'accord avec la méthode que vous avez suivie, en précisant les questions essentielles à envisager et en analysant ces questions selon les différentes zones de la mer.

Je me permets de vous envoyer ci-incluses les réponses à votre questionnaire. Comme vous le verrez, j'aimerais que l'Institut, tout en poursuivant les études sur ce thème de plus en plus important dans le monde actuel, attende de connaître les résultats de la Conférence des Nations Unies sur le droit de la mer.

C'est peut-être le fait d'avoir participé à cette Conférence à Caracas, Genève et New York (comme d'ailleurs à celles de Genève en 1958 et 1960) qui me fait espérer, avec quelque optimisme, que l'on aura une conclusion positive de cette Conférence cette année ou l'année prochaine.

Je vous renouvelle mes félicitations pour votre travail de si profonde analyse et de si efficace synthèse et vous envoie mes salutations bien amicales.

Mario Scerni

Réponses de M. Mario Scerni au questionnaire

1. Ma préférence serait pour l'idée d'attendre la fin de la Conférence actuelle sur le droit de la mer. En effet c'est tout le régime juridique des espaces maritimes qui est en train d'être révisé et je considère que, comme il ressort de votre exposé, la solution de nos problèmes est strictement liée à ce nouveau régime juridique des zones de la mer.

2. Si on ne décide pas d'attendre, je crois que en vue du changement reconnu comme nécessaire dans le droit objectif il faudrait proposer, comme il est dit à la lettre c), un système complet *de lege ferenda.*

3. La base dogmatique qui a, sans doute, reçu la faveur des Etats est celle de « l'héritage commun de l'humanité », quitte à savoir plus exactement ce que cette définition signifie en termes juridiques et quitte à restreindre l'espace maritime ainsi conçu par l'élargissement très étendu des zones à compétence ou juridiction étatique.

4. La notion de collision d'utilisations peut être utilisée pour ce qui concerne la mer libre, mais pour les eaux sous souveraineté nationale ou pour les zones à prérogatives limitées, le point de vue vient à changer radicalement.

5. Je crois que l'on ne peut pas ne pas tenir compte des manifestations les plus récentes et surtout des travaux de la Conférence des Nations Unies sur le droit de la mer.

6. Complètement d'accord pour retenir, *de lege lata,* le principe de la liberté de la mer qui a apporté historiquement de grands bénéfices au progrès de l'humanité.

7. a) Je crois que l'on peut répondre négativement.

b) La reconnaissance distincte ne me paraît pas nécessaire.

c) La question me paraît très délicate ; mais je suis d'avis que les particuliers reçoivent la possibilité d'exercer les libertés de la mer par l'entremise de l'Etat auquel ils appartiennent (comme il apparaît du reste au paragraphe 8 de l'exposé).

8. Tout à fait d'accord.

9. Les sept questions essentielles formulées au paragraphe 2 me paraissent couvrir tout l'ensemble de la matière.

10. J'ai quelques doutes, à propos du paragraphe 9, quant au consentement de l'Etat riverain pour les constructions dans les « zones à prérogatives », surtout si l'on considère que les « zones économiques exclusives » viendront à s'étendre jusqu'à 200 milles de la côte et que l'on considère ces zones comme partie de la haute mer, tout au moins selon les déclarations de plusieurs Etats à la Conférence des Nations Unies.

11. Je pense qu'il serait conseillable d'ouvrir une voie de recours aux particuliers dans les cas envisagés dans cette hypothèse ; mais il me paraît difficile d'établir une vraie « obligation » dans ce sens à la charge des Etats.

12. Il faut espérer, je pense, que l'on arrive à créer une espèce de Tribunal International de la Mer ; dans ce cas la matière des îles artificielles et des superports devrait être comprise dans la compétence de ce Tribunal.

13. Je crois que la forme d'une « résolution » serait la plus adaptée.

Mario Scerni

3. *Observations de M. Manlio Udina*

Trieste, le 3 mars 1977

Mon cher Confrère,

Voici mes réponses au Questionnaire annexé à l'excellent Exposé préliminaire que vous avez si soigneusement préparé à l'intention des membres de notre Troisième Commission et dont vous êtes le rapporteur :

1. J'estime qu'il n'est pas nécessaire d'attendre les résultats de la 3e Conférence sur le droit de la mer, puisqu'il n'est pas encore certain que l'on pourra obtenir le consensus des Etats sur les textes de négociation déjà rédigés et que ces résultats pourraient aussi ne pas être entièrement satisfaisants au point de vue des principes du droit international généralement reconnus.

2. Si la réponse que j'ai donnée à la première question était partagée par la majorité des membres de la commission, je suis d'avis qu'il serait convenable d'essayer d'établir les règles générales actuellement en vigueur dans la matière et aussi de combler les lacunes éventuelles. Un système complet *de lege ferenda* pourrait être proposé seulement s'il était certain que les travaux de la commission pourraient être achevés avant la conclusion des travaux de la Conférence.

3. Pour ce qui a trait à la mer et au fond de la mer au-delà de la juridiction nationale de chaque Etat côtier, on pourrait partir du concept moderne, qui est en train de faire son chemin, de l' « héritage commun ». Autrement, je m'en tiendrais encore à la conception de la *res nullius* que j'ai soutenue dans l'un de mes écrits d'il y a quarante ans (v. *Udina*, La condizione giuridica internazionale degli isolotti galleggianti, « Studi di Diritto aereonautico », 1931, pp. 16-35).

4. Il me paraît possible de traiter les problèmes qui nous occupent même si ce n'était que sous l'aspect d'une collision d'utilisations de la mer.

5. Selon mon opinion, il serait opportun de traiter notre sujet en prenant comme point de départ les conventions de 1958 et en tenant compte aussi des manifestations les plus récentes.

6. Oui.

7. a) Non.
b) Non.
c) Oui.

8. Je suis d'accord sur la définition de l'île artificielle. Par contre, je trouve tout à fait évidente — sinon superflue — la définition du « superport » qui est seulement une spécification de l'île artificielle. Bien plus, il me semble que voulant mettre l'accent sur les superports (néologisme pas très heureux) ainsi que cela paraît être l'intention de l'Institut, la formulation la plus exacte de notre sujet devrait être « Aspects juridiques de la création de superports et *autres* îles artificielles ». Pour ma part, toutefois, j'aimerais mieux parler « d'îles artificielles et autres installations », conformément aux expressions employées à la 3e Conférence sur le droit de la mer.

9. Pas pour le moment.

10. Dans l'ensemble, je n'aurais pas de remarques à faire sur les opinions exposées aux §§ 7-13.

11. Tout au plus, seulement un engagement générique, sans prévoir l'institution d'une juridiction spéciale pour une matière aussi limitée.

12. Non, pour les mêmes considérations que ci-dessus et parce qu'il est toujours possible que la 3e Conférence sur le droit de la mer accueille le système complet de résolution des différends internationaux prévu par le texte de négociation qui lui a été soumis, y compris la création d'un Tribunal du droit de la mer.

13. Le texte à voter par l'Institut devrait être celui d'une résolution constatant les règles de droit international actuellement en vigueur dans la matière.

Veuillez croire, mon cher Confrère et ami, à l'expression de mes sentiments les meilleurs.

Manlio Udina

4. Réponses de M. Karl Zemanek au questionnaire

Vienne, le 22 mars 1977

Mon cher Confrère,

Avant de répondre à votre questionnaire, je tiens à vous féliciter de l'excellent travail que vous avez fourni en si peu de temps et de la maîtrise de votre exposé préliminaire. De même, je vous prie d'excuser le retard de ma réponse en espérant que celle-ci peut encore vous être utile.

Mes réponses à votre questionnaire sont les suivantes :

1. Non aux trois points.

2. Oui aux points a) et b) ; non pour c).

3. Non aux trois points.

4. Oui.

5. Non aux points a) et b) ; oui au c).

6. Oui.

7. Non aux trois points. En ce qui concerne le c) : L'exercice des libertés de la mer est un droit des Etats.

8. Oui.

9. Non.

10. D'accord sur les §§ 7 à 9 et 11 à 13. Egalement d'accord avec le § 10, mais les mots « assez *important* pour s'organiser en corps politique indépendant » au dernier paragraphe, sont des mots-clefs.

11. Non, car je crains qu'une pareille idée n'ait aucune chance d'être réalisée par les Etats.

12. Peut-être. Mais il sera utile d'attendre d'abord le sort de la IV[e] partie du *Revised Single Negotiating Text.*

13. Etant donné la complexité du problème, je propose un code annexé à une résolution.

Veuillez croire, mon cher Confrère, à mes meilleurs et cordiaux sentiments.

Karl Zemanek

5. Observations de M. J.H.W. Verzijl

London, 22nd August, 1979

My dear Colleague,

Although at the last possible moment, I will still submit to you some observations concerning your preliminary exposé and provisional report on artificial islands.

Let me begin by expressing my very profound admiration for the thoroughness with which you have analysed and systematized the problem in all its various ramifications.

Although at this stage it serves perhaps no useful purpose to return to your questionnaire, I will still do so if only to show what my first impression was of the highly problematical legal questions involved without being influenced by the answers of others.

So I will still begin with a brief reaction to your original exposé. Basic personal views on the juristic contents of the freedom of the seas as a whole, from which our special problem cannot, of course, be isolated, necessarily influence the answers to your thirteen original questions, and therefore, before answering your questionnaire point by point, I will make a few introductory observations.

I set out very briefly my general approach to our problem.

What must the Institute do in general ? I for one am adverse to mixing-up existing international law with suggestions *de jure constituendo.* The two must remain separate. Therefore let our Commission begin by attempting to state the

law as it stands. Only after that can we formulate proposals for ameliorating the law for the future. Now, I am personally convinced that the law which obtains at the present moment is still in principle that of the Conventions of 1958 which have never been amended, nor denounced, nor fallen into disuetude, despite the seemingly endless political struggle for their replacement by new modern ideas, such as the participation by landlocked States in maritime rights of their own, the idea of « a common heritage of mankind », exaggerated claims to vast « economic zones » and a world government and administration of the sea. Among the latter I look with particular distrust at the slogan of « a common heritage of mankind » which idea recalls to my mind the sad experience that heritages are only too often the object of an ensuing fierce battle between the heirs themselves which is, for that matter, already taking place.

The open sea is legally still « free ». That historical freedom of the seas relates to their surface and body of water and has, in my opinion, nothing to do with the legal regime of their floor and its underground, to which still applies to the full extent the qualification of *terra nullius*, in so far as they have not become the object of special treaty regulations, such as the Convention on the Continental Shelf of 1958.

As to the surface of the sea to which our subject specifically belongs, the problem of the artificial islands, is very complicated. I personally attach no importance to doctrinal constructions, such as *terra nullius*, *terra communis*, or *domaine public* in so far as — instead of being presented as simple catch-words or formulae to indicate and epitomise the actual contents of an aggregate of existing positive legal rules, such as the contemplating lawyer sees and interprets them — they pretend to have a right to general recognition as lofty, independent principles, floating in the air of juristic speculation, from which all sorts of concrete, palpable rules of law can be inferred.

It is clear that the prevailing traditional system of the freedom of the sea needs concerted consideration and action with a view to its adaptation to novel conditions in many fields of international co-existence and their ever increasing impact on inter-state legal relations, which cannot be ignored and which the Institute must pay attention to, though not in the form of a statement of existing law. This is in particular the case in respect of our problems. For it is not only the regime of the open sea that requires such reorientation but also, and most urgently, that of maritime areas more closely adjacent to continental land areas, for which various elaborated treaty regulations are already in existence.

On the basis of this general approach I now come to the requested answers to your questionnaire.

1. I should prefer to wait,

(a) for the results of the actual Conference to be known. I should, perhaps, feel otherwise if I had the conviction, or even the simple impression that the politicians in their dogged fight cared much for the contents of a resolution of our Institute. But we would probably be better placed for influencing the course of events in phase.

(b) after a thorough and well-founded examination in a more serene juridical atmosphere of the imperfections and probable unacceptabilities which the Conference results, if any, will presumably contain.

2. If this view is not adopted I would answer yes to your a) and b) but only hesitatingly to c) : do we already have sufficient knowledge of the technical possibilities to propose a « complete » system *de lege ferenda ?* I doubt it.

3. As said above, I feel no attraction to such dogmatic constructions, especially not to the novel invention of a « common heritage » with a completely undefined content, which I rather see as one of those transient ideals, or fata morganas, that so frequently and intermittently haunted our science and have always betrayed our hopeful expectations.

4. I think this would be a more realistic approach.

5. In principle according to b) with due and very cautious regard to c).

6. Yes, in the version set out above.

7. ad a) No, I have never since I was Chairman of the Netherlands delegation to the first Law of the Sea Conference lost the conviction that the enumeration obtaining in Art. 2, alinea 2, of the 1958 Convention on the High Seas is artificial and unduly restricted.

ad b) I see no useful purpose for such a distinct recognition.

ad c) I do not clearly understand what you mean by the term « originairement » in this context. Do you mean : in the historical sense of appertaining to private persons in the days of Grotius' theories ? Or in the sense of belonging primarily to individuals and only by way of derivation from those individual rights to the State as their guardian ? Il am not in favour of recognizing independent rights of the individual in this domain and admit, on the contrary, that it is the State which is the real depositary of the freedom rights which, of course, « radiate » by reflection towards its nationals (either in the monistic or the dualistic construction) but which the State is also empowered to deny them for reasons of national interest or for considerations of international significance. Their supposed freedom rights cannot possibly, in my opinion, be contemplated as uninfringible rights of their own.

8. Yes, as far as artificial islands are concerned, but I see no ground for mentioning expressly and defining as a separate category the so-called superports, one of the many possible variants of artificial islands. I therefore should prefer to change the whole heading of the draft resolution and to speak only of « Artificial Islands and Comparable Installations ».

9. I see only two special topics for examination :

(a) the special crepuscular legal status of the newly invented economic zone, intermediate between the open sea and the more closely land bound maritime zones « à prérogatives limitées », and

(b) the international responsibility of a coastal state for the harm which can be inflicted upon the international community by its neglect to prescribe the necessary precautions against such harm when permitting the construction

of artificial islands in its adjacent areas, or to prevent such construction in case of unauthorised action by private persons.

10. Para. 7. Your exposé is perfectly logical. And yet I hesitate to accept it when considering the practical effects of its recognition *de lege lata*. It would indeed mean that in your system any foreign State, even from another continent, or of less friendly disposition, would be entitled under existing international law to construct artificial islands within another coastal State's zone of limited competencies. Imagine what that freedom for other, even non-coastal landlocked States would imply! Moreover, you mention together three of such zones: 1) the continental shelf area; 2) the contiguous zone; and 3) « éventuellement » the economic zone or some other zone resembling it. First of all, there is a marked difference between the continental shelf on the one hand, and the contiguous (and the economic) zone on the other. In respect of the continental shelf area the rights of the coastal State are primarily ocean-floor bound whereas the surface installations, however indispensable, are of secondary importance, and the coastal State's rights in this area are expressly qualified as « sovereign rights », though not as « territorial sovereignty ». But nothing of the kind is the case with primarily surface installations such as constructions in the contiguous zone (and much less so in the economic zone): artificial islands, super-ports, aeroports, radio and television broadcasting stations etc. From my months in Geneva in 1958 I have no recollection that when restricting the coastal State's competencies in the continental shelf area to a strictly circumscribed number of « sovereign rights », the Conference has for one moment contemplated granting, let alone actually granting, to outsider States, a free hand to do within that area whatever they liked in the field of surface installations. That prospect has remained entirely outside its field of consideration. Any positive grant of freedom for foreign States virtually to annex the water surface of another coastal State can therefore, in my opinion, not be inferred from the 1958 codification.

Para. 8. I disagree with your thesis that the right of usage of the sea has always belonged to private persons, at least as an unassailable personal right. In former centuries this doctrinal puzzle still lay outside the interest of scholars, and the thesis is in my view in any case untenable for the present time as, for that matter, you seem to acknowledge yourself in Para. 9.

Para. 10. My above objections imply further hesitation vis-a-vis your thesis that surface « constructions once established, even if illicitly, by an outsider State in the zone of limited prerogatives (including the continental shelf area) will be under the jurisdiction of the State that has established them ». As to constructions built by individual foreigners there, I agree, of course, that they possess « no statute of public law » and that they are subject to interference by the coastal State. You construe that right of interference as « a *preferential* right to the *occupation* of such structures ». I underline two words. The term « preferential » and your further argumentation imply that you recognise the right of e.g. an American republic, if it sees a chance of being there first before the usually « most diligent » European coastal State acts, is entitled to settle there and your further contention that its successful initiative to occupy « the

island must be honoured by the coastal State with the result that that republic would acquire exclusive jurisdiction over that island ». Now what is « occupation » in this context ? It sounds, and is obviously also meant as a mild form of territorial sovereignty over the artificial island. Such island, however, is in fact nothing more than an object of property rights under civil law floating on the sea and should therefore be kept entirely outside the international law category of territory submitted to State sovereignty. You mention in this context the Netherlands REM affair. I have always disagreed with the official Dutch juristic construction of that affair, especially when, at first and before they thought better of it, Dutch official circles asserted that they were even entitled to institute penal proceedings against foreigners established on the REM island. Our Government was fully entitled, of course, to prosecute Netherlands nationals working on the island on the strength of their personal jurisdiction over them, but it was without any title to prosecute foreigners on such a foreign owned construction, for lack of any of the traditional titles of jurisdiction, territorial, pseudo-territorial, protective or universal. I had no objection to the Government's action in general but the claims they advanced were too high.

In any case, don't let us try to draw such cases into the doctrinal sphere of (pseudo-) territorial or jurisdictional rights of the coastal State in the sense of the law of nations, but rather simply look at them as a question of the legality or otherwise of appropriation of foreign property found in the coastal States maritime domain, which is legally *no res nullius*, either in the sense of international or in that of civil law. The precedents you invoke have, in my feeling, only a remote connection with the concrete issues we are examining.

Para. 11. There can certainly be no question of attributing an internationally recognized zone of territorial sea around these artificial islands, which indeed cannot boast of any « sovereign rights » such as have been granted to the coastal State in respect of, primarily, the soil and subsoil of its continental shelf and, secondarily, of the surface constructions which are indispensable for the exploration and exploitation of the real object of these rights.

I leave it with these more basic doubts about the trend of your exposé and now return to the three sections of your questionnaire 11-13.

11. This must remain « a domestic affair » of every single State.

12. I am not in favour of continuing to create ever new tribunals for limited fields of general international law, whilst existing valuable judicial or arbitral bodies, such as the Permanent Court of Arbitration and the International Court of Justice, which are quite capable of deciding controversies of this kind, continue to be neglected and so under-employed ; threatened, in fact, by a lethal anaemia. But it will in any case be wise to wait for the outcome of the third Conference of the Law of the Sea.

13. To my mind a resolution which in its first part should state the legal rules which at the present moment govern the regime of artificial islands — including possible lacunae therein — and in its second part should formulate recommendations for the creation of new rules to fill the stated lacunae and to establish a new regime for them.

These are the observations which I should have sent to you if I had been in a personal position to formulate them at the time. Now that I am faced with your provisional report I can only « as mustard after the meal » make the following additional remarks as a logical conclusion from my preceding more elaborate observations.

It must have been not only very disappointing but also very difficult for you to present a provisional report with annexed draft Resolution on the basis of such a disappointing number of reactions to your eminent and thorough preliminary exposé. In so far as I am among those guilty of causing those difficulties by remaining silent, I will sincerely apologise to you. Now that you have an opportunity to discuss the matter orally in a Commission meeting and time to consult them on how next to go from here, I wish to express my feeling that I would like to see a little more from the substantive contents of your preliminary exposé reflected in the draft Resolution, because in its present form it does not do adequate honour to the scholarly merits of your preliminary work. Would it not be possible, for instance, to be a little more specific in the 2nd paragraph of your preamble about the existing lacunae in the positive law in force and to add in its paragraph something about the desirability of making concrete proposals for the filling of the existing lacunae ?

As to Art. 3 of the draft, I harbour great doubts about its acceptability both *de lege lata* and *de lege ferenda*, especially if it is intended to apply also on the continental shelf area. And, on the whole, this is one of the articles on which I would prefer to see a clearer distinction made between the two *leges*.

As to your first *vœu*, I wonder whether a) it is in its appropriate place as a general wish attached incidentally to a special limited subject such as ours ; b) if it is really desirable to introduce it as a general expedient in the whole field of international relations ?

As to your second *vœu*, is the term « des particuliers » not too wide ? Perhaps not as far as the continental shelf area (and possibly the contiguous zone) is concerned but what about the open sea and the economic or comparable zone ? There the coastal and any other State can only legislate in respect of those over whom it has legal authority as its nationals or at the utmost as its residents.

J.H.W. Verzijl

6. Observations de M. Lucius Caflisch

Genève, le 7 mai 1980

Cher Confrère,

Permettez-moi d'abord de vous dire toute mon admiration et de vous adresser mes plus vives félicitations pour l'Exposé préliminaire et le Rapport provisoire que vous avez consacrés au problème des îles artificielles. Conformément au souhait que vous avez exprimé, je vous communique ci-après mes réponses au Questionnaire joint à l'Exposé préliminaire.

1. Non. A vues humaines, les dispositions du Texte composite de négociation officieux révisé (Nations Unies, document A/CONF.62/WP.10/Rev.1, du 28 avril 1979 ; ci-après : TNCOR), élaborées dans le cadre de la Troisième Conférence des Nations Unies sur le droit de la mer (ci-après : CNUDM) et consacrées aux îles artificielles, ne feront plus l'objet de négociations au sein de la Conférence. On peut donc penser qu'elles seront reprises telles quelles dans la future Convention. Il est vrai qu'un échec de la Conférence reste possible, mais il est à prévoir, dans cette éventualité, que les dispositions du TNCOR et spécialement celles relatives aux zones sous juridiction nationale, y compris les règles portant sur les îles artificielles, auront une influence décisive sur la formation d'un nouveau droit international *coutumier* de la mer.

2. a) Oui. Vu la réponse qui précède, ces règles générales doivent en principe refléter les dispositions du TNCOR et, dans la mesure où elles ne sont pas incompatibles avec celles-ci, les autres règles du droit international en la matière, notamment celles découlant des Conventions de Genève de 1958. Il ne servirait à rien, à mon avis, d'étudier d'éventuelles règles générales qui disparaîtront fatalement d'ici quelques années.

b) Oui. Le TNCOR comporte en effet des lacunes importantes, parmi lesquelles il faut signaler l'absence quasi totale de règles sur le régime des îles artificielles au-delà des limites de la juridiction nationale.

c) Il est difficile de répondre à cette question par un oui ou par un non. Comme nous l'avons vu, les principes qu'il s'agit d'énoncer devraient former un ensemble cohérent comprenant les dispositions du TNCOR, des règles du droit classique, ainsi que des normes portant sur des points qui ne sont expressément réglés ni par le TNCOR ni par le droit classique. J'ajouterai que notre adhésion aux dispositions du TNCOR ne doit pas nécessairement être totale : là où ces dispositions nous paraissent déficientes, nous devons tenter de les améliorer. Ma réponse à la question posée est donc la suivante : nous devons essayer de proposer un système raisonnablement complet qui se composera d'éléments de la *lex lata* aussi bien que de la *lex ferenda*.

3. Non, car une telle base dogmatique n'est guère nécessaire pour résoudre les problèmes concrets qui se posent. D'ailleurs, les bases possibles mentionnées par le Questionnaire — *res nullius*, *res communis*, patrimoine commun — ne vaudraient que pour les îles artificielles sises au-delà des limites de la juridiction nationale, de sorte que d'autres bases dogmatiques devraient être recherchées pour justifier les règles portant sur des îles artificielles sises en-deçà de ces limites.

4. Oui, vu la réponse donnée à la question 3. Cela étant, les problèmes spécifiques et pratiques que pose la présence d'îles artificielles dans les espaces marins devraient faire l'objet d'une réglementation raisonnablement complète (voir réponse à la question 2 c)).

5. Non aux questions a) et b), oui à la question c). En principe, les dispositions du TNCOR devraient être considérées en priorité. Cela ne veut pas dire — voir ma réponse à la question 2 c) — que notre acceptation de ces principes doit être totale.

6. Oui, mais on est bien obligé de reconnaître que le champ d'application spatial de ce principe est en train de se rétrécir.

7. a) et b). Non, voir le texte de l'article 2, alinéa premier, de la Convention sur la haute mer de 1958, reprise par l'article 87, chiffre premier, du TNCOR. On notera que ce dernier inclut dans les libertés énumérées « [l]a liberté [de placer en haute mer] des îles artificielles et autres installations autorisées par le droit international, sous réserve des dispositions de la partie VI [plateau continental] ».

c) Si l'on se place sur le plan du droit positif, la réponse semble devoir être négative, voir le libellé de l'article 2, alinéa premier, de la Convention de 1958 sur la haute mer et de l'article 87 du TNCOR ; pour la liberté de la navigation, voir aussi l'article 4 de la Convention de 1958 et l'article 90 du TNCOR (« Tous les *Etats*... ont le droit de faire naviguer en haute mer des navires arborant [battant] leur pavillon »).

8. Un point liminaire à examiner à propos de cette question est celui de savoir s'il convient de traiter les îles artificielles et les « superports » comme formant deux catégories distinctes. A première vue, il paraît que non, car la notion d'île artificielle semble pouvoir couvrir celle de « superport » : un « superport » est une île artificielle ou un ensemble de telles îles et est, à ce titre, soumis aux mêmes règles que ces îles. On pourrait toutefois examiner si la définition des « îles artificielles » figurant au para. 6 de l'Exposé préliminaire ne devrait pas couvrir les « îles artificielles et autres installations ». Bien qu'elle puisse paraître superflue, l'adjonction des mots : « et autres installations » aurait l'avantage de rapprocher notre définition de la formule employée par le TNCOR.

Pour ce qui est du contenu de la définition, celui-ci me semble excellent. Mon seul doute concerne la portée des mots « en permanence ». Je comprends parfaitement les raisons qui justifient leur insertion, mais je me demande quel est le degré de permanence précis qui est requis.

9. Pour le moment non. Cette réponse est fondée sur la présomption que les questions a) à d) englobent le problème du lien pouvant rattacher une île artificielle à tel ou tel Etat, que la question b) (droit des particuliers de créer des îles artificielles) couvre celle du statut juridique éventuel de telles îles, que la question g) (obligations des Etats) comprend celle de la responsabilité pour la mise en place et l'utilisation de telles îles et que la question e) (statut des eaux environnantes) touche aussi à l'utilisation (ou la non-utilisation) des îles artificielles comme points fixes pour tracer la ligne de base de la mer territoriale ou des lignes de base archipélagiques. Dernière remarque, la mise en place et l'utilisation de telles îles par des organisations internationales, que ce soit en vue de l'exploration ou de l'exploitation des ressources naturelles des fonds marins ou de conduire des activités de recherche scientifique marine, est une hypothèse qui doit être prise en considération.

10. Pour répondre à cette question, j'aimerais faire quelques observations sur les points traités aux para. 7 à 9 et 11 à 12 de l'Exposé préliminaire.

Para. 7 : Je voudrais relever d'abord que, dans les espaces marins où l'Etat côtier jouit de compétences exclusives en matière de mise en place et d'utili-

sation d'îles artificielles, cet Etat peut toujours autoriser un autre Etat ou une organisation internationale à établir et à maintenir de telles îles (Exposé préliminaire, pp. 30-31).

Seconde observation, l'affirmation suivant laquelle la mise en place d'îles artificielles dans la zone contiguë est inadmissible semble devoir être nuancée (*ibid.*, p. 31 ; voir aussi p. 36).

Para. 8 : L'Exposé préliminaire constate à juste titre que dans les eaux soumises à la souveraineté de l'Etat côtier, les particuliers sont assujettis à la loi de celui-ci et qu'il en va de même pour les zones à compétence limitée en tant que l'île artificielle sert à des usages réservés à l'Etat côtier ; *grosso modo*, cette constatation correspond à ce que prévoit le TNCOR[1]).

Ce cas doit être clairement distingué de celui des îles artificielles situées en haute mer ou sur les grands fonds marins. La *lex lata* relative à ces îles, peu satisfaisante, est décrite au para. 9 de l'Exposé préliminaire : « [l]es constructions créées par des particuliers... en haute mer sont... dépourvues de tout statut de droit public », donc des *res nullius* susceptibles d'occupation (p. 37). Cette absence de statut juridique résulte du fait que le droit des Etats de faire naviguer des navires en haute mer sous leur pavillon est complété par la règle que le pavillon emporte attribution de compétence exclusive, alors que la *lex lata*, tout en n'interdisant pas la mise en place d'îles artificielles, n'établit aucun lien juridique entre tel ou tel Etat et l'île artificielle, de sorte que celle-ci est dépourvue de statut juridique. La situation s'est encore aggravée dans le cadre du TNCOR, puisque l'article 87, chiffre premier, lettre d), de celui-ci étend expressément la liberté de la haute mer à la liberté de placer en haute mer des îles artificielles, sans toutefois apporter les précisions indispensables relatives au rattachement de ces îles à un Etat et, par voie de conséquence, relatives à leur statut juridique. A ce propos, il convient toutefois d'attirer l'attention sur l'article 262 du TNCOR parce que celui-ci, qui ne porte que sur le statut des installations et du matériel scientifiques, laisse entrevoir une solution qui pourrait être étendue aux îles artificielles en général. Cet article a la teneur suivante :

« Les installations ou le matériel visés dans la présente section doivent être munis de marques d'identification indiquant l'Etat où ils sont enregistrés ou l'organisation internationale à laquelle ils appartiennent, ainsi que des moyens appropriés de signalisation ayant fait l'objet d'un accord international pour assurer la sécurité de la navigation maritime et aérienne, compte tenu des principes établis par les organisations internationales compétentes. »

Malheureusement, l'idée qui semble sous-tendre ce texte — création d'un système d'enregistrement ayant pour conséquence l'attribution de droits, devoirs et compétences à l'Etat (ou à l'organisation) d'enregistrement — n'est pas

[1] Encore que l'article 60, chiffre premier, lettre a), du TNCOR aille plus loin en ce qui concerne les îles artificielles sises dans la zone économique « exclusive » puisqu'il les soumet purement et simplement à la juridiction de l'Etat côtier.

concrétisée par l'article 262 du TNCOR. Cette disposition omet en effet de spécifier les conditions d'enregistrement ; de plus, elle omet de préciser que l'enregistrement comporte attribution de compétence. Il appartient à l'Institut de combler ces lacunes, tant pour les installations servant à la recherche scientifique marine que pour les îles artificielles en général.

Para. 11 et 12 : Il me semble souhaitable de distinguer, dans le projet de résolution, entre les règles relatives à l'influence que peut avoir la présence d'une île artificielle sur le tracé de limites et délimitations maritimes (lignes de base, délimitation d'espaces marins entre Etats dont les côtes se font face ou sont limitrophes), et les règles portant sur les espaces marins pouvant se rattacher à une île artificielle en tant que telle.

11. Non, cela ne me semble guère réaliste.

12. Non, car une bonne partie des litiges pouvant naître dans ce domaine seront soumis aux procédures obligatoires de règlement instituées par la section 2, de la Partie XV du TNCOR.

13. Celle d'un projet de résolution accompagné, le cas échéant, d'un certain nombre de vœux.

Veuillez croire, cher Confrère, à l'expression de mes sentiments les meilleurs.

Lucius Caflisch

Aspects juridiques de la création de superports et d'îles artificielles

(*Troisième Commission*)

Rapport définitif

Fritz Münch

I

1. En premier lieu, il convient que le rapport définitif souligne l'importance du problème. Si nos connaissances historiques sur les constructions en mer qu'on peut qualifier d'îles artificielles et sur le droit écrit et coutumier y relatif sont sporadiques, les exemples récents sont nombreux et variés. *N. Papadakis*, The International Legal Regime of Artificial Islands, 1977, a essayé de les systématiser.

Il suffit ici de dire que les usages actuels couvrent un large éventail d'intérêts : habitation, protection des ports, aide à la navigation (ces trois aspects apparaissent déjà dans l'Antiquité), récréation, science, exploitation de la mer, défense (bien que les îles artificielles soient plus vulnérables que des installations et engins sous-marins). Ces constructions sont aussi bien le fait d'autorités publiques que de personnes privées, celles-ci agissant avec ou sans autorisation, parfois même contre les intentions et intérêts gouvernementaux (radio-pirates).

Le potentiel de développement du phénomène est grand, la technique permettant de s'implanter dans les mers marginales, dans de larges bassins et plateaux peu profonds devant beaucoup de continents, et sur de nombreuses montagnes submergées à peu de distance de la surface dans le Pacifique (les dénommés « guyots »).

Il existe des plans ambitieux pour implanter en mer de vastes entreprises qui sont indésirables sur la terre ferme.

2. Les renseignements donnés dans l'exposé préliminaire, para. 1, dans le rapport provisoire, para. II 1, et dans « *Zeitschrift für*

ausländisches öffentliches Recht und Völkerrecht », vol. 38, pp. 935-939, peuvent être mis à jour, en partie grâce à la courtoisie de nos confrères, MM. *Bos* et *Jennings*.

On a lu que les îles artificielles implantées sur les récifs Minerva près de l'archipel de Tonga auraient disparu. Le grand projet belge d'un port artificiel dans la Manche paraît avoir été mis en veilleuse. Le projet analogue néerlandais a fait l'objet d'un rapport officiel détaillé (Stunet - Stuurgroep Studie Noordzeeeilanden en Terminal, 1979), mais le Gouvernement n'entend pas prendre d'initiative pour le moment.

Le tunnel sous la Manche, à en croire des rumeurs, serait projeté non plus à partir de la terre ferme, mais de deux îles artificielles construites dans le chenal et reliées par des ponts à chacune des côtes. Il serait question de déposer en mer, devant la côte suédoise, les déchets d'une carrière pour en former une île artificielle qui serait boisée et transformée en parc.

Il y a eu du nouveau sur l'ancienne fortification anti-aérienne Rough's Tower devant Harwich, occupée depuis 1966 par un ancien officier nommé Roy Bates. Celui-ci prétend établir un Etat appelé Sealand, émettant des timbres-poste et des documents officiels, et recherchant la reconnaissance par d'autres Etats. Son soi-disant ministre des affaires étrangères a tenté en vain de faire constater, par le Tribunal administratif de Cologne, la perte de sa nationalité allemande en conséquence de sa naturalisation à Sealand. Malgré les troubles et les violences survenus sur cette île artificielle (*Keesing*, Archiv der Gegenwart, 16.8.1978, p. 2 199 3 A), les autorités britanniques ont estimé qu'elles n'avaient pas à intervenir, bien que la Couronne en soit propriétaire. (Question à la Chambre des Lords, 5 décembre 1978, Hansard Lords, vol. 397, col. 4-7).

II

1. Votre rapporteur estime que l'état des travaux de la Troisième Conférence des Nations Unies sur le droit de la mer permet à l'Institut de s'occuper utilement du thème de la Troisième commission. En effet, il paraît, d'une part, que les dispositions matérielles du projet de la Conférence ont atteint un caractère de *ne varietur*,

et d'autre part, que le projet de clauses finales caractérise le texte comme un projet de convention de droit international tout à fait classique. Cela revient à dire que le fait de clore la Conférence par la présentation du nouveau droit de la mer n'abolit pas l'ancien droit coutumier ou conventionnel, et que celui-ci ne sera remplacé qu'au fur et à mesure que les Etats, par leur ratification, mettront en vigueur *inter se* le texte de la Conférence. Pour les Etats non parties, il faudra continuer à appliquer l'ancien droit, donc le cas échéant les Conventions de 1958, jusqu'au moment où le texte nouveau, par une adhésion quasi-universelle, formelle ou pratique, se présentera comme droit international général.

Le Texte de Négociation composite informel en date du 11 avril 1980 (A/Conf. 62/WP. 10/Rev. 2) ne groupe pas les articles relatifs aux superports et aux îles artificielles dans une section à part, mais les disperse selon d'autres points de vue. Ils n'épuisent d'ailleurs pas la matière, ainsi que le fait observer M. *Caflisch.*

2. Ainsi, pour commencer, le Texte ne définit ni le superport ni l'île artificielle. L'île tout court est une étendue naturelle de terre entourée d'eau qui reste découverte à marée haute (art. 121, al. 1er) ; formule empruntée à l'art. 10, al. 1er, de la Convention sur la Mer territoriale et la Zone contiguë du 29 avril 1958. Pour définir l'île artificielle, il faudra retrancher les mots « naturelle de terre », ce qui cependant ne devrait pas empêcher que l'île artificielle soit construite d'un amas de terre, de pierre et de matériau fourni par la nature.

La définition comporte l'idée d'une étendue, et ceci distinguera l'île artificielle d'une installation en forme de bouée, de balise ou d'échafaudage. On exigera donc un minimum de surface suffisant au séjour prolongé d'hommes mais pas nécessairement permanent. Il n'y a pas lieu, d'autre part, de constituer parmi les îles artificielles une classe de rang inférieur à l'instar de l'art. 121, al. 3. De par la nature des choses, il faudra admettre comme îles artificielles les surfaces qui n'ont pas de vie économique propre.

Il faut encore mentionner l'art. 7, al. 4, qui, dans sa première alternative, permet de tirer une ligne de base droite vers une élévation (surface n'émergeant qu'à marée basse, voir art. 13) lorsqu'elle porte un phare ou une construction similaire restant de manière permanente au-dessus de la marée haute. Cette description corres-

pond à la définition de l'île artificielle, mais elle est traitée comme une île naturelle.

Les superports ne sont pas non plus définis, mais il y est fait allusion, aux art. 11, phr. 2, et 18, al. 1, sous les noms d' « installations au large des côtes » et « installations portuaires ».

3. Le statut des îles artificielles est visé à l'art. 11, phr. 2. Elles ne comptent pas comme « installations portuaires permanentes » qui, d'après la première phrase de l'article, font partie de la côte en tant que base de la mer territoriale. Pris à la lettre, ce texte modifierait *ex nunc* la ligne de base de la mer territoriale devant tous les ports dont les ouvrages extérieurs permanents sont des môles ou des brise-lames non rattachés à la terre ferme (donc des îles artificielles) et qui, dans la pratique ancienne, avaient constitué la ligne de base. On n'en voit pas la raison, et on peut même douter que telle ait été l'intention des rédacteurs.

D'après le même art. 11 phr. 2, les superports ne font pas partie d'une ligne de base.

4. Sur le point de savoir s'il est admissible de construire des îles artificielles et des superports, le Texte ne donne pas de réponse explicite en ce qui concerne les eaux intérieures et territoriales. Il faut supposer que les rédacteurs considèrent comme allant de soi que l'Etat côtier, souverain dans ces eaux, peut construire ou admettre ces constructions. En effet, elles sont mentionnées aux art. 18, al. 1, 21, al. 1 (b), et 25, al. 2.

Pour la haute mer l'art. 87, al. 1, lit. d), dispose expressément que la construction d'îles artificielles fait partie des libertés de la haute mer. Est réservé le cas des eaux surplombant le plateau continental, pour lesquelles l'art. 80 renvoie à l'art. 60 relatif à la zone économique exclusive. Dans celle-ci (et par conséquent au-dessus du plateau continental), l'Etat côtier seul peut construire, admettre et réglementer des îles artificielles (art. 60, al. 1 et 2, art. 56, al. lit. b (i)).

La liberté de construire des îles artificielles en haute mer sera pratiquement restreinte lorsque l'Autorité internationale des fonds marins fonctionnera et que le régime de la « Zone » entrera en vigueur. Selon l'art. 147, al. 2 (a), l'Autorité pourra émettre des règlements à ce sujet.

5. Cet article 147 fournit également des précisions sur le régime des îles artificielles, et l'on peut supposer que ce régime a été conçu comme s'appliquant aux îles artificielles dans toutes les sections de la mer. En tout cas, il se recommande comme approprié aux nécessités ; il est dérivé du régime que la Convention de 1958 a institué pour les installations servant à l'exploitation du plateau continental.

On y trouve :

a) l'obligation de notifier au public l'emplacement ;

b) la défense d'obstruer les voies importantes de navigation et les lieux de pêche intensive ;

c) l'établissement de zones de sécurité autour des installations ;

d) l'interdiction d'activités non pacifiques ;

e) l'absence du statut d'îles naturelles, c'est-à-dire que les îles artificielles n'ont ni mer territoriale, ni zone économique exclusive, ni plateau continental, et leur présence n'influence pas la délimitation de ces zones.

L'essentiel de ce régime est répété pour les installations de recherche scientifique en mer, y compris donc celles qui seraient des îles artificielles, aux art. 260-263.

III

Six confrères ont répondu au questionnaire annexé à l'exposé préliminaire, et notamment M. *Zemanek* qui, depuis, a démissionné de la Troisième commission pour siéger dans une autre. Qu'il soit permis cependant d'incorporer ses opinions dans ce compte rendu.

1. Dans les questions 1, 2 et 5, il s'agit de savoir s'il faut attendre la fin de la Conférence, s'il faut exposer la *lex lata* ou la *lex ferenda*, et si la *lex lata* se manifeste dans les textes de 1958. Les réponses sont divergentes, mais il paraît que l'état actuel des choses facilite un accord. Si les confrères acceptent l'interprétation du projet de clauses finales du Texte donnée ci-dessus (II 1), on peut dire que le Texte lui-même, en dépit de tout ce qui a été dit, et malgré l'irrégularité de son élaboration, reste un projet de convention multilatérale au sens classique. Il ne prétend pas être une codification du droit existant — pour certaines matières, où il répète d'anciens

textes, on lui accordera néanmoins ce caractère — il ne prétend pas remplacer dès maintenant le droit de la mer préexistant, en particulier les conventions de 1958.

On peut donc, on devrait même, dans l'opinion de votre rapporteur, rédiger un petit code des superports et îles artificielles, surtout parce que la matière n'est pas traitée systématiquement ni complètement dans le Texte. Il faudra nécessairement décrire le droit actuel, et l'on peut exprimer des critiques. En présence du Texte, on pourra considérer le statut des îles artificielles en fonction de l'hypothèse de la création de la zone exclusive économique et de la « Zone ». Il faudra ne pas oublier que pendant un certain temps les droits des Etats non parties au nouveau Texte se maintiendront contre les revendications des Etats parties .

2. La troisième question était de savoir s'il convient de discuter à partir d'une théorie générale sur le statut de la mer. Alors que MM. *Caflisch*, *Verzijl* et *Zemanek* répondent négativement, MM. *Scerni* et *Udina* se prononcent pour l'idée de l'héritage commun, et M. *Bos* préfère parler de domaine public international.

Dans ces conditions, votre rapporteur voudrait pouvoir se dispenser d'une discussion théorique.

3. La quatrième question ne vise que l'alternative à la troisième, et les confrères y ont répondu par l'affirmative. Cependant M. *Bos* veut qu'on prenne l'intérêt général comme point de départ ; M. *Scerni* fait observer que pour les vastes zones de souveraineté et de prérogatives des Etats côtiers, le problème essentiel n'est plus celui des collisions d'utilisations.

Votre rapporteur craint qu'il n'ait mal posé cette question. Les collisions d'utilisations doivent être jugées selon une règle générale basée sur l'intérêt commun ; même le régime des zones de souveraineté et de prérogatives doit s'en inspirer. Cela a d'ailleurs été le fondement du droit classique de la mer.

4. En réponse à la sixième question, les confrères se sont prononcés en faveur de la liberté des mers comme principe directeur. M. *Caflisch* fait remarquer que l'espace régi par cette liberté a fortement diminué et M. *Bos* voit un danger pour cette liberté dans la multiplication des grandes îles artificielles.

Votre rapporteur pense que le principe de la liberté des mers

n'est pas encore affecté ; il figure à l'art. 87 du Texte de la Conférence. Tant que le nouveau Texte n'est pas devenu droit international général, cette liberté continue à signifier le libre usage pour tous, restreint par l'égard dû aux autres usagers et, éventuellement, par les conventions réglant la concurrence des usages. L'idée de l'héritage commun de l'humanité avait été réalisée sous cette forme dans une société internationale non organisée. Elle ne pourra faire place à la réglementation totale qu'au moment où le droit international général aura changé et que les autorités dirigeant l'usage de la mer seront installées.

5. Les libertés de la mer — objet de la septième question — n'ont pas besoin d'être énumérées. Les confrères sont d'accord sur ce point. Mais les réponses diffèrent sur la question 7 c) de savoir si l'exercice de ces libertés revient originairement aux particuliers.

On pourrait se passer de se prononcer sur ce point en disant que l'Institut s'occupe d'un problème de droit international public, donc uniquement des droits et devoirs des Etats. Cependant il faudrait savoir si un Etat peut intervenir, et lequel, lorsque, en haute mer, des individus établissent une île artificielle. Il faut donc poser la question de savoir si l'individu agit, dans un tel cas, en dehors de tout droit et s'expose à la répression de la part de n'importe quel Etat, à l'instar du pirate.

Nous connaissons quatre cas dans lesquels les constructeurs d'îles artificielles ont même prétendu y installer des Etats indépendants. Trois de ces entreprises ont été éphémères (*K.M. Keith*, Floating Cities, in Marine Policy vol. 1 pp. 190 ss. ; « Minerva » est aussi mentionnée à l'exposé préliminaire § 1 e), mais celle de « *Sealand* » continue (*supra* § I 2 *in fine*). La tentation subsiste ; Keith discute même l'hypothèse de pareils mini-Etats sur des plates-formes dérivant à travers les mers. C'est donc au droit international de dire si de tels organismes peuvent être qualifiés d'Etats et revendiquer un statut légal. Keith pense qu'il n'y a pas d'Etat sans reconnaissance par les autres Etats, mais il me paraît que cette doctrine est dépassée et qu'en tout cas elle n'est pas généralement admise.

6. Les définitions du superport et de l'île artificielle proposées dans l'exposé préliminaire (§ 6) et reprises dans le projet provisoire de résolution (art. 1er) ont trouvé l'appui des confrères. M. *Caflisch*

aimerait préciser encore la notion de permanence qui y est introduite pour les constructions flottantes.

Votre rapporteur lui donne raison, mais il est dans l'embarras de trouver une bonne et simple solution. L'île artificielle flottante exige un autre régime qu'un navire amarré. En droit international on ne saurait adopter les distinctions que les droits nationaux pratiquent, parfois différentes pour des aspects différents. Ainsi *Keith* (*supra* § 6) rapporte qu'un tribunal américain a qualifié de « *vessel* » une construction de forage de pétrole en mer, pour lui appliquer la législation sur les accidents de travail.

S. Ferrarini (dans Rapports nationaux italiens au X° Congrès international de Droit comparé, Budapest, 1978, pp. 375 ss.) indique des appréciations contradictoires dans le droit italien.

Or, les îles de forage sont normalement construites pour être déplacées après avoir servi leur but, et installées sur un autre site. La permanence est, pour ainsi dire provisoire ; mais cet élément est peut-être compris dans le terme. Si les confrères estiment que pour plus de clarté on devrait dire « en permanence ou pendant un laps de temps considérable » (ainsi Ferrarini l. c. p. 379), le rapporteur y consent.

7. La majorité des confrères ne souhaite pas que la Troisième Commission aborde d'autres questions encore, en particulier celles d'un recours individuel national dans ces matières ou d'un règlement international des différends (questions 9, 10 et 11). MM. *Bos* et *Verzijl* proposent pourtant de discuter la responsabilité de l'Etat pour ses îles artificielles.

Votre rapporteur hésite, car la responsabilité fait l'objet d'autres travaux de codification ; celle pour actes licites est au programme de l'Institut même. Selon lui, il suffit de constater quand l'établissement d'îles artificielles est licite et quand il ne l'est pas. Les problèmes surgissant alors, celui de la responsabilité envers la communauté internationale et pour les actes des personnes privées, sont visés dans les deux projets de vœux ajoutés au projet de résolution.

8. La question 10 devait provoquer une discussion sur la théorie générale des îles artificielles et sur leur statut dans les eaux qui sont prévues pour tomber sous des prérogatives étatiques malgré le slogan de l'héritage commun. Les opinions recueillies diffèrent beaucoup.

Le rapporteur s'est décidé à y renvoyer sans pour le moment modifier son exposé ou l'essence de son projet. En effet, le nombre de réponses obtenues jusqu'ici ne permet pas de fixer l'opinion de la majorité de la commission. Ensuite, jusqu'à l'ouverture de la session de Dijon, on pourra peut-être mieux apprécier les chances du Texte de la Conférence de devenir droit général.

Cela ne veut pas dire que le rapporteur soit insensible aux préoccupations des confrères qui se sont alarmés à la perspective d'un pullulement d'îles artificielles étrangères devant les côtes, ou de frictions entre l'Etat titulaire d'une prérogative et d'autres Etats projetant la construction d'îles artificielles dans les eaux concernées. Mais il ne voit pas comment protéger *de lege lata* les Etats côtiers contre ces inconvénients. Peut-on discriminer la liberté de construire des îles artificielles en mer, liberté qui vient d'être reconnue *expressis verbis*, en lui imposant des limites dans l'espace, en d'autres termes en créant des zones de protection en faveur des Etats côtiers ? Ne faut-il pas se contenter, pour le moment, de la restriction générale qui s'impose à tous les libres usages de la mer, c'est-à-dire le respect mutuel ? Tant que le statut des eaux dans les zones à prérogatives restera en principe celui de la haute mer, il faudra même admettre dans ces eaux la présence d'îles artificielles qui n'interfèrent pas dans la matière de la prérogative. Il faudra, pour modifier cette situation, que les art. 60 et 80 du Texte de la Conférence deviennent droit international général ; alors seulement les prérogatives comporteront le monopole de la construction d'îles artificielles.

Ce monopole d'ailleurs serait dicté par des considérations pratiques et non pas par des nécessités de logique juridique ; il ne pourrait donc s'imposer sans le consentement exprès des membres de la communauté internationale. Même si ceux-ci admettaient le principe de la zone économique exclusive, comme ils ont admis le plateau continental, les règles de détail et les incursions supplémentaires sur le principe de la mer libre auront besoin d'un titre juridique distinct.

9. Quant à la forme à donner au résultat de nos délibérations — question 13 — M. *Bos* opine pour une déclaration de droit international à appliquer aux îles artificielles et aux superports, tandis

que les autres confrères veulent une résolution, soit simple, soit accompagnée d'un code, soit suivie de vœux sur la *lex ferenda*.

Votre rapporteur estime que, pour le moment, il peut maintenir sa proposition de formuler une résolution habituelle avec des vœux.

IV

1. Votre rapporteur propose quelques légères modifications au projet de résolution. Pour l'essentiel il peut donc renvoyer au commentaire qu'il en a donné au rapport provisoire, chapitre IV. Quant au nouveau texte des alinéas 2, 3 et 6 du préambule et des articles 1 et 5 al. 2, il fait observer ce qui suit :

a) Les alinéas 2 et 3 du préambule justifient les travaux que l'Institut a entrepris par l'absence de système dans les textes actuels et proposés sur les îles artificielles et les superports.

b) Un nouvel alinéa 6 réserve expressément les questions de responsabilité (voir *supra* III 7).

c) Dans l'article premier, définition de l'île artificielle, il a été ajouté entre parenthèses, c'est-à-dire comme alternative sur laquelle la commission et l'Institut se prononceront, une clarification du terme « permanence » par les mots « ou pendant un laps de temps considérable » (suggestion de M. *Caflisch*, formule de *S. Ferrarini*, *supra* III 6).

d) Comme la question n'est pas dépourvue d'une certaine actualité, il est proposé de se prononcer sur les îles artificielles mini-Etats, et d'ajouter, à l'article 5, un alinéa leur refusant l'existence (*supra* III 5 *in fine*, et I 2 *in fine*). Cela ne préjuge en rien la faculté pour l'Etat de donner un statut municipal et administratif particulier aux îles artificielles et superports importants.

2. Le projet de résolution a été rédigé avec un souci de concision, et les confrères qui l'ont eu sous les yeux n'ont pas adressé d'observations sur ce point au rapporteur. On pourrait cependant discuter en commission sur l'utilité d'être plus explicite là où les questions sont résolues par des renvois.

Ainsi, l'obligation de l'Etat de marquer les constructions, de les notifier au public et de les enlever lorsqu'elles ne servent plus, se trouve à l'article 6 du projet, sous forme de renvoi à l'art. 5, al. 5,

de la Convention de 1958 sur le Plateau continental. Peut-être vaudrait-il mieux l'insérer dans la résolution elle-même ou en prescrire l'application par analogie et extension.

Le régime des superports, à l'art. 6 *in fine*, est laissé à la discrétion de l'Etat. Faut-il dire que les superports sont soustraits au régime international des ports classiques avec leur accès libéralisé, et que les eaux situées à l'intérieur de leurs limites ne conservent pas le statut de la haute mer ou des eaux territoriales dans lesquelles ils sont situés ?

3. Un confrère a proposé de modifier l'intitulé de la résolution en « îles artificielles et superports ». En effet, le projet de résolution est relativement sommaire sur les superports qu'il considère essentiellement comme un assemblage d'îles artificielles et dont l'accès est réservé. Cette question pourra être traitée ultérieurement.

V

1. Notre Secrétaire général a suggéré d'approfondir la question de savoir quel droit sera la *lex loci* sur les îles artificielles, car il pense qu'elle sera posée au cours des délibérations. Elle ne figure pas, en effet, au questionnaire, et les membres de la commission ne l'ont pas soulevée non plus. Jusqu'à présent, votre rapporteur avait pensé qu'elle se résolvait par ce qui est dit à l'article 5 du projet de résolution ; celui-ci déterminant la souveraineté (ou la juridiction) à laquelle chaque île artificielle (et chaque superport) sera soumise.

Il est vrai cependant qu'il y a des problèmes. Souveraineté ou juridiction ne veut pas dire que l'ordre juridique en entier soit applicable sur le territoire ou l'étendue de la surface. Il y a des Etats à régimes locaux différents et l'idée que les îles artificielles et les superports soient placés sous des systèmes particuliers paraît raisonnable.

2. En effet, à comparer trois législations pertinentes, on trouve des solutions variées. Les Etats-Unis, dans leur *Deepwater Port Act* de 1974, soumettent globalement les futurs superports au droit fédéral et subsidiairement au droit de l'Etat membre le plus proche. Ce serait donc l'un des extrêmes qu'on peut imaginer en théorie ; ce

qui n'exclut pas qu'en pratique la Fédération et les Etats membres émettent un corps de normes d'exception.

Les Pays-Bas, dans leur loi du 3 décembre 1964 sur les installations implantées sur leur plateau continental (Wet Installaties Noordzee, Staatsblad 1964 p. 1129, traduction en français Nederlands Tijdskrift voor Internationaal Recht 1965 p. 209), rendent immédiatement applicable le droit pénal néerlandais aux personnes qui se rendraient coupables d'un fait punissable sur une installation en question. D'autres normes néerlandaises peuvent être rendues applicables par décret (Algemeene Maatregel van Bestuur), et par ce moyen des exceptions peuvent être apportées à l'emprise du droit néerlandais.

La loi allemande de 1964 sur le plateau continental (Bundesgesetzblatt 1964 I p. 497) est encore moins explicite sur le point qui nous intéresse ici. Elle interdit toute activité d'exploration et d'exploitation sans permis spécial, et elle autorise certains fonctionnaires allemands à pénétrer sur les installations en mer.

Il est difficile de déduire, sans autre, une conception claire sur l'assimilation ou non des installations au territoire allemand.

3. Votre rapporteur pense qu'il faut distinguer le régime des îles artificielles et surtout des superports de celui des navires. Il s'agit de surfaces fixes, tant qu'elles existent, et le besoin de déterminer leur ordre juridique est aussi urgent que pour des portions de la terre ferme.

La Convention de 1958 sur le plateau continental soumet les installations servant à l'exploration et à l'exploitation, à la juridiction de l'Etat riverain (art. 5 al. 4). Or, ces installations ne sont pas toujours habitées. A plus forte raison on peut dire que la communauté internationale, en adoptant cette convention et son art. 5 al. 4, s'est montrée d'accord pour admettre que des surfaces fixes, implantées en mer, soient exemptes de l'interdiction d'acquérir des droits exclusifs de juridiction, telle qu'elle est énoncée à l'article 2, al. 1, phr. 1, de la Convention de 1958 sur la Haute Mer. Il me semble même permis de généraliser cette idée et d'affirmer que chaque fois qu'une utilisation privative durable de la mer (voir à l'exposé préliminaire, chap. I 4) est admise, les installations nécessaires peuvent ressortir à la juridiction exclusive d'un Etat.

4. Il y a cependant deux observations à retenir : La juridiction

d'un Etat devant être reconnue *in abstracto*, son étendue doit se déterminer d'après le règlement concret, c'est-à-dire que l'ordre juridique, établi sur une île artificielle ou dans un superport, peut être rudimentaire et que pour certaines matières on ne trouve pas d'indication explicite dans la *lex loci*.

Il peut même arriver que cette absence de *lex loci* explicite soit absolue ; ce sont les cas où une île artificielle se trouve en haute mer (et jusqu'à nouvel ordre dans les nouvelles zones à prérogative, et dans les eaux surplombant le plateau continental sans servir à son exploration ou exploitation) sans être soumise à la juridiction d'un Etat, parce que l'initiative de sa construction est restée entièrement privée. Il faut alors déterminer la loi applicable à un fait survenant sur une pareille île artificielle comme si l'on avait affaire à une *terra nullius*.

Il ne s'agit pas d'une hypothèse purement scolastique. Le Rough's Tower (*supra* p. 63 s.) est propriété de la Couronne britannique, mais le gouvernement de la Grande-Bretagne a déclaré qu'il n'est pas territoire britannique et que, par conséquent, ce gouvernement ne saurait intervenir pour libérer les sujets néerlandais et allemands qui y étaient détenus par le soi-disant Prince de Sealand.

5. Pour le moment, votre rapporteur ne propose pas de modifier son projet de résolution pour donner une solution à la question traitée dans ce chapitre. Il comprend les développements qu'il y a consacrés comme un commentaire à l'art. 5 du projet. Peut-être pourra-t-on préciser dans ce sens qu'une île artificielle sur laquelle aucun Etat n'a étendu sa juridiction, doit être traitée en droit international comme une *terra nullius*.

Par ailleurs, votre rapporteur envisage de rédiger éventuellement, pour la session de Dijon, un rapport complémentaire qui tiendrait compte de l'évolution de la question à la Conférence des Nations Unies sur le droit de la mer.

Heidelberg, juillet 1980

VI. *Projet définitif de résolution*

L'Institut de Droit international,

Constatant l'activité croissante déployée dans le domaine de la construction d'îles artificielles et de superports ;

Constatant que ni les textes actuellement en vigueur ni ceux qui sont en voie d'élaboration au sein de la III[e] Conférence des Nations Unies sur le droit de la mer ne contiennent un corps systématique de règles relatives aux îles artificielles et aux superports ;

Estimant que les efforts déployés en vue de la réforme du droit international de la mer ne pourront aboutir, dans un avenir rapproché, à en altérer les principes essentiels ;

Jugeant dès lors nécessaire de clarifier certains aspects du régime juridique des îles artificielles et des superports sur la base des principes du droit de la mer actuellement en vigueur ;

S'inspirant simultanément des besoins nouveaux de la communauté internationale contemporaine ;

Réservant la question de l'étendue et des conséquences de la responsabilité internationale des Etats qui construisent des îles artificielles et des superports ou qui en autorisent ou en tolèrent la construction ;

Propose les articles suivants comme régime légal approprié des îles artificielles et des superports :

Article 1

Au sens de la présente résolution :

— une île artificielle est toute construction fixée au sol de la mer ou flottant en permanence (pendant un laps de temps considérable) en un endroit de la mer et qui reste découverte à marée haute ;

— un superport est une île artificielle ou un assemblage d'îles artificielles servant (ou destinés à servir) de port.

Les îles artificielles destinées ou affectées à l'exploration ou à l'exploitation du plateau continental restent soumises au régime consacré par l'article 5 de la Convention de Genève du 29 avril 1958 sur le Plateau continental.

Article 2

Tout Etat peut prohiber la construction ou l'établissement d'îles artificielles et de superports dans ses eaux intérieures, dans ses eaux territoriales ainsi que dans sa zone contiguë.

Article 3

Tout Etat peut prohiber la construction ou l'établissement d'îles artificielles et de superports sur son plateau continental et dans sa zone économique lorsqu'il en résulterait une gêne sensible pour l'exploitation de richesses soumises à sa juridiction.

Article 4

L'Etat qui construit une île artificielle ou un superport, qui en autorise la construction ou qui, dans les hypothèses visées aux articles 2 et 3, n'en prohibe pas la construction, doit veiller à ce que ni la construction, ni l'utilisation de ces îles ou superports n'entravent sensiblement la navigation internationale, ne nuisent sensiblement aux ressources de la mer ou ne causent des pollutions sensibles.

Article 5

Les îles artificielles et les superports construits dans les eaux intérieures et dans les eaux territoriales relèvent de la souveraineté de l'Etat riverain.

Dans les autres eaux maritimes, ils relèvent de la souveraineté (de la juridiction) de l'Etat qui les a construits et, éventuellement de la souveraineté (de la juridiction) de l'Etat qui les aura occupés.

La population établie sur une île artificielle n'est pas en droit de se constituer en Etat (indépendant).

Article 6

Sans préjudice des articles 4, al. 3, 8 et 11 de la Convention de Genève du 29 avril 1958 sur la mer territoriale et la zone contiguë, les îles artificielles et les superports ne comportent ni mer territoriale, ni plateau continental, ni zone à prérogative.

L'Etat qui exerce la souveraineté peut établir autour de ces îles

et superports des zones de sécurité telles qu'elles sont décrites à l'article 5, al. 2 et 7 de la Convention de Genève du 29 avril 1958 sur le Plateau continental.

Il peut également créer un régime pour les superports et les rades qui y seraient éventuellement rattachées.

Article 7

L'existence d'îles artificielles ou de superports n'affecte pas les limites des zones d'eaux maritimes entre Etats limitrophes ou entre Etats dont les côtes se font face.

Vœux :

L'Institut de Droit international,

I. *Estimant* qu'il existe des obligations des Etats envers la communauté internationale dans son ensemble et regrettant que les procédures et sanctions du droit international ne soient pas d'application certaine en pareils cas,

Emet le vœu

que la jurisprudence internationale développe le moyen procédural de l'*actio popularis*.

II. *Trouvant* insuffisants les remèdes dont dispose la communauté internationale envers les actes des particuliers lorsque ceux-ci lèsent l'intérêt général par la construction inconsidérée d'îles artificielles ou de superports en mer,

Emet le vœu

que chaque Etat adopte des mesures législatives et administratives pour empêcher que des particuliers construisent en mer des îles artificielles ou des superports sans qu'il soit constaté au préalable que l'intérêt général de la communauté internationale n'ait à en pâtir.

New problems of the international legal system of extradition with special reference to multilateral treaties

*(Twelfth Commission)**

Provisional Report

Karl Doehring

Introduction

Since the questionnaire was approved by the members of the Commission during the Oslo Session, it seems justified to assume that the systematic presentation of the material in that document may form the structural basis for the reports that are to follow.

All except three of the members of the Commission have forwarded their replies. I thank my Confrères for their general support and in particular for their interesting statements. After having examined the replies, I, nevertheless, have the impression that there were some questions which were not understood exactly in the sense I meant to give them. The purpose of my questions was to enable me to ascertain whether there was a tendency in a particular direction. The questions were intended to assist in the preparation of *de lege ferenda* recommendations and were not supposed to result in a discussion solely of existing law. It is precisely here that misunderstandings seem to have occurred, for some of the replies were confined to the statement that a given legal situation corresponds to existing law. My questions, however, were based on the idea that the existing law may be regarded as unsatisfactory and that the answers could lead to the drafting of *de lege ferenda* recommendations.

* The Commission is composed of Mr. Doehring, *rapporteur*, Mrs Bindschedler, MM. Cansacchi, de La Pradelle, McWhinney, Monaco, do Nascimento e Silva, Oda, Rosenne, Sucharitkul, Ustor and Wortley.

To avoid unnecessary repetitions, I assume that the contents of my preliminary report are known to the reader.

I. *The existing legal system : a critical review*

The first question contained in the questionnaire was whether a bilateral system of extradition would be preferable to a system based upon multilateral treaties or whether such a preference should exist in the reverse sense. The members of the Commission were divided on this point. Some doubts were expressed regarding the practicability of a multilateral system (Mr. *McWhinney*) ; in this connection, reference was made to the procedural delays that could result from such a system and also to the difficulties that might arise in incorporating the obligations based on multilateral treaties into municipal law. Experience on this point has not been encouraging[1]. Mr. *Rosenne* and Mr. *Sucharitkul* recommended the maintenance and continuation of the existing bilateral system but suggested its completion through multilateral treaties. Nearly the same opinion is given by Mr. *Wortley*. While Mr. *Ustor* expresses the view that an obligation to extradite exists under positive law even if no treaty binds the States concerned, which leads him to conclude that multilateral treaties are merely a helpful complement, the remaining members of the Commission (MM. *Cansacchi, do Nascimento e Silva, Oda*) favour a strong multilateral system. In this respect it has been argued that multilateral treaties could operate particularly successfully among the States whose legal systems share the same legal values (Mrs. *Cansacchi*) ; it has also been claimed that regional treaties may be considered to be of a more promising character (Mr. *Sucharitkul*).

This survey shows that, except for the position of Mr. *Ustor*, the common and overwhelming opinion of the members of the Commission favours the idea of perfecting both systems and, in particular, does not recommend the abandoning of the bilateral system.

Since the statements of the members of the Commission indicate that a multilateral treaty system is not rejected, despite a

[1] The European Convention on Extradition was signed on December 13, 1957, but entered into force for the Federal Republic of Germany January 1, 1977, BGBl. 1976, II, p. 1778 ; UNTS, vol. 359, p. 273.

measure of scepticism, the question arises whether universal or regional multilateral treaties would be considered to be more effective. Obviously it is more difficult to establish a world-wide consensus in respect of extradition matters, and it may be that a politically homogeneous region would be better prepared to accept common principles, as is clearly demonstrated by the example of the European Convention on the Suppression of Terrorism, which is currently in force[2]. This position is supported by the majority of the members of the Commission with relevant arguments (Mr. *Cansacchi*, Mr. *McWhinney*, Mr. *Sucharitkul* and, with some hesitation, Mr. *Rosenne*), whereas Mr. *do Nascimento e Silva* favours a universal system and other members (Mr. *Oda* and Mr. *Wortley*) reserved their opinion on this question, Since Mr. *Ustor* argues that the obligation to extradite does not result only from a treaty obligation, but rather that such a duty follows from the Charter of the United Nations, the whole question seems in his view to be without substance; nevertheless, he recommends a universal system as a consequence of his fundamental position. My own opinion inclines toward bilateral treaties; at the same time, I would also support the system of regional treaties. On the other hand, I fear that a world-wide system would remain without real function and therefore would produce only the mere impression of a consensus (Mr. *Wortley* agrees).

To sum up the positions of the members of the Commission, it may be stated that the majority of them support the attempts to promote multilateral treaties. In this connection the question arises whether reservations made with regard to such treaties should be permitted[3]. This question assumes special importance because modern multilateral treaties, contrary to the traditional bilateral system, formulate their obligations in more pronounced terms, so that the possibility for parties to escape from strict law may be restricted; bilateral treaties, however, normally provide the opportunity for the requested State to decide unilaterally on extra-

[2] European Convention on the Suppression of Terrorism, International Legal Materials XV (1976), no. 6, pp. 1272-1276; *T. Stein*, Die Europäische Konvention zur Bekämpfung des Terrorismus, ZaöRV, Bd. 37, 1977, p. 668 *et seq.*

[3] See *e.g.* the reservations made by Luxembourg when the European Convention on Extradition was ratified, BGBl. 1977, II, p. 252.

dition, for instance to decide what constitutes a political offence or whether the granting of asylum is justified. If therefore multilateral treaties restrict the right to invoke such exceptions, formal reservations with regard to treaties assume importance. It may also be claimed that there is no longer an essential difference between multilateral and bilateral treaties if reservations are admitted ; the legal relations between the requesting State and the requested State would in such a situation always have to be investigated individually with respect to specific reservations in spite of the fact that formally a multilateral treaty is concerned.

There is no clear majority among the members of the Commission on this question due to the highly divergent nature of the replies. Mr. *Wortley* recommends considerable caution with respect to the permissibility of reservations, as the treaty would otherwise become inoperative ; in particular, reservations should not endanger human rights. Mr. *Oda* warns against reservations but indicates, nevertheless, that complete exclusion of reservations would reduce the contents of the treaty to mere rudiments. Similar doubts have been expressed by Mr. *McWhinney*, who fears that the exclusion of reservations would prevent many States from collaborating. The same position is taken by Mr. *Cansacchi*. The permissibility of reservations is recommended by Mr. *do Nascimento e Silva* especially in order to preserve flexibility. Mr. *Sucharitkul* recalls the general problem of reservations, which is no different in matters of extradition from that in all other multilateral obligations. Mr. *Ustor* points out that a meaningful decision about the permissibility of reservations must depend on the specific contents of the treaty. Though the majority of the Commission regards the practice of reservations somewhat negatively, it is considered with a certain degree of resignation that complete exclusion of reservations would be unrealistic.

As regards the general and formal structure of international relations in matters of extradition, the question arises whether, at least *de lege ferenda*, a legal situation should be established or promoted under which an obligation to extradite would exist even in the absence of binding treaties. In my preliminary report, I assumed that such a legal situation does not yet exist ; this statement reflects a general opinion and can, in particular, be based upon the argument that the legal system of many States that follow the Anglo-American

practice only permit extradition if a formal treaty obligation exists[4].

The answers to this question show a quite differentiated picture, though a certain general tendency can be ascertained. As indicated, Mr. *Ustor* defends the opinion that the obligation to extradite, even if no treaty exists, already forms part of the existing law. He argues that owing to the provisions of the United Nations Charter (art. 1, par. 3, 55 and 56) which obliges States to collaborate in social questions and also owing to the resolution of the General Assembly on friendly relations (October 24, 1970, 2625/XXV), it would be unlawful to refuse extradition by invoking solely the non-existence of a treaty. The principle of reciprocity would then be automatically applicable. Hence, it is not the treaty law that should be developed but rather the relevant customary law, which could also be promoted by resolutions of the United Nations and be elaborated in detail by the International Law Commission. This resolute position does not correspond to those of the other members of the Commission. Mr. *Rosenne* does not recognize any duty to extradite in the absence of any treaty obligation, and Mr. *Wortley* holds that every State is free to decide this question unilaterally in each individual case; international law would not be opposed to such a free choice as long as human rights were observed. This opinion seems to be in complete conformity with existing law[5].

Mr. *Cansacchi*, Mr. *McWhinney*, Mr. *Oda* and Mr. *Sucharitkul* recommend promoting a system of extradition which would be based not solely upon treaty obligations, recognizing however that such a duty is not established in existing law. Mr. *Cansacchi* and Mr. *Sucharitkul* indicate that examples of such a practice can already be noted and that a tendency in this direction can be observed.

An interesting proposal in this connection is made by Mr. *do Nascimento e Silva*. Assuming that the existing treaties on the suppression of terrorism do not alter, but only supplement, the bilateral system, one could strive to have these multilateral conventions declared applicable even in cases where no special treaties on extradition between the States concerned are in force. The result

[4] *I.A. Shearer* (Extradition in International Law, 1971, p. 28) refers to 18 U.S.C. § 3184 (1964 ed.).

[5] *A. Verdross* and *B. Simma*, Universelles Völkerrecht, 1976, pp. 295 and 598; *Akehurst*, International Affairs 50 (1974), p. 115; *Shearer, loc. cit.*, pp. 23-27.

would be a mixture of extradition performed without treaty obligations and extradition based upon special treaties.

The survey finally shows a marked tendency to promote extradition even if not required by treaty obligations. This means that States should be recommended to strengthen their efforts in following the practice of extraditing even where there is no treaty obligation. The restriction recommended by Mr. *Wortley* that such a practice should not endanger general human rights seems to be generally acceptable.

II. *The political offence as a justification not to extradite*

This problem has to be incorporated in reports on the investigation of existing law. Whereas formerly the political offence was not considered as a justification for non-extradition if it was not expressly mentioned in the texts of treaties[6], this opinion now seems to be weakened and perhaps even reversed by reason of the strengthening of the protection of human rights. This statement also seems to be supported by the replies of the members of the Commission. The entire question is of particular importance because special treaty provisions expressly excluding the invocation of the political offence as a hinderance to extradition[7] would be necessary and would be of a constitutive and not only of a declaratory character if the invocation of the political offence as a justification for non-extradition is permitted in every case and therefore also in cases where the treaty is silent in this regard. A further result of this tenet would be that the problem of defining the concept of political offence would become almost unavoidable.

The overwhelming opinion of the members of the Commission seems to be that the refusal to extradite on the grounds of a political offence is also justified if the treaty to be applied does not contain any reference to such offences. This position is also expressed by Mr. *Cansacchi*, who, nevertheless, has misgivings as to whether this is the correct legal situation. The same view is taken by Mr. *McWhinney*, by Mr. *Oda*, who refers in this connection to the right to grant asylum, by Mr. *Rosenne*, who warns against an evasion of this principle, by Mr. *Sucharitkul*, who notes that the requested State has such a prero-

[6] *F. Berber*, Lehrbuch des Völkerrechts, vol. I, 1975, 2. ed., pp. 419, 422.

[7] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 1.

gative, and by Mr. *Wortley*, who identifies the existence of a corresponding rule of customary law. Mr. *do Nascimento e Silva* believes that solely the interpretation of the specific treaty obligations could disclose whether the refusal of extradition due to the existence of a political offence may be justified even if the treaty does not contain a special provision. To sum up the personal opinions of the members of the Commission, it may be stated that the impressively demonstrated unanimity, despite minor differences, would no longer justify following the former concept which led to a more restricted interpretation of treaties on extradition in this respect. The importance of this statement in relation to the formulation of the texts of new treaties, and especially multilateral treaties, has already been underlined.

Since the definition of the concept of political offence has always produced particular difficulties — which will be discussed later in this paper —, one could consider the complete elimination of such justification for non-extradition and base the right not to extradite solely on the right to grant asylum. Such a simplification could be justified by the fact that the political offender in most cases may also qualify as a political refugee. That situation, however, does not necessarily exist in every case. The granting of asylum may also be recommended and justified when no offence has occurred and when, on this assumption, extradition could not be requested. This situation, it is true, would not raise any problem for extradition law. The reverse situation, however, may also occur when there has been a political offence but no reason to grant asylum since political persecution does not exist. In this situation the extradition would have to be carried out in spite of the political offence if the refusal to extradite could only be based upon the right to grant asylum. This could result in a highly questionable situation. On the other hand, if a situation exists where there is a right to grant asylum and a political offence has also occurred, again no problem would arise.

The replies dealing with these questions differ considerably. No member of the Commission clearly favours the possibility of replacing invocation of the political offence by the mere right to grant asylum and thereby justifying non-extradition solely by this right. On the contrary, it is clear that most of the replies contain reservations against such a system. Mr. *McWhinney* argues that such an interpretation could produce a double standard because it may be that

the governments feel themselves justified in a different manner to grant asylum ; if, by reason of such a situation, a government could not justify the granting of asylum, the obligation to extradite a political offender would arise. I thoroughly appreciate those suggestions, but would, nevertheless, like to point out that the difficulties demonstrated could be eliminated through common harmonization of the principles for granting asylum. Mr. *do Nascimento e Silva* warns against creating a relationship between the two different legal principles, namely the right to refuse extradition due to a political offence and the right to grant asylum, because abuse of both these principles could occur. Supplementing the right not to extradite by reason of a political offence with the right to grant asylum is recommended by Mr. *Rosenne*, but not its replacement by the latter, and he warns against abusing the right to grant asylum in order to protect criminal offenders. Mr. *Sucharitkul*, in following the opinion he has already put forward, underlines that the State has a discretion to refuse extradition either by reason of a political offence or by invoking the right to grant asylum. My own view is that in every case such a discretion is limited by the prohibition against a misuse of legal institutions. Mr. *Oda* suggests that it may be easier for a State which wishes to refuse extradition to invoke an express limitation contained in the treaty, e.g. concerning political offences, than to rely only on general principles. He nevertheless concedes that the question could be answered in the affirmative if a modern tendency could be noted that the invocation of the political offence as well as the invocation of the right to grant asylum must be seen as subject to strict limitations. The question is clearly rejected by Mr. *Wortley*, whereas Mr. *Cansacchi* apparently tends to support the right of the States to refuse extradition in the traditional sense by reason of a political offence. This survey demonstrates that the replacement of the traditional right to refuse extradition by reason of a political offence with merely the right to grant asylum is, in general, not recommended.

Since it therefore seems to be generally agreed that the legal possibility to refuse extradition by reason of a political offence should not be eliminated, the old question must be raised anew whether one should repeat the attempts to define the legal character of the political offence or whether one should uphold the traditional practice which enables the State to decide unilaterally on this

definition in each individual situation[8]. In so far as extradition is executed without a contractual obligation, the problem mentioned here does not exist ; if a State is free to refuse extradition on account of the lack of a treaty obligation, there are no obstacles to conceding to the State the unilateral definition of the political offence. If, however, one adopts Mr. *Ustor's* opinion that there is an obligation to extradite even without the existence of a binding treaty, it follows that the requested State is not free to justify non-extradition solely by a unilateral definition of the political offence. If, on the other hand, treaty obligations regulating extradition have to be applied, their unilateral interpretation must be seen as an exception to the rule in general treaty law, comparable to that resulting from reservations (for instance concerning internal affairs) in accepting the jurisdiction of the International Court of Justice. If therefore, in order to avoid this unilateralism, attempts should be made to develop a generally accepted definition of the political offence, a decision would be necessary on whether the so-called subjective theory or the objective theory should govern the system (*cf.* in this respect the preliminary report)[9]. The reconciliation of both theories with one another and the harmonization of the practice of States have not been possible to date. In this question may be found one of the most crucial obstacles to the functioning of international relations in matters of extradition, a problem which assumes particular importance with reference to the question of the practicability of multilateral treaties. Apart from the statement by Mr. *Ustor*, who considers the whole problem to be irrelevant and believes that it is a hindrance to further developments in matters of extradition, the replies of the other members of the Commission may be divided into two main groups.

Mr. *do Nascimento e Silva*, Mr. *Oda* and Mr. *Rosenne* recommend continuing the attempt to find an acceptable definition. Mr. *do Nascimento e Silva*, in particular, favours the possibility of following the system of enumeration. Though he considers definitions to be

[8] *I.A. Shearer, loc. cit.*, pp. 187-191 (The Utility of Further Elaboration or Qualification of the Concept of Political Offences) ; see also Traité d'Extradition et d'Entraide Judiciaire en Matière Pénale entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas, UNTS, vol. 16, p. 80, art. 3.

[9] *D.P. O'Connell*, International Law, 2nd ed., 1970, vol. II, p. 727 ; *F. Berber, loc. cit.*, p. 423.

somewhat dangerous, Mr. *Rosenne* points out that some measure of success could be reached through a negative limitation ; specifically, one could perhaps define which crimes are not of a political character, a system already followed to a certain extent by some provisions of multilateral treaties[10]. Although upholding the principle that treaty obligations must be given a definition common to both parties to a treaty, Mr. *Oda*, nevertheless, doubts that this would meet with success ; his point that the discretion of the States must necessarily be seen as limited may be emphasized here.

A certain contrast to the opinions just mentioned may be seen in the replies of Mr. *Cansacchi*, for whom further attempts to define the political offence seem to be meaningless owing to the highly diverse positions of the States, of Mr. *McWhinney*, who does not reject such attempts in principle but who, nevertheless, does not anticipate any success, and of Mr. *Wortley*, who is not opposed to unilateral definitions by the requested State as long as human rights are not endangered. Mr. *Sucharitkul* is also of a similar opinion. My own position leads me to believe that it will not be possible to achieve agreement on common definitions, at least not among those groups of States following different social, ideological and political conceptions. The majority of the members of the Commission therefore seem convinced that further attempts at a definition should not be made. The question, nevertheless, remains open whether it is worth upholding the traditional situation in which States are entitled to lay down a unilateral definition or whether it would be better fully to eliminate the concept of political offence from legal relations in matters of extradition. In order to promote usefully the development and construction of multilateral treaties, the proposal of Mr. *Rosenne* seems to be appropriate, namely to follow the principle of the attentat clause and to try to develop negative definitions.

Considering the fact that also in future the invocation of the right to refuse extradition by reason of a political offence will probably be generally recognized, the question arises whether it would be commendable at least to give up this right in regional relations[11]. It would appear unnecessary to invoke the right to refuse extradition on account of a political offence among States whose legal systems show

[10] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 1.
[11] But see European Convention on Extradition, *loc. cit.*, art. 3.

a certain similarity and convergence in appreciating legal values, since a given political offence committed in such States may be expected to be directed against that very policy which is common to those States; if, on the other hand, the specific offence is not directed against the common policy, then an excessive or abusive prosecution and a disregard of the rule of law are not to be expected on the part of the requesting State. The former regulations governing the matters of extradition between the members of the British Commonwealth were obviously based on these considerations[12]. Only after a certain reduction in common legal aspects in the Commonwealth and after a certain weakening in the so-called *inter se* relations were the provisions in matters of extradition altered. From this viewpoint the question had to be answered whether at least in a politically homogeneous region or a similar group of States it would be possible to eliminate the political offence as a reason for not extraditing.

The answer given by Mr. *Cansacchi* seems to be particularly useful. He points out that States whose legal systems show a politically and socially homogeneous structure would either accept a common definition of the political offence or would no longer make use of this reason for refusing to extradite. In addition, Mr. *McWhinney* feels that among such groups of States the political offence should no longer play any role, and this question is answered in the same manner by Mr. *Sucharitkul*. I agree with these statements. Mr. *Rosenne*, on the other hand, has some doubts in respect of attempts to define the concept of political homogeneity for the purposes of legal provisions. One could, however, reply that such a definition would not be all that relevant, the envisaged homogeneity being generally established by facts. But it is also true that there has been some success in defining homogeneous goals, and this can be demonstrated by the texts of, for instance, the European treaties and especially by the preambles of the treaties establishing the European Communities[13]; the same is true of the preambles of the statute of the Council of Mutual Economic Assistance and of the Warshaw-

[12] *D.P. O'Connell, loc. cit.*, vol. II, p. 727.

[13] See Treaty establishing the European Coal and Steel Community, BGBl. 1952, II, p. 447.

Pact[14]. Mr. *do Nascimento e Silva* finds himself opposed to such a result, in particular on the grounds that the said homogeneity may exist only temporarily. Mr. *Oda* and Mr. *Wortley* seem to consider that the whole question is not meaningful. As the result of these statements one can see that the overwhelming majority of the members of the Commission take the view that the invocation of the political offence to justify non-extradition is an unnecessary obstacle in the fight against criminality where relations between States based on homogeneous legal systems are involved. There remains, nevertheless, a certain lack of clarity about the practice to be expected.

Assuming that in the general extradition area invocation of the political offence seems to be unavoidable, the question at least remains whether, in respect of multilateral treaties aimed at the suppression of serious international criminality and terrorism, an exception should be made. The European Convention on the Suppression of Terrorism indicates such a possibility and contains a specific attempt[15]. Mr. *Cansacchi* votes in favour of this aim and mentions the special clauses of the European Convention. Mr. *McWhinney* also favours this system, expressing, nevertheless, a certain scepticism about a successful regulation. Mr. *Wortley* endorses this opinion. The same position is taken by Mr. *do Nascimento e Silva*; he notes, however, that several African and Arab States would not follow this line but instead would hand over the whole problem of terrorism to the United Nations. Mr. *Sucharitkul* also takes the view that the invocation of the political offence as a justification not to extradite should be eliminated from conventions on the suppression of terrorism; to this extent he restricts his formerly expressed opinion that the right to refuse extradition is always part of the prerogative of the requested State. A certain moderation is contained in the reply of Mr. *Rosenne*, who finds the best solution in applying the principle *aut dedere aut judicare*; we shall have to come back to this principle when dealing with the principle of substituting prosecution.

[14] Vertrag über Freundschaft, Zusammenarbeit und gegenseitigen Beistand zwischen der Volksrepublik Albanien, der Volksrepublik Bulgarien, der Ungarischen Volksrepublik, der Deutschen Demokratischen Republik, der Volksrepublik Polen, der Rumänischen Volksrepublik, der Union der Sozialistischen Sowjetrepubliken und der Tschechoslowakischen Republik, May 14, 1955, GBl.-DDR 1955, I, p. 382.

[15] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 1.

Mr. *Oda* suggests that it must always be examined whether the serious criminality in question could be classified a political offence.

Thus it seems to be the opinion of the majority of the members of the Commission that with regard to serious international criminality and terrorism the right to justify non-extradition by invoking the political offence should be materially restricted.

III. *Protection of internationally recognized human rights*

If a refusal to extradite, based on treaty obligations, cannot, in a given case, be justified by invoking the political nature of the offence (*cf.* through invoking the attentat clause), a situation is, nevertheless, imaginable where the requested government may doubt that the extradee would be treated in conformity with human rights in the requesting State. This situation also has to be distinguished from the situation under which asylum may be granted, since the right to grant asylum presupposes the political persecution of the individual concerned and does not require the occurrence of a political offence. A political persecution and a violation of human rights may often occur in combination, but that is not necessarily the case. The question therefore arises whether solely the danger that human rights could be violated can justify the requested State in refusing extradition. I would answer this question in the affirmative[16].

The majority of the members of the Commission also seem to take the view that a threat to violate human rights should in any case justify non-extradition. This is in particular the position of Mr. *Cansacchi* who, nevertheless, points out that the other party to the treaty would probably claim a breach of the obligation; one could, of course, also take into account the practicability of denouncing the treaty if the threat existed that human rights might be violated. The same opinion is shared by Mr. *McWhinney* and Mr. *Sucharitkul*. Mr. *Ustor* and Mr. *Wortley* emphasize that the protection of human rights has in any case to be observed.

Mr. *do Nascimento e Silva*, on the other hand, has reservations regarding such a practice, and he points to the danger that wrong information about the observance or violation of human rights could

[16] The same position is taken by *F. Berber, loc. cit.*, p. 420.

create some uncertainty for the competent courts in deciding on such questions. Mr. *Rosenne* recommends differentiating between situations involving bilateral treaties and those involving multilateral treaties ; as regards bilateral treaties, it would be easier to obtain an agreement between the parties relating to the protection of human rights than would be the case with multilateral treaties. Mr. *Oda* points out that it would hardly be possible to separate this problem of human rights from the problem of political offence or right to grant asylum.

Despite the commonly agreed view that the threat of violation of human rights remains relevant in relation to the matters of extradition and asylum, it remains necessary to ask whether the protection of human rights should also operate in favour of war criminals and of persons guilty of crimes against humanity. Similar investigations have often been made during the deliberations of international conferences ; a resolution of the ILA provided an answer in so far as it recommended that asylum should not be granted to such criminals even if the threat of violation of human rights cannot be excluded[17]. I have some doubts whether such a result should be favoured since the protection of human rights must be granted to every human being, and an alternative may be established through the principle of substituting prosecution. This opinion is also supported by Mr. *McWhinney* and Mr. *Wortley*. Mr. *Cansacchi* seems to take the view that war crimes and crimes against humanity must be qualified as political offences and that under this view special considerations may be unnecessary. Mr. *Rosenne*, on the other hand, points out that a State should not be entitled to invoke the protection of human rights in denying the duty to extradite such criminals. Mr. *Oda* relies on general principles of the right to grant asylum which, however, would not solve the problem, since the whole question is disputed regarding both the obligations to extradite and the right to grant asylum. Unequivocal answers are not given by Mr. *do Nascimento e Silva*, who feels that this problem, which arose after the Second World War, will probably not occur again, or by Mr. *Sucharitkul*, who recommends the creation of an international rule and who mentions in this connection the problem of concurrent

[17] Draft Convention on Territorial Asylum, art. 1 (d), Report of the Fifty-Fifth Conference of the International Law Association, New York 1972, p. 208.

requests in matters of extradition. Thus a clear majority concerning this question cannot be stated.

IV. *Relations between the right to grant asylum and the duty tc extradite*

In reviewing State practice and literature one can ascertain that no sufficient distinction of rights and duties has been made between extradition matters on the one hand and asylum matters on the other. This is particularly unfortunate because the question whether a State is entitled to grant asylum may also arise when the duty to extradite is not involved; political refugees may also be protected by the granting of asylum in cases where the obligations resulting from a treaty on extradition are not involved because an offence has not really occurred. On the other hand, extradition may be refused by invoking the political offence doctrine although no political persecution has occurred, so that a justification to grant asylum would not be established.

The most important question in this connection was inserted in the first part of my questionnaire dealing with the right to grant asylum. Since, however, this question and the corresponding basic problem were apparently not correctly understood by some members of the Commission, perhaps on account of my own, somewhat unfortunate explanation, I would like to restate the legal problem. The following example may demonstrate what is meant. Suppose an offender motivated by political goals has killed the head of a State (for instance, the assassination of President Kennedy). The extradition treaty applicable obliges the State to extradite because the killing of the head of State has been declared by express provisions to be non-political (attentat clause)[18]. Therefore extradition can be demanded by invoking the obligation contained in the treaty; the requested State, however, could raise the argument that the granting of asylum is justified and extradition must not therefore be executed. The question arises whether such an argument must be accepted as being relevant in every case or only in cases where it cannot be expected that the offender would be treated in the requested State with due

[18] See *e.g.* Treaty between the Federal Republic of Germany and France, November 29, 1951, BGBl. 1953, II, p. 152; 1959, II, p. 1251, art. 4.

observance of generally recognized human rights and a fair trial under the rule of law. An argument that the right to grant asylum cannot be invoked in this case may be based on the statement that a prosecution which respects the principles of fair trial and of the rule of law need not be regarded as a political persecution justifying the granting of asylum, since every State is entitled to protect its own legal system as long as human rights are not endangered[19]. The contrary opinion, however, may be based on the argument that, in spite of all promises of the requested State, doubts may persist whether in the actual case the prosecution would not at the same time present a political persecution by reason of its political background.

The replies dealing with this question show a differentiated picture. Mr. *do Nascimento e Silva* and Mr. *Rosenne* warn against combining the legal remedy of asylum with that of extradition and therefore do not answer the question. Despite my own willingness to appreciate this warning, I nevertheless would like to recall that State practice itself has repeatedly established this connection, and one can observe that the argument that extradition cannot be executed because asylum must be granted is introduced in just those cases in which the general interest in the prosecution seems to be particularly urgent and stimulates the reactions of the community of nations. Very often the offender claims to be protected through asylum, pretending his offence was politically motivated and therefore would not be of a typically criminal nature[20]. I therefore believe that one cannot avoid giving an answer to this question whenever problems of extradition are involved.

Mr. *Cansacchi* points out that States are entitled to grant asylum and to refuse extradition if no concrete treaty obligation exists. This position cannot be questioned but it nevertheless does not afford an answer when binding treaties are to be applied. Mr. *Sucharitkul*, upholding consequently his opinion given with regard to other problems, underlines the fact that every State has the right to grant asylum using discretion — and he means in every situation. The same position is taken by Mr. *Ustor*, who sees this right as being restricted

[19] *K. Doehring*, Asylrecht und Staatsschutz (Right to Asylum and State Security, Summary), ZaöRV, vol. 26, 1966, pp. 33-57.

[20] Cour d'Appel (16-11-1977), EuGRZ 1978, pp. 20, 25.

only by the prohibition on abuse of discretion. Mr. *Oda* believes that the question whether the offender can expect, in the requested State, a fair trial under the rule of law has nothing to do with the question whether a political offence has occurred, and therefore he refuses to accept that this matter is related to the right to grant asylum. Mr. *McWhinney's* statement implies that he would not recommend granting asylum in cases where a fair trial under the rule of law seems to be guaranteed; his point, however, that such a rule would be difficult to formulate is quite understandable. Mr. *Wortley* recalls the legal possibility of substituting prosecution, a method which could in his view solve the problem. To sum up the answers, one can see that there is no majority opinion among the members of the Commission.

The next question deals with the problem of whether or not the right to grant asylum, which therefore justifies non-extradition, should be construed as an individual right under municipal law. This question was based on the following consideration. If under a more modern view the individual is seen as the true object to be protected by the asylum, he would, nevertheless, remain without real protection if no individual claim were admissible before the municipal courts of the requested State. The, relatively speaking, best protection of the individual would of course be that provided, e.g., in the Federal Republic of Germany[21], where a constitutional provision directly guarantees the individual a subjective right of asylum which must be respected by the courts. Since most of the States have not inserted such an individual right in their municipal legal systems, the question which I raised was whether such a system should be recommended.

A recommendation to grant an individual right in matters of asylum under municipal law has clearly been rejected by Mr. *do Nascimento e Silva*, Mr. *McWhinney* and Mr. *Wortley*, who obviously wishes to maintain the position that the right to grant asylum must remain solely in the competence of the government and a matter of discretion. Mr. *Oda* did not answer the question. Mr. *Rosenne* warns against dealing with the question in this context, and Mr. *Sucharitkul* describes the current legal situation as he sees it. Only Mr. *Cansacchi* favours the construction of an individual right which could be invoked before municipal courts. My own opinion inclines to this view, but

[21] Art. 16 of the Fundamental Law, May 23, 1949, BGBl. 1949, I, p. 1.

this may be under the inspiration of the German constitution; however, I would like to recommend interpreting in a restrictive sense the concept of political persecution which would justify the granting of asylum.

The following question relates to a situation which in State practice shows a quite differentiated picture. Under several legal systems, for instance that of the Federal Republic of Germany, the offender whose extradition is requested will not be permitted to plead before municipal courts that the provisions of the treaty on extradition have been wrongly applied; this means that he is prevented from invoking directly for his own protection the provisions of the treaty[22]. The grounds justifying this restriction are that the treaty by itself only creates rights and duties among the States concerned and that the offender therefore can only invoke the provisions of municipal law favouring him. The legal situation, nevertheless, is not always clear because one could argue that approval of the international treaty by the national parliament would simultaneously create municipal law which could form the basis of an individual claim in favour of the offender[23].

Since Mr. *Rosenne* is not prepared to deal with questions of municipal law even in combination with the problems of asylum, he does not answer this question. Mr. *do Nascimento e Silva* limits his reply to indicating that in many legal systems the judicial control of such questions would give rise to difficulties. Mr. *Oda* favours, in general, judicial protection through national courts in matters of extradition, and the same position is taken by Mr. *McWhinney*, who does not however believe that the granting of protection by national courts requires the possibility of invoking directly the provisions of the treaty to be applied. Mr. *Cansacchi* and Mr. *Wortley* recommend a right of the individual to invoke directly the provisions of the international treaty before national courts. Although Mr. *Sucharitkul* recommends national court protection, he does not reply to the question whether the individual should rely directly on the provisions of the treaty. Thus a clear majority cannot be stated in view of such characterized systems of national court protection.

[22] RG (13-8-1936), RGSt 70, 286; BVerfG (20-10-1977), BVerfGE 46, 214.

[23] As to comparative law in this respect see *D.P. O'Connell, loc. cit.*, vol. I, p. 54 *et seq.*

V. *The attentat clause*

This clause forms a solid component of the traditional legal system in matters of extradition[24]. It has always served to forbid the invocation of the political offence doctrine if the persons threatened by the offence were considered to be protected by reason of their particular position. Whereas many treaties declare only an assassination attempt against a head of State or against the members of a Government to be of a non-political character, there are other treaties whose provisions qualify every murder as non-political for the purposes of extradition[25]. In such provisions a tendency can be seen to widen the scope of this clause which restricts the concept of political offence, and this system has also been adopted in modern multilateral treaties to guarantee extradition in cases of particularly serious types of international criminality[26]. The importance of this clause is, in particular, that it eliminates the possibility for the requested State unilaterally to decide whether or not a political offence exists. It must however be stated that in matters of asylum a certain lack of clarity persists. For the problem remains whether the requested State would be justified in invoking its right to grant asylum despite the fact that, by reason of the attentat clause, the extradition could regularly be claimed[27]. The texts of the bilateral treaties do not, in general, resolve this problem. There are, however, bilateral treaties whose provisions recognize the right to refuse extradition if the national law of the requested State is opposed to extradition[28], a case which may occur when national law guarantees individual protection through the granting of asylum. Some multilateral treaties also contain a similar restriction of an attentat clause, namely in cases where political persecution by the requested State cannot be excluded[29]. I apologize for not having formulated this problem more clearly in my questionnaire.

[24] *I.A. Shearer, loc. cit.*, p. 185.

[25] See *e.g.* Treaty between the Federal Republic of Germany and Yugoslavia, November 26, 1970, art. 3, BGBl. 1974, II, p. 1258.

[26] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 3.

[27] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 5.

[28] Treaty between the Federal Republic of Germany and France, *loc. cit.*, art. 2.

[29] European Convention on the Suppression of Terrorism, *loc. cit.*, art. 5.

The general retention of the attentat clause has been supported by the clear majority of the members of the Commission, and most of the answers recommend extending the clause to include particularly serious international criminality. Only Mr. *do Nascimento e Silva* declares that such an extension would probably not be advantageous, but rather that stricter measures to suppress such offences are necessary. For the above mentioned reasons, the relationship between the attentat clause and the right to grant asylum was not considered in the replies. In my opinion the system established in the European Convention on the Suppression of Terrorism offers a commendable solution to this problem. Under this view, serious international criminality should not be qualified as a political offence in matters of extradition ; the States may, nevertheless, reserve the right to refuse extradition when convinced that the request is essentially motivated to persecute for political or racial reasons. Such a system would satisfy the goal of permitting asylum to be granted at least in cases of a threat of violation of human rights. That this goal has the support of the majority of the members of the Commission emanates clearly from the answers given to the foregoing questions.

VI. *The substitution of prosecution by the requested State*

The legal possibility of bringing criminal proceedings even in cases where legal provisions of the State of sojourn of the offender are not directly violated by the offence assumes importance if extradition cannot be executed on legal grounds because, for instance, the requested State is justified in granting asylum and exerts this right. Such a situation presupposes, of course, that no incompatibility under the municipal law of the requested State exists between granting asylum and prosecuting the offender[30]. The majority of the members of the Commission seem to vote in favour of this system and to recommend its strengthening (Mr. *Cansacchi*, Mr. *do Nascimento e Silva*, Mr. *Rosenne*, Mr. *Ustor*, Mr. *Wortley*). In this connection Mr. *McWhinney* points out that such an obligation should be taken seriously so as not to create merely the impression of a prosecution.

[30] This situation may occur under a municipal legal system which does not allow the punishment of offences committed abroad but, nevertheless, permits the granting of asylum.

Mr. *Sucharitkul* fears that a situation may occur in which the offence is not punishable in the State of residence of the offender with the result that even a substituted punishment would not be possible. This may of course occur, but one can suppose in general that municipal law regularly provides penalties in case of serious crimes. The difficulties in matters of evidence, envisaged with good reason by Mr. *Wortley*, may be dealt with in connection with the problems of legal assistance ; we have to come back to these questions. Assuming that in principle the system of substituting prosecution is recommended, the acceptance of a corresponding obligation by the States could also create the obligation to amend, where necessary, the municipal criminal law and the law of procedure. The legal system of the Federal Republic of Germany offers an example of the way in which this may be accomplished.

Since the system of substituting prosecution, emphatically recommended by the members of the Commission, means that a State is under an obligation to punish the offender in spite of the fact that the offence has not been committed on its territory, the necessity arises in such cases to strengthen the legal assistance of other States and in particular of the State of the *locus delicti commissi*, for instance as regards the furnishing of evidence. This necessity is taken into account in the system of the European Convention on the Suppression of Terrorism, which is mentioned in this connection also by Mr. *Cansacchi* and Mr. *Wortley*. However, I have some doubts whether the problem has been understood by all members of the Commission exactly in the meaning which I envisaged. Nevertheless, I believe I may proceed on the assumption that the majority of the Commission would support the idea of mutual assistance in criminal matters as it is inserted in the European Convention[31].

Mr. *McWhinney* has indicated that prosecution by substitution should not result in an evasion of the obligation to punish seriously. In connection with this warning, one has to consider the possibility that an unproportionally severe penalty might also be imposed or that, owing to a lack of sufficient evidence, the proceedings might be brought in a merely superficial manner. Since the system of

[31] See *e.g.* European Convention on the Suppression of Terrorism, *loc. cit.*, art. 8.

substituting prosecution is a reflection of the common interest of the community of nations, the question arises whether some control mechanism should be envisaged through the establishment of international publicity, for instance by the obligation of the prosecuting State to admit foreign observers. In my own view it would be favourable to introduce such obligations into international treaties, and this view is supported by Mr. *Cansacchi* and M. *McWhinney* and also by Mr. *Sucharitkul*, who fears, however, that some States would not accept this principle and who has doubts about the real usefulness of the proposal. Mr. *do Nascimento e Silva*, on the other hand, cannot see any advantage in supporting this principle, and Mr. *Wortley* is also unwilling to recommend it. Mr. *Rosenne* only mentions that criminal proceedings are generally open to the public and that at least the presence of the defence counsel affords the necessary protection for the accused. It is, nevertheless, well known that in many States, and particularly in cases which are of interest here, proceedings are brought with the public being excluded and that, in addition, the presence of the defence counsel would not prevent the carrying out of less serious proceedings which produce only the illusion of punishment. One must also consider that in most instances a substituted prosecution would have a political background since the non-extradition may generally be based on political motives, as it is for example in cases involving the granting of asylum to politically persecuted individuals. My own suggestion therefore is to uphold this proposal in spite of the fact that no clear majority of the members of the Commission on this question has been established.

Connected with the foregoing consideration is the question whether, for instance in cases of serious international criminality, a minimum penalty should be provided for in the relevant treaties, in order to exclude favouring the offender through merely formal punishment[32]. Whereas Mr. *Cansacchi*, Mr. *McWhinney* and Mr. *do Nascimento e Silva* answer this question in the affirmative and are prepared to recommend such an obligation, Mr. *Sucharitkul* and Mr.

[32] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Dec. 14, 1973, International Legal Materials, vol. 13, 1974, p. 41), art. 2, sect. 2 : « Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature ».

Wortley would not agree, on the grounds that it would not be opportune to restrict the discretionary power of the judges. The intention here was of course not to restrict the freedom of courts by creating a presumption of guilt as such through prescribing a minimum penalty. Judges must remain free in weighing the evidence and in deciding whether the facts would justify a finding of guilt or whether the accused is innocent. The courts' jurisdiction would only be restricted to the extent that the degree of the penalty would be subject to a limitation after guilt had been proved as is the case in many national legal systems which have never been considered incompatible with the fundamental principle of the rule of law. Many States recognize the principles of *nulla poena sina lege* and *nullum crimen sine lege* the contents of which have also to be seen in the calculability of the degree of penalty. Mr. *Rosenne's* statement that such a binding effect would result in an unjustifiable interference with national legal systems must be countered by the argument that the State's agreement to punish at all also amounts to interference, but it has been generally accepted in State practice. The Geneva Conventions on *ius in bello* for instance contain this principle[33], and the same is true for the convention providing for the punishment in cases of genocide[34].

VII. *The extradition of nationals*

State practice shows different systems as regards the extradition of nationals. Whereas in some States there is no objection to the extradition of nationals because these States do not extend their criminal jurisdiction to punish offences committed abroad, in some other States the prohibition to extradite nationals is maintained in combination with the legal possibility of prosecuting offences committed in foreign territory. The reasons for such different practices have already been discussed in the preliminary report. In multilateral treaties the decision on this point is often left to the parties to the treaty[35], combined in most cases with the stipulation of substituting prosecution[36].

[33] See *e.g.* art. 49, Convention No. I, UNTS, vol. 75, p. 31.

[34] Art. V, UNTS, vol. 78, p. 277.

[35] European Convention on Extradition, *loc. cit.*, art. 6, sect. 1 (a).

[36] European Convention on Extradition, *loc. cit.*, art. 6, sect. 2.

Whereas several members of the Commission limit their replies to a discussion of the differences in the existing national systems and therefore do not offer recommendations *de lege ferenda* (Mr. *Oda*, Mr. *Rosenne*, Mr. *Wortley*, Mr. *Sucharitkul*, who sees a certain increase in the practice of not extraditing nationals, and Mr. *do Nascimento e Silva*, who does not see any objection to the non-extradition of nationals, but nevertheless declares national reservations in this field to be admissible), Mr. *Cansacchi* and Mr. *McWhinney* recommend the extradition of nationals while expressing doubts as to the acceptance of such a recommendation by many States. In the view of Mr. *Ustor*, the non-extradition of nationals is justified.

Despite the different views prevailing among the members of the Commission, it seems nevertheless that the system of the European Convention on Extradition would generally be accepted. Under this European system every State is free unilaterally to decide on this question but is under an obligation to substitute prosecution if extradition is not permitted.

The next question relates to the problem of whether the extradition of nationals should be recommended when the suppression of serious international criminality is involved[37]. It would seem clear that objectively the extradition of nationals would support the suppression of terrorism since the direct prosecution by the State in the territory of which the offence has been committed would more effectively discourage further offences from being committed.

Mr. *Cansacchi*, Mr. *McWhinney* and Mr. *do Nascimento e Silva* answer in favour of this possibility and the same seems to follow from the reply of Mr. *Sucharitkul*, who notes, however, that further investigations into the character and legal nature of these offences may be necessary. Mr. *Oda* feels that it is not impossible that such a procedure might provide, to some extent, undue protection for the offender in the cases considered. Other members of the Commission did not give specific replies as to this problem.

If the majority of the Commission were finally to recommend that the extradition of nationals be stipulated in multilateral treaties in order to suppress serious international criminality, then it would

[37] The multilateral conventions mentioned above are silent on this point.

be necessary for some States to amend their laws on extradition and perhaps even their constitutions, a remark which is solely intended to illuminate the entire scope of the problem.

VIII. Extradition and municipal law

Some members of the Commission replied that they were opposed to combining questions of national law with suggestions about international matters of extradition; such a combination would not be opportune and should be avoided owing to the differences between national legal systems which tend to uphold their own principles (Mr. *Rosenne*, Mr. *Ustor*, Mr. *Wortley*). Assuming that international rules concerning extradition have, on the one hand, to help in the suppression of criminality but that they also have, on the other hand, to protect the individual involved, it would seem to follow that one should include in the considerations those questions of national law which are meant to strengthen the legal position of the individual. This position is reflected in the replies of other members of the Commission. The protection of the individual will probably be more effective if the individual to be extradited is entitled to invoke directly those provisions of the treaty to be applied which favour that person and the application of which has been agreed by the parties to the treaty to be self-executing.

Whereas Mr. *McWhinney* obviously looks on such an extension of the provisions of extradition treaties with a somewhat sceptical eye, Mr. *do Nascimento e Silva*, on the other hand, takes the view that the provisions of the treaties should not be undermined through unilateral application of national law and that therefore — if I have rightly understood his explanation — the person to be extradited should be able directly to invoke the provisions of the treaties. Mr. *Cansacchi* agrees with that opinion and believes that treaty provisions which are more favourable to the individual than national law can be invoked by the individual. The same point is made by Mr. *Sucharitkul*. I personally support the recommendation that, in the formulation of extradition treaties, such a self-executing effect should be expressly stipulated.

In the absence of any binding treaty on extradition and where national law does not allow extradition, the State of residence of the offender may avail itself of the possibility to expel him. The expulsion

must not necessarily result in deporting the individual into the State which is interested in the criminal prosecution since, in general, the individual to be expelled is free to choose the State of residence. Nevertheless, it may happen that only the State interested in the prosecution — i.e. in general the State of the nationality of the offender — is prepared to receive the individual expelled and that, this being so, what actually occurs is extradition. This example is meant to reveal once again the relations between extradition and expulsion[38] :

In pointing out that extradition and expulsion must dogmatically be considered to be separate legal institutions, Mr. *Oda* seems to presuppose that the abusive exercise of expulsion mentioned above will not occur. Mr. *Wortley* remarks only that there is no right of residence for a person having illegally entered the territory of a State, and he thus follows the same view.

Mr. *Rosenne* believes that under existing law the deportation of the individual into a State interested in the extradition would not be illegal. The same point is made by Mr. *Cansacchi,* Mr. *McWhinney,* and Mr. *Sucharitkul.* Mr. *do Nascimento e Silva,* on the other hand, fears that such an expulsion may violate human rights. My own opinion leads me to recommend a harmonization of the contradicting positions, as is suggested in the reply of Mr. *do Nascimento e Silva.* Expulsion should be regarded as lawful even if the conditions of extradition are not given, but only under the guarantee that human rights are fully protected. Harmonization may also be established through the right to grant asylum.

IX. *Arbitration in matters of extradition*

The majority of the members of the Commission recommend that arbitration be provided for in matters of extradition (Mr. *Cansacchi,* Mr. *do Nascimento e Silva,* Mr. *Sucharitkul,* Mr. *Ustor*). But some reservations were made. Mr. *Wortley* notes that the prosecution may be delayed by arbitration, and Mr. *McWhinney* feels some doubts as to the effectiveness of arbitration in cases where the legal systems of the States involved differ markedly in questions of legal

[38] On this problem see *K. Buschbeck,* Verschleierte Auslieferung durch Ausweisung, 1972.

values. Both these considerations seem to be realistic. But despite this scepticism one should, in my opinion, support the institutionalization of arbitration in matters of extradition because only this system would afford the opportunity of achieving a generally acceptable solution to many disputes in this field[39].

The next question was answered by only a few members of the Commission. This was whether an established arbitration tribunal should have the authority to determine whether all obligations emanating from the treaty have been observed or whether there are subjects which should be left to the unilateral decision of the parties, as has been the case hitherto for instance in determining the nature of the political offence, Mr. *Cansacchi* and Mr. *McWhinney* recommend extending the jurisdiction of a court of arbitration to all questions emanating from the treaty, whereas Mr. *do Nascimento e Silva* apparently believes that some restriction might be worthy of consideration. In my own view, a court of arbitration should have the power to decide on every question resulting from the provisions of a treaty on extradition.

Heidelberg, March 30, 1979

[39] See *e.g.* Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, art. 12, International Legal Materials, vol. 10, 1971, p. 133; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *loc. cit.*, art. 16.

Draft resolution

The Institute of International Law,

Whereas the existing tradition system of extradition may be considered to form an appropriate basis for international relations in that field even with regard to future necessities;

Whereas, however, the recent development of the community of nations has seen essential changes;

Whereas there are new tendencies in the types of criminal offences committed and in the manner in which they are being committed;

Adopts the following Resolution:

I. The existing treaty system

1. Both systems of extradition currently in practice, the bilateral and the multilateral system, should be developed and expanded.

2. In order to promote a more useful State practice in matters of extradition, governments acting under politically homogeneous legal systems should co-operate through particularly close contacts. Such contacts may offer a more important contribution to the development of a modern system of extradition than may be attained solely through efforts to establish universality.

3. The traditionally practised system of entering reservations when accepting the obligations of multilateral treaties should also remain applicable to the conclusion of multilateral extradition treaties; a restrictive practice, however, is recommended.

4. Despite the existing legal situation in which only treaty obligations form the basis of claims in matters of extradition, States should nevertheless be encouraged to extradite also where such binding obligations do not exist.

II. The political offence

1. Even if the extradition treaty to be applied does not expressly contain the right to refuse extradition by invoking the exception of political offence, such invocation should be considered to be permissible.

2. The right to refuse extradition by reason of a political offence should not be replaced by the mere right to grant political asylum and to refuse extradition solely on this ground.

3. Further attempts to define the concept of political offence do not seem to be successful. Nevertheless, a definition of the political offence should be promoted in a negative sense, *i.e.*, by stating that certain offences should not be considered to be of a political nature.

4. Consideration should be given to the question whether the invocation of the political offence doctrine can be completely abolished between States based on political homogeneous legal systems.

5. In order to suppress serious international criminality, the possibility of invoking the political offence doctrine should be materially restricted.

III. The protection of human rights in matters of extradition

1. The invocation of the duty to protect human rights should in any case justify the non-extradition, particularly in cases where no political persecution exists and thus the granting of asylum could not be based on that ground.

2. In cases where violation of human rights is to be expected, neither differentiations with regard to the personal attributes of the individual whose extradition is requested nor differentiations with regard to the offence committed should be of any relevance.

IV. The relationship between the right to grant asylum and extradition

1. The right to refuse extradition through invoking the right to grant asylum should not be exercised when doubts do not exist that the requesting State will prosecute the offender with due

observance of all requirements, both substantial and procedural, of the rule of law. (No majority in the Commission).

2. The person to be extradited should not be entitled to invoke directly and on his own behalf the provisions of the treaty to be applied. Invocation of the rights and duties contained in the treaty should be reserved to States as parties to the treaty.

V. The attentat clause

1. The traditional attentat clause should in principle be maintained.

2. The application of the attentat clause should be extended with regard to serious international crimes, unless the prosecution would violate human rights.

VI. Substituting prosecution

1. The system of substituting prosecution should be strengthened and expanded.

2. The system of substituting prosecution should be supplemented by stipulating detailed methods of legal assistance.

3. When governments act in substituting prosecution, the interested governments and in particular the government of the territory in which the offence has been committed should be entitled to send observers to the trial unless serious grounds, in particular the preservation of State security, would justify their non-admittance.

4. In cases of substituting prosecution a minimum penalty should be imposed if the tribunal concerned determines that the accused is guilty.

VII. The extradition of nationals

1. Every State should in principle remain free to refuse the extradition of nationals.

2. States should, however, consider waiving the right not to extradite nationals where this would help in the suppression of serious international criminality.

VIII. The relationship between the international obligation to extradite and the requirements of municipal law

1. In concluding further treaties on extradition, the parties to such treaties should stipulate the direct applicability thereof under municipal law (self-executing effect).

2. The right to expel and to deport aliens should not be regarded as being restricted by the fact that this right could produce the same effect as a prohibited extradition; nor should the right mentioned above be affected in cases of political offences, unless human rights would be endangered.

IX. Arbitration

The observance of obligations resulting from treaties on extradition should be controlled by courts of arbitration, the competence of which should include all applicable provisions of the treaty concerned.

Annex I

Observations of the Members of the Twelfth Commission on Professor Doehring's Preliminary Report and Questionnaire.

1. Observations de M. Giorgio Cansacchi

Turin, le 30 janvier 1978

Mon cher Confrère,

J'ai lu avec un grand intérêt votre excellent et très détaillé « Preliminary Report » sur les nouveaux problèmes posés par le système international d'extradition.

J'approuve presque totalement les observations que vous faites dans cette matière et notamment votre souci de proposer des moyens efficaces pour poursuivre pénalement et châtier les auteurs des plus graves crimes d'aujourd'hui, tels que la capture des aéronefs, l'enlèvement et le meurtre d'otages, les massacres indiscriminés par l'usage de bombes, de fusées, d'armes automatiques, etc....

Je réponds comme suit à votre questionnaire :

I. *Le système actuel d'extradition*

1. Oui. J'estime qu'il serait préférable, en matière d'extradition, de développer le système multilatéral des traités, spécialement entre les Etats qui, en droit pénal, suivent les mêmes principes.

2. Non. Je ne crois pas que le système multilatéral puisse avoir une application mondiale. Ce serait déjà un bon résultat si ce système pouvait obtenir une application régionale suffisamment étendue.

3. Oui. Je pense qu'on ne peut pas exclure des clauses de réserve dans les traités d'extradition. Autrement, certains Etats n'accepteraient pas les traités d'extradition dans leur totalité et ces traités auraient par conséquent une application plus limitée.

4. Oui. Plusieurs Etats — à ce qu'il me semble — suivent déjà cette conduite, même si la réciprocité n'est pas envisagée. J'estime que cette conduite doit être encouragée.

II. *Les crimes politiques*

5. Oui. Le droit pour un Etat de refuser l'extradition en présence de crimes politiques est considéré, dans l'ordre international actuel, comme un principe général d'application normale. Le principe trouve application — me semble-t-il — même si le traité d'extradition ne mentionne pas cette exception. Ce comportement des Etats est certainement regrettable, mais je ne crois pas qu'il puisse être changé.

6. Je ne suis pas sûr d'avoir bien compris votre question. Selon moi, l'interprétation est la suivante : à la question de savoir si l'Etat qui accorde l'asile politique a le droit de refuser l'extradition à l'Etat de la requête, je réponds oui.

7. Je ne crois pas que l'on puisse définir dans les traités d'extradition les crimes considérés comme « politiques ». Tout essai en ce domaine a toujours échoué. Même la jurisprudence de chaque pays est très variable sur ce point.

8. Oui. Je pense que les Etats qui suivent une même idéologie politique et sociale pourraient plus facilement s'accorder entre eux sur une définition du crime politique ou bien exclure certains types de crimes de la catégorie des crimes politiques.

9. Oui. Je pense qu'on pourrait concevoir des traités d'extradition dans lesquels certains crimes, même s'ils présentent des aspects « politiques », seraient considérés comme « non politiques » pour permettre à l'Etat refuge de consentir l'extradition.

Cet expédient a été adopté dans la Convention européenne sur la répression du terrorisme, signée à Strasbourg le 22 janvier 1977 par les Etats du Conseil de l'Europe.

Dans l'article I° de cette Convention, on lit que « pour les besoins de l'extradition... aucune des infractions mentionnées ci-après ne sera considérée comme une infraction politique... » et le même article mentionne comme « non politiques » la capture illicite d'aéronefs, les actes illicites dirigés contre la sécurité de l'aviation civile, les attaques contre la vie, l'intégrité corporelle ou la liberté des agents diplomatiques, l'enlèvement et la prise d'otages, l'utilisation de bombes et de fusées, etc...

III. *La protection des droits de l'homme*

10. Oui, Je pense qu'un Etat peut refuser l'extradition en déclarant que l'Etat de la requête ne reconnaît pas suffisamment les droits de l'homme et les libertés fondamentales, mais je crains que ce comportement ne soit pas légitime en droit international s'il y a un traité d'extradition en vigueur entre les deux Etats intéressés.

Si un Etat a la conviction que certains Etats, parties contractantes de traités d'extradition, ne respectent pas les droits fondamentaux de l'homme, spécialement dans le domaine du procès pénal, il doit dénoncer préalablement les traités d'extradition qui l'obligent envers ces Etats.

11. Oui. Je pense que même dans ce cas, l'Etat requis peut refuser l'extradition s'il n'est pas lié à l'Etat de la requête par un traité d'extradition en vigueur.

12. Oui, s'il n'y a pas un traité d'extradition en vigueur entre les Etats intéressés. On doit toutefois souligner que les crimes « contre l'humanité » et les crimes « de guerre » sont souvent considérés par plusieurs Etats comme des crimes « politiques » à l'égard desquels on peut refuser l'extradition.

IV. *Le droit d'accorder l'asile*

13. Oui. Je crois que selon le droit international général actuel, il n'y a aucune obligation pour un Etat d'accorder l'extradition d'un criminel si cet Etat n'est pas lié à l'Etat de la requête par un traité d'extradition en vigueur.

14. Oui. Je pense qu'il serait utile de considérer le droit d'asile comme un droit individuel réglé par la loi de l'Etat national du criminel ou, en général, par la loi de l'Etat du refuge. Ce droit individuel pourrait aussi être reconnu en faveur des citoyens par la loi constitutionnelle. En Italie, l'art. 26, para. I° de la Constitution empêche l'extradition du citoyen, à moins qu'elle ne soit permise par une règle expresse d'une convention.

Dans le droit allemand, la Constitution empêche l'extradition des citoyens.

15. Oui. Il serait convenable d'admettre un contrôle judiciaire direct par les tribunaux de l'Etat requis sur l'exacte application, dans les cas concrets, de la convention d'extradition. Ce contrôle judiciaire devrait être admis à la demande en justice du criminel réfugié dans l'Etat du for.

V. *La clause de l'attentat*

16. Oui. Je pense que cette clause traditionnelle, reconnue par le droit international coutumier, doit être conservée.

17. Oui. Je pense que l'extension que vous proposez de la clause de l'attentat est souhaitable et très utile pour une plus efficace défense de la population et des communications aériennes.

VI. *La substitution du procès pénal de l'Etat requis*

18. Oui. On devrait s'accorder entre Etats pour que si l'Etat requis ne concède pas l'extradition du criminel à l'Etat où le crime a été perpétré, l'Etat requis soit internationalement obligé envers l'Etat de la requête de soumettre à procès le criminel par ses tribunaux et de lui infliger une punition adéquate à la gravité du crime commis et à ses conséquences.

19. Selon mon opinion, ce principe devrait toujours être suivi pour éviter que le criminel n'échappe à un juste châtiment. Le procès pénal contre les criminels et leur condamnation à un châtiment adéquat seraient encore plus nécessaires en présence de crimes très graves, tels ceux de la capture d'aéro-

nefs, de la prise et du meurtre d'otages, de massacres indiscriminés par bombes, fusées, etc...

20. Oui. Je pense qu'il serait utile de statuer sur l'obligation internationale d'assistance légale lorsqu'il y a substitution du procès pénal entre l'Etat de la requête et l'Etat d'asile.

21. Oui. Je crois que cette présence est souhaitable.

22. Oui. Spécialement en présence de crimes graves qui attentent à la vie et à la liberté d'un nombre important de personnes.

VII. *L'extradition des citoyens*

23. Je suis convaincu qu'il serait souhaitable de supprimer l'immunité des citoyens à l'égard de l'extradition, mais je crois que la plupart des gouvernements ne consentiraient pas à cette suppression. Cela provient du fait qu'il y a encore aujourd'hui une large méfiance de la part des gouvernements envers les juridictions pénales étrangères.

24. Oui. L'immunité des citoyens en matière d'extradition ne devrait pas être admise en présence de crimes très graves contre l'humanité et la sureté des communications internationales.

VIII. *L'importance de la loi nationale d'un Etat sur le devoir d'extrader*

25. Oui. Le criminel dont l'extradition est requise doit pouvoir se défendre en justice, réclamer l'application des règles du traité d'extradition si elles lui sont plus favorables que celles de la loi interne de l'Etat requis.

26. Non. Selon mon avis, l'Etat du refuge qui ne concède pas l'extradition faute de traité d'extradition ou pour empêchement de sa loi nationale peut toujours se libérer du criminel réfugié sur son territoire par son expulsion ou par sa déportation.

VI. *L'arbitrage international et la juridiction nationale*

27. Oui. Je pense que l'arbitrage international, même en matière d'extradition, est convenable et utile lorsque naissent des contestations sur l'interprétation ou l'exécution du traité d'extradition entre les Etats signataires.

28. Si on admet le jugement d'une Cour arbitrale, sa compétence devrait être totale, c'est-à-dire s'étendre sur l'interprétation de toutes les dispositions du traité d'extradition.

Je pense toutefois que les Etats signataires du traité d'arbitrage consentiraient bien difficilement à ce que la Cour arbitrale se prononce sur la qualification politique du crime commis, lorsque l'Etat requis a déclaré refuser l'extradition du criminel réfugié sur la base de cette qualification.

Croyez, mon cher Confrère, à mes sentiments les plus amicaux.

Giorgio Cansacchi

2. *Observations of Professor Edward McWhinney*

Vancouver, October 25, 1977

Part I

1. The experience, in recent years, with multilateral treaty-based attempts to facilitate extradition of criminal offenders — see, in this regard, the multilateral treaties concerning the illegal diversion of aircraft — is not a happy one. Such multilateral treaty provisions, often signed by a large number of States, are too often ratified in dilatory fashion or else not ratified at all; and, beyond that, even when ratified, they are too often not implemented in the legislation and practice of the ratifying States concerned. It may be suggested that the more general experience with multilateral treaties in the post-War era warrants a certain scepticism as to those treaties' possibilities, in all cases of being translated into World Community « living law », or law-in-action. *A fortiori,* bilateral treaties — though evidently more modest and limited in their intended range of effects, — would offer better prospects of being concretely implemented at this particular stage of development of international law.

2. For the reasons indicated above, a strictly regional operation, limited to countries sharing the same basic legal values or ideological preferences, would seem to offer much better prospects of becoming effective at this time.

3. The price of not permitting reservations is presumably to reduce the number of potential State signatures and, beyond that, of ratifications and implementations after signature.

4. Yes.

Part II

5. Yes.

6. It seems to me that this proposal would create a double standard in giving a special premium (right not to extradite) to those States to whom, under international Law as it now stands, the category of Asylum applies.

7. The *de facto* situation today seems very close to the proposition contained in the second part of the question. While it is no doubt very desirable to define more precisely the legal scope of political offence, it is a peculiarly difficult task in an era of ideological pluralism in the World Community.

8. Yes. Prospects of achieving consensus on just such an objective are clearly best in regional groupings or associations of States characterised by homogeneity of ideology and values.

9. Yes. For the reasons already indicated, the record of actual State practice in this area is a dismal one.

Part III

10. Yes. The proposition appears realistic and might facilitate a closer correspondence between the positive law of treaty text and the actual law-in-action of subsequent State practice.

11. Yes, for the reasons indicated above.

12. Yes, for the reasons indicated above.

Part IV

13. No. It would, however, seem most difficult to enforce any legal rule formulated in these terms.

14. The Right of Asylum, as an exception to any general obligation to extradite, should be construed narrowly and limited to the international law category of Asylum as it now exists.

15. No.

Part V

16. and 17. I am in favour of strengthening the international law obligation to extradite and of limiting, as far as possible, any special exceptions to its application. However, the *attentat* clause, with its special provisions as to Heads of States only, appears historically dated, and it would seem better to strive for some more comprehensive category or categories of criminal offences in respect to which the obligation to extradite should be automatic and without exception — for example, offences directed against international activities « affected with the general public interest » of the World Community (interferences with international communications, transportation, postal and telegraph services; destruction of international navigational aids, and the like).

Part VI

18. Yes. I would favour adding to any *aut dedere, aut punire* obligation the stipulation that the prosecution by the harbouring State must be a *bona fide* one and not a colourable operation. It remains a sad truth that State practice in this area, in recent years, too often indicates a purely casual follow-up, with humorously light sentences following upon any conviction.

19. Yes.

20. I cannot see any reason for this.

21. and 22. Yes.

Part VII

23. and 24. Yes.

Part VIII

25. and 26. No.

Part IX

27. I doubt if this is a realistic proposal today, except in the cases of bilateral treaties or of multilateral treaties limited in membership to a special grouping of States sharing common legal values and political ideologies.

28. If the proposal is adopted, I do not see why it should be restricted in its operation.

Edward McWhinney

3. *Observations of Ambassador G.E. do Nascimento e Silva*

Bogota, December 1, 1977

My dear Confrère,

I read with great interest your preliminary report on extradition[1] and wish to congratulate you on your work. I must add that at this stage the only point on which I do not see eye to eye with you relates to the introduction of the problem of human rights that will possibly create an element of confusion contrary to a favourable solution to a very complex matter, as you point out.

With reference to your questionnaire, here are my suggestions on the matter:

I. *The existing legal system of extradition*

1. I would rather put the question the other way around: the system of bilateral treaties could be replaced by a multilateral system, which would be supplemented by bilateral treaties.

2. A multilateral system should aim at world-wide operation.

3. If we aim at flexible world-wide operation, the possibility to declare reservations compatible with the treaty must be maintained. States that enter reservations could be periodically invited to examine their stand on the matter.

4. If a treaty should be signed, it could include a clause such as we find in Article 8 of the The Hague Convention of 1970 for the suppression of unlawful seizure of aircraft: « The offence shall be deemed to be included as an extraditable offence under any extradition treaty existing between contracting States... If a contracting State which makes extradition conditional on the existence of a treaty refuses a request for extradition from another contracting State with which it has no extradition treaty, it may at its option

[1] In your report you list the multilateral treaties dealing with extradition and you mentioned the Inter-American Draft Convention on Extradition prepared by the Inter-American Juridical Committee. I feel that the most important document in this matter is the Convention of Private International Law (The Bustamante Code) signed in Havanna in 1928, which has a very complete chapter on extradition.

consider this Convention as the legal basis for extradition in respect of the offence ».

II. *The political offence*

5. It would depend on the drafting of the treaty. Usually there is an express clause in this sense. In the legislation of most States refusal is expressly mentioned.

6. I would avoid linking the institution of extradition to asylum. In the case of *non-refoulement* an individual may enter a country from which he will subsequently be extradited if it is proved that the political, racial or other motivations were a mere pretext to escaping justice.

7. Yes. An enumeration in which *inter alia* extradition is justified might be a solution.

8. No. Such a political homogeneity may only be momentary.

9. Yes. But in The Hague in 1970 and in Geneva in 1977 during the Conference on Territorial Asylum certain African and Arab countries took a very strong stand against such a position, pointing out that the question of terrorism has to be decided by the General Assembly of the United Nations.

III. *The protection of human rights*

10. No. Such a possibility would be pernicious since a tribunal based on biased press reports could easily invoke one of the thirty articles of the Universal Declaration of Human Rights and it is a well-known fact that even those States which adopt a very positive stand on this matter do not *de facto* accept all the rights mentioned such as, for example, articles 13 and 23 and also racial equality.

11. This problem is linked to item 7, *i.e.*, the definition of a political offence, and in Geneva this year the different approaches to this problem were evident.

12. Such a procedure would have a highly negative effect in cases of a « purely criminal character ». In the other two cases I am afraid the solutions given after World War II were of a political character and one-sided. The problem was not raised either after the war of Korea or that of Vietnam.

IV. *The right to grant asylum*

13. As I pointed out before, it would be advisable not to link extradition and asylum. The draft convention on territorial asylum adopted in Bellagio, in Italy, in April 1971 contained article 3 under which « no person shall be extradited to a State to the territory of which he may not be returned by virtue of article 2 ».

The United Nations group of experts on the draft convention on territorial asylum, which met in Geneva as from 28 April 1975, considered that this article should be deleted and it was mentioned that it might give rise to difficulty from the standpoint of existing extradition treaties and in particular

treaties of a bilateral character. During the 1977 Conference on Territorial Asylum amendments were tabled by various delegations in favour of an article on non-extradition but the Conference decided to examine them at a later stage.

14. No.

15. In certain judicial systems such a control might be difficult.

V. *The attentat clause*

16. Yes.

17. I cannot see any special advantage in such a procedure. It might be easier simply to adopt stricter measures to avoid such offences.

VI. *The substitution of prosecution by the requested State*

18. Yes.

19. In much legislation such a procedure is normal. The The Hague Convention of 1970 and the Montreal Convention of 1971 contained clauses on this subject. It would be highly desirable that every United Nations member ratify these important Conventions.

20. With the adoption of the above-mentioned Conventions, such a recommendation would be unnecessary.

21. I do not see any special advantage in adopting such a measure.

22. Yes. Article 2 of the The Hague Convention says that « The contracting State undertakes to make the offence punishable by severe penalties » (*ibid.* the Montreal Convention). Attempts to spell out the phrase « severe penalties » did not receive the necessary approval.

VII. *The protection of nationals*

23. Personally I am in favour. An international treaty would have to permit reservations in this respect.

24. Yes.

VIII. *The relevance of the domestic law under a duty to extradite*

25. If a treaty is in effect, such a right should be automatic in the majority of legal systems. Such a recommendation would be useful in those countries in which the law of the land can reverse international treaties.

26. Such a procedure is not only unlawful but also deplorable and clearly violates human rights.

IX. *International arbitration and domestic legislation*

27. Should States be permitted to refuse extradition on account of a threat of violation of human rights, the mechanism would have to be construed

to avoid abuse. We would also be faced with the problem of the composition of such a court : would it be on the lines of the International Court of Justice, or would it be of a regional scope or would the parties to the treaty be free to choose the arbitrators from a list ?

The creation of another instance would always have the inconvenience of delaying extradition and might be contrary to the international duty of States in the suppression of criminality.

28. If we are to accept the existence of such a court of arbitration, its powers should be restricted.

G.E. do Nascimento e Silva

4. Observations of Judge Shigeru Oda

12 April, 1978

1. The legal system of extradition essentially concerns the relationship between the requesting State and the requested State, and the multilateral system is nothing but the accumulation of the bilateral systems. There is no difference in principle between the bilateral systems and the multilateral system, but a multilateral system offers some advantage over bilateral systems simply because it can obviate some of the technical hitches of negotiating bilateral treaties.

2.

3. This is a problem relating to treaty law in general, and the total exclusion of reservations would surely be preferable. However, it would be pointless if the content of the treaties were restricted just in order to get agreement on the exclusion of reservations.

4. This question does not appear to be quite clear. Is it meant to suggest that a general international legal norm be formulated so as to impose a duty of extradition upon States on condition of reciprocity ? If so, is this any different from suggesting that a multilateral legal system be formulated ?

To the extent that extradition is a desirable system, it is certainly appropriate to increase the possibility of extradition even in the absence of any specific extradition treaty in force.

5. The obligation of extradition under a treaty does not prejudge the right of States to grant asylum where the protection of human rights is concerned. Even if the non-extradition of political offenders is not mentioned in a treaty, the granting of asylum can always be regarded as an exception to the general obligation to extradite offenders.

6. In consideration of what is mentioned in 5 above, specific allusion to the non-extradition of political offenders may be eliminated from the provisions of treaties so long as the right of States to grant asylum continues to be upheld. The actual withdrawal of the legal possibility of refusing the extradition of

political offenders is, however, quite another problem. Of course, it will always be easier for a State to refuse extradition on the basis of a treaty provision. At the same time, if the extradition of political offenders is now to be encouraged and the right of granting asylum restricted, the question is one which should be answered in the affirmative.

7. The non-extradition of political offenders implies that the relevant treaty contains a provision for exemption of the requested State from the general obligation to extradite. Under what circumstances the requested State may refuse to extradite, is a very complex question, and it will certainly be appropriate to define these circumstances, but it remains a question whether such definition is actually possible, and some curb on the absolute discretion of the requested State should exist.

8. I do not quite understand why this question is raised; extradition or non-extradition of political offenders seems to have nothing to do with political homogeneity.

9. In order to respond to this question we have to first consider what is meant by a « political offence »; in other words, the problem is whether internationally dangerous criminality such as the seizure of aircraft and hostages can be considered as a political offence.

10-12. In considering these three questions which start with the words: « should a State be permitted to refuse the extradition », it is important to note that the obligation of extradition is imposed by the specific treaty and that the permissibility of any refusal to extradite implies the right of a State to be released from this obligation. These three questions may therefore be construed so as to discover under what circumstances such a right may be relied on by a State. Question 10 poses the case that on the part of the requesting State there is no guarantee of the preservation of human rights, while Questions 11 and 12 relate to the cases where there is simply a threatened violation of human rights. All of these questions depend upon the definition of « political offenders » within the meaning of non-extradition of political offenders as provided for in the specific treaties, or otherwise these questions can be considered in conjunction with the general right of a State to grant asylum.

13. Whether a fair trial under the rules of law is guaranteed or not in the requesting State has nothing to do with the question whether the offence in question is political. Therefore the question should be answered in the negative if it is related to extradition. However, it is another question under what circumstances a State will not bear any international responsibility by granting asylum.

14. The right of asylum is the right of the State under international law to grant asylum to an individual. Whether the right of the individual to asylum is guaranteed or not depends on the provisions of the Constitution or legal system of each country.

15. Yes.

16 and 17. Certain historical considerations apart, it seems difficult to make a distinction between the assassination of the Head of State and that of members of the Government, and to make this into a special case. Whether the assassination of either the Head of State or members of the Government could be considered as a political offence or not should be considered in the light of the circumstances of the act.

18-22. It should be noted that the international obligation to prosecute is imposed on a requested State which is released from the treaty obligation to extradite the offender, but this is strictly limited to the case where the offender is a national of the requested country. This obligation has nothing to do with political offenders.

23. The non-extradition of nationals has been maintained for a long time although logically there has been little support for this institution. It seems to be based simply on some emotional motives but on the other hand, as stated above, the requested State has been obliged to prosecute and punish its own nationals who have not been extradited to the requesting State. Theoretically, the principle of non-extradition of nationals does not need to be retained ; however, in practice there may be many cases in which there is much apprehension concerning the ineffectiveness of the rule of law on the part of the requesting States.

24. In connection with this question it may be as well to consider the possibility of a requesting State seeking extradition simply in order to protect the offenders rather than to punish them.

25. This question relates to a general problem of treaty law. Whether the individual has a personal right under the municipal law to invoke the relevant treaty simply depends on the provision of each nation's municipal law, although it may be desirable to have the municipal law of each State systematised in that sense. This is not only a question of extradition, however, but also one of asylum.

26. The issue of expulsion or deportation is basically separate from that of extradition, so that the requirements concerning the latter cannot settle the question of the legality of the former. Under international law, expulsion or deportation come however within the purview of human rights.

27 and 28.

Shigeru Oda

5. *Observations of Ambassador Shabtai Rosenne*

Jerusalem, 23 January 1978

Dear Friend and Colleague,

Great pressures of work recently, since our meeting in Oslo, have prevented me from giving to your excellent preliminary report for the 12th Commission the attention it deserves, and for the same reason I am not now

able to present to you some of the more fundamental considerations which I have encountered in recent years, and which prompted me to suggest that the Institute take up the study of the question of extradition, which it has not examined during this century. I would also have liked to have given some indications of the evolution of Israel's practice in the matter — interesting from several points of view, including the impact of State succession problems on extradition, the problems of a new State of mass immigration, and so on. However, circumstances, which you will well understand, compel me to put all that aside for the moment, and to limit myself to some cursory, and perhaps tentative, answers to your questionnaire. But before doing that I would also like to thank you for your courtesy in furnishing us with an English translation of the most useful passage on extradition which you included in your masterly survey in *Festschrift Justitia et Pace* prepared by our German confrères in honour of the Centenary of our Institute.

Herewith my answers:

1. In principle, keeping in mind what might be termed certain ideological factors evident in the modern international community, the habitual (I would refrain from calling it « traditional ») system of bilateral treaties should remain the core, but could be supplemented by a restricted, not universal, multilateral system. Israel's experience since it adhered to the European Convention on Extradition is generally satisfactory. I am strongly of the opinion that international agreement (treaty) must remain the foundation of international extradition law. I also believe that the treatytechnique performs a useful function in securing maximum unification of the procedure for dealing with fugitive criminals.

2. See answer to question 1.

3. For particular reasons connected with the topic of extradition, and for more general reasons connected with the broader problems of multilateral treaties, including the difficulties of reconciling different legal systems, the possibility of making reservations should be maintained. However, it is preferable not to rely exclusively on the modern « compatibility » test of general international law, which may not be too clear when dealing with restricted regional treaties and the negotiators of those treaties should be encouraged to deal with the matter specifically. I think that this should be the subject of a special paragraph in our resolution.

4. No.

5. There should be no extradition for political offences, or if the requested States has sound reasons to believe that the request for extradition was based on political motives, or that the trial will be politically biassed. This is the case even if there is no specific position in the treaty.

6. No. But allow me to quote from a speech which I made in my official capacity in the 605th meeting of the Sixth Committee of the U.N. General Assembly on 1 October 1959 (I am quoting from the original manuscript):

« ... (I)f any system of asylum is to be satisfactory, it must be matched

with an adequate system of extradition which will ensure that genuine cases of asylum will not become confused with what is mere criminality ».

7. I am not opposed to further attempts being made to define the concept of « political offence » with the general object of limiting its scope, but I would keep in mind the civil law maxim *Omnis definitio periculosa est.* Perhaps it would be easier to indicate what is not to be regarded as a political offence, and in those cases to introduce a properly formulated rule of *aut dedere aut judicare.* This is the method followed in some recent treaties directed against certain forms of terrorism, if I have correctly understood them.

8. I doubt it. The conception of « political homogeneity » is difficult to define in legal terms.

9. They should include a properly drafted clause *aut dedere aut judicare,* and I think the Institute would perform a useful service if it were to examine the structure and contents of such a clause.

10-11. These questions raise the issue of ideological homogeneity to which I alluded in my answer to question 1. The answers may not always be the same, depending upon whether one is dealing with a bilateral, a restricted multilateral or a universal multilateral treaty. For instance, in most bilateral treaties the question will have been examined in the course of the negotiations leading to the conclusion of the treaty, while in universal multilateral treaties, it probably is not. Moreover, internal changes in the State structure and in the political, social, economic and cultural aims of one of the parties to a bilateral treaty could destroy that element of ideological compatibility upon which the treaty was originally premissed. I have no doubt that the ideal of the protection of human rights, in the sense here of the individual's human rights, the right to a fair trial for instance, must be respected. I would find it easier to answer your questions if you could furnish us with more concrete formulations.

12. No.

13-15. I think the whole question of the right of asylum needs to be thought through again in the light of the debates at the U.N. Conference on Territorial Asylum held early in 1977. At the same time, I think we should try and avoid having to commit ourselves to any theory as to the nature of the right of asylum — State right or individual right. The doctrinal controversy is likely to lead us far astray. Moreover, I doubt if it would be wise to try and formulate an international rule or standard for what will always be a delicate matter of internal law and national policy.

16. Yes. But consider whether it should be adapted to the modern practice by which certain other dignitaries, not necessarily formally Government officials, should be given like protection. On the other hand, note the somewhat restrictive definition of « internationally protected person » in the 1974 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

17-18. Yes.

19. All cases of justified refusal, including the instances of crimes against humanity and war criminals, as well as the defined terrorist acts excluded from the exception of political offence.

20. I think this is an independent rubric of the law, not necessarily tied in with the *aut dedere aut judicare* principle. On the other hand, I note that very frequently extradition and judicial assistance in criminal matters go hand in hand, and we cannot ignore it.

21. No. Surely, most trials are held in public. *Cf.* article 10 of the Universal Declaration of Human Rights. In those rare circumstances in which a closed trial is legitimate, the presence of counsel freely chosen by the accused would normally be an adequate protection. If this is not so will lead to doubts as to the protection of the individual's human rights.

22. No. There must be no unwarranted interference in the internal affairs of the trial State.

23. I do not think this is a matter of « principle » but one which depends on the circumstances of each State. Under our original Extradition Law of 1954, the extradition of nationals was permitted, but by virtue of an amendment passed this year, the extradition of Israeli nationals is permitted only in case the person concerned became a national after the date of the offence for which his extradition is requested.

24. For me, therefore, this question does not arise.

25. This, too, is not, I think, a matter of principle for which international regulation would be appropriate, but one which depends upon the circumstances of each country. It seems to me, from a perusal of the cases in our Courts, that everything will be grist to the mill of learned counsel trying to avoid extradition, and it is up to the Courts to separate the wheat from the chaff in the light of the relevant provisions of the internal law and the public policy of the Court. As an illustration, see *The Attorney-General of Israel v. Kamjar* (1966, 1967), 44 International Law Reports 197 (1972).

26. No. Expulsion and deportation, when carried out in accordance with the law, are entirely different from extradition, even when they lead to the return of the wanted person to the requesting State. Note that in the circumstances possible restrictions on the indictment which the extradition might embody will not apply.

27. No. An extradition treaty is in no different position from any other bilateral or multilateral treaty binding the State, and whatever provisions are accepted by that State for the third party settlement of disputes relating to its treaties will automatically embrace its extradition treaties. There is nothing to prevent States from including some sort of compromissory clause in their extradition treaty, if such is their wish. More than that is not required.

28. For me, therefore, this question does not arise.

General question. At the page 146 of your preliminary report, you

refer to the incorporation of extradition obligations in multilateral treaties which mainly deal with other purposes. In my view, this practice raises many difficulties, and a further close examination of it would be timely. I personally came across this for the first time when I participated in the 1972 United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs, 1961, and I draw your attention to the discussion held at the 9th - 11th meetings of the Second Committee (Official Records of the Conference, vol. II, pp. 196-206, document E/CONF. 63/10/Add. 1). See also the further discussion at the 8th plenary meeting, ib., at p. 24. I observe that a few reservations have been made to the extradition aspect. Apart from matters of drafting and of legal draftsmanship and technique which were brought out in that discussion in the Conference, I am asking myself whether the inclusion of such provisions in a Convention of universal applicability does not run counter to the ideological homogeneity factor which, as I see it, is one of the non-legal elements in an effective system of extradition, of which the lawyer ought to be aware. The practice itself is much older, of course, and I wonder what the general experience of it teaches us.

Again congratulating you on the important preparatory work you have accomplished, and wishing you all success in your difficult task of Rapporteur, I remain,

Yours sincerely,

Shabtai Rosenne

6. Observations of Ambassador Sompong Sucharitkul

Paris, February 19, 1978

Dear Confrère,

I am responding to your appeal for an early submission of observations and comments on your preliminary report of November 7, 1977, and completion of answers to the set of questions circulated since August 1, 1977.

I shall therefore present a few preliminary observations of a general nature before proceeding to reply to the questionnaire.

In my view, the preliminary report provides an adequately wide coverage of the kind of new problems confronting States and national authorities in connection with a claim of extradition. An examination of current problems of extradition will uncover several interesting new trends in the practice of States as well as in legal developments.

I. *The concept of extradition*

1. *A power-and-liability relationship*

Extradition can be and should be viewed in the light of jural relationship.

As a legal concept, « extradition » represents, first and foremost, the power or prerogative or discretion of the executive branch of a sovereign government to hand over a person accused of a crime to the responsible authority of another State for the purpose of being brought to trial in accordance with the criminal justice of the requesting State, for the specific offence which the extradited person is alleged to have personally committed, or for which he is otherwise deemed to have been criminally responsible.

As a correlative to this power of the Executive to extradite should be mentioned the liability of the person whose custody has been sought by the requesting State to an extradition proceeding. A person who is physically present in the territory of a sovereign State is clearly liable or subjected to the power of the territorial State, which is authorized to expel him or to extradite him in accordance with its internal laws. Whether and to what extent the territorial authority is empowered to expel or to extradite an individual in a given case is a matter that is governed by the law of the expelling or extraditing State.

The internal law of a State may or may not provide for the possibility of expulsion or extradition of nationals or aliens... It may also contain detailed provisions regarding the conditions in which a person may be liable to an expulsion or extradition proceeding. Some systems may be blessed with constitutional safeguards or legal guarantees of the rights of the individual known as « due process of law ». An appeal may be permissible to a judicial organ against an executive order of expulsion or extradition.

The grounds on which an individual could challenge an expulsion order or object to an extradition proceeding are varied. An extradition may be unauthorized, for instance, if the offence complained of is not considered to be a crime under the law of the territorial State or of the requesting State, or if the extradition order fails to fulfil one ore more of the conditions prescribed by the *lex fori* of the extraditing State.

2. *The right not to be unlawfully extradited*

Secondly, extradition also involves a consideration of an individual's right. A person clearly has the right to challenge an extradition or expulsion order. He may do so, as indicated above, on grounds provided by the law of the extraditing State. Such legal grounds could be substantive or purely procedural. This right not to be unlawfully or lawlessly extradited could evolve into a new form of human right, for which the territorial State owes to natural persons the duty of protection. In any event, the right exists to the extent recognized by the law of the territorial State, which is under a duty not to violate or exceed the authority or discretion given to it by law. Thus, in exercising its power or prerogative or discretion to extradite a person, the extraditing authority is also bound to conform to the law.

The law setting the limits to this power of extradition can be found not only in the constitution or in the domestic basic laws, but also in the established norms of international law. Thus, under customary international law the State is not authorized to extradite a person for a crime which is

domestically or internationally not extraditable. The question of non-extraditability of political offenders is doubly tested by national laws as well as by customary international law. It should be observed, however, that while under the municipal legal system the right of the individual to challenge or appeal against an extradition order may be exercised against the extraditing State, for which practical remedies may be adequately assured, under international law a parallel right of the individual may be said to be of imperfect obligation. Remedies available to individuals before an international forum or tribunal are not always readily obtainable, save where the State against which a proceeding is instituted for unlawful extradition has consented to such a proceeding in an internationally binding convention or has otherwise accepted it as a matter of grace.

3. *Absence of the duty to extradite or not to extradite*

The third area of jural relationship is the right-and-duty correlation. It has sometimes been said that a State has a legal duty to extradite or not to extradite a particular person for some legitimate reasons. It is submitted that as a general rule it would be more accurate to maintain that there is no legal duty on the part of State to extradite any person regardless of the nature of the request.

This general proposition is subject to an immediate qualification. The duty to extradite could be created or undertaken or expressly accepted by any sovereign State by way of an unilateral declaration, a bilateral agreement or a multilateral convention. The duty thus assumed by the State is at worst only self-imposed and as such is binding only by virtue of its contractual obligation.

The duty to extradite is not one of general international law but rather of specific treaty or contractual obligation binding that State on the basis of reciprocity vis-a-vis the requesting State party to the agreement.

It would also appear to be likewise in the case of the duty not to extradite under general norms of international law, as States could always agree to extradite with or without assuming any legal duty. Extradition is more the exercise of a power than the performance of a legal duty. Even where there appears to be general prohibition against extradition such as in the cases of political offences, nothing seems to be capable of preventing the will of two contracting States from redefining the scope of extraditability and thereby bringing to fruition their agreed objective of extraditing specified political offenders or any offender they could have in mind. Such aggrieved offenders could have limited recourse to the due process of law which might be locally available or find possible remedies before an international instance. In most cases, the individual would be remediless. This does not appear to be inconsistant with the recent trends in State practice to cooperate in the joint suppression of common enemies or mutually subversive elements. Bilateral agreements providing for extradition of otherwise « political offenders » would seem perfectly in good order.

Accordingly, there appears to be sufficient justification for the proposition that there is no duty on the part of the territorial State to extradite any

person unless such duty has been assumed by that State of its own volition, nor conversely is there inescapable duty not to extradite any person or type of persons which States have mutually agreed to extradite. The question of extraditability as an international criterion deserves a separate treatment.

II. *Extraditability*

The question of extraditability is inherent in every request for extradition. The test of extraditability has to be satisfied nationally as well as internationally. While the national test varies from country to country, the international criterion depends on the direction in which the practice of nations moves. Regardless of the willingness of the State to extradite an offender, and irrespective of the nature of the offence a person is alleged to have committed, extradition may be avoided for a number of other reasons. Extraditability therefore relates inevitably to the question of competence or jurisdiction as well as to the criminality of the act under complaint.

1. *Justiciability : a primary criterion*

Without going too deeply into the detail of justiciability of a criminal act which is a question primarily of municipal criminal justice, and ultimately of conflict of criminal jurisdictions regulated by Private International Law, suffice it to state that an extradition request may be refused for want of jurisdiction on the part of the requesting authority to try the alleged offender. This is clearly discernible where the offence complained of has no connection whatever with the country requesting extradition, no matter whatever jurisdictional test may be applied, e.g., objective test, or passive test or the universal test.

2. *The distinctions between extraditable and non-extraditable offences*

Independently of the question of jurisdiction or the lack thereof, the problem of « extraditability » is raised in connection with the substantive nature of the crime. Some offences are said to be extraditable while others are not. The scope of extraditable crimes is defined by municipal legislations. Not all criminal offences are extraditable under national laws. Some of the ordinary criminal offences are also recognized as not extraditable for various jurisdictional and procedural reasons.

Better known categories of non-extraditable offences are of political or mixed nature. Thus, in the classical penal law classification, offences are divided into ordinary crimes (délits de droit commun), which are extraditable, and political crimes (délits politiques) or mixed crimes (délits mixtes) which are not extraditable. National criteria in this connection are far from uniform.

Customary international law is not too clearly settled as to the precise line of distinction to be drawn between offences which are extraditable and those which are not on grounds of their political nature. Nor is it helpful to qualify non-extraditable crimes as political offences. For even if such a fine line of distinction were to be clearly drawn, there would still be no legal justification for extraditability or its absence.

Whatever legal justification may have been advanced in support of non-extraditability of political offenders, the current trend against non-extradition

is reflected in the increasing limitations being placed on the so-called « political » offences. Priority appears to have been placed on the arrest, trial and punishment of offenders rather than on the right of the offender to escape detention, trial and punishment for political motivations.

3. *Dwindling categories of non-extraditable political offences*

International usage appears to warrant the proposition that political offenders should not be extradited for fear of inhuman treatment, political persecution or otherwise. The actual practice of States has to some extent militated in favour of this proposition. There is, however no agreed version as to what constitutes « political offences » for purposes of non-extradition. Recent developments in multilateral conventions appears to have eroded the scope of non-extraditable or political offences, either by introducing new exceptions or qualifications, such as the universal nature of the crime, the serious character of the damage incurred, the indiscriminate nature of the injury inflicted, and the gravity of the type of destructive weapons employed. The European Convention on the Suppression of Terrorism, the The Hague Convention on Unlawful Seizure of Aircraft in Flight, and the Convention on Unlawful Actions against the Security of Civil Aviation may be noted as illustrations of the types of criminal offences, which would be clearly considered to be extraditable regardless of the political motivations. The taking of hostages, air and maritime piracies, the use of machine guns, hand grenades and other weapons of mass destruction would constitute exceptions to non-extraditability of political offences.

4. *Expanding notion of the Attentat Clause*

The exception of « lèse-majesté » or the Attentat Clause with reference to an attempt on the life of the Sovereign Head of State, which crime would in any event be extraditable, whatever the political background of the offender, has been much further developed. The notion of the Attentat Clause was introduced at the time when most of the Heads of States in Europe and also in Asia were Sovereign Monarchs. With the growth of the family of sovereign nations and the increasing members of the United Nations with varying types and structures of government, the list of personalities against whom no attempt would be tolerated continues to expand. This continuing expansion is further encouraged by the principles of friendly relations and cooperation among States in accordance with the Charter of the United Nations. Cooperation is extended to cover all fields including criminal justice, the protection of Chiefs of State, Chiefs of Government, Chiefs of Diplomatic Missions, etc., and suppression of terrorism.

In the interest of friendly relations, peaceful coexistence and good neighbourliness, extradition should be the rule rather than the exception. Hesitations could also be prompted by the fear of personal persecution and inhuman treatment of offenders. But this is a separate subject which requires extensive studies elsewhere. Suffice it to assume that in these days and age nations are sufficiently civilized to afford the minimum guarantees of human rights and due process or the Rule of Law.

Modern States are disposed to extradite all criminal offenders, almost regardless of their political undercurrents, especially to neighbouring countries. Such dispositions are encouraging and conducive to better neighbourly relations and cooperation. This practice is prevailing between Thailand and her neighbours.

5. *Growing notion of extraditability*

The practice of States appears to be heading towards a new notion of extraditability. There is a growing list of extraditable offences, as the concept of non-extraditable political crimes is waning. Ultimately, there will be no valid prohibition against extradition. States refusing to extradite when under a legal duty to do so would in future have to rely on the power to grant territorial asylum, or on other humanitarian grounds, or for the protection of human rights, which incidentally lie outside the immediate purview of the present enquiry.

III. *Priorities of recipients*

The advancement of science and technology has entailed as a byproduct that of enabling more crimes to be committed across national frontiers, thus increasing the number of interested States for the trial and punishment of the same crimes or the same authors of successive crimes.

As extradition becomes more and more frequent in contemporary international practice, request for extradition also becomes easier to justify. It is not unlikely that in a given case of a universal offence, such as piracy *ex jure gentium* on the high seas or in mid-air, or on international water-ways, many States could claim extradition of the alleged offenders. Other crimes too, because of the multiplicity of countries involved, either by subjective or passive test as injured party or by objective or active test because the accused happens to have a certain nationality, can generate severality of claimants of extradition. It would be an interesting academic as well as practical exercise to sort out a set of priorities among the claimants to determine the State that would have prior title to receive the wrong-doer for trial and possible punishment, assuming that all the claimants are equally qualified under local rules and international law to request the extradition of a particular offender.

These are the types of new problems that may become more acute in the future, and to which the attention of the Institute might be drawn. Without being too clearly decisive on the order of priority, it could be submitted that the following practical considerations might be relevant.

1. *The time element*

The State that is first in time to submit an application for extradition should be on the top of the list for priority. If all other conditions are fulfilled, the extraditing State could extradite without fear of having to answer a second or subsequent requests. Generally speaking, a claimant most interested in the custody of the accused should waste no time to request for his extradition. Once extradition is completed, the country of original custody is no longer

responsible or answerable to subsequent claimants. If extradition proceeding is delayed so that other claims can be joined, then the time element should also be accorded the predominance. Other considerations may also be relevant.

2. *The place element*

The *locus delicti commissi* or the place of commission of the crime is also of fundamental importance to found criminal jurisdiction, and therefore another sound basis on which to claim extradition.

Among the places which have the closest connection with the crimes, another order of priority could be set. Thus, the place of actual commission or omission of an act resulting in a crime could be one, whereas the place where the injury occurred could be another, each having a legitimate claim to extradition of the alleged offender.

The place where the accused is found could also be decisive in determining priority for the right to try the accused, especially in the event of conflicting or concurrent criminal jurisdictions. Thus, it is not infrequent that there is no need to extradite the accused if the requested State is itself interested in and entitled to conduct the trial and punish the offender, as when it has one or more local connections with the venues of the offence or the very presence of the accused in its territory in the case of a crime of universal character, such as piracy *ex jure gentium*, where the accused is regarded as « *hostes generi humanis* ».

3. *The national interests*

The nationality element is also not uncommon as a justification for requesting extradition. Apart from territorial connection, a State may claim extradition of an offender on grounds of the nationality of the « accused » or of the « injured party » or the national interests affected by the commission of the offence, which requires criminal investigation, trial and punishment of the offender. On the other hand, a State may refuse extradition on the grounds that the accused is its national and under its own constitutions the authority is powerless to expel or extradite its own nationals.

IV. *Settlement of disputes and priorities of competing claims*

The order of priorities of claimants has to be settled by peaceful means in the event of a dispute. A global system should also provide for a mechanism or machinery to settle disputes as to the legality and possibility of extradition, and also the order of priority among possible recipients of the alleged offender.

Failing a universal machinery, a regional mechanism could be established for settlement of disputes within a particular region. In any event, the parties to a particular dispute can always devise a machinery for its settlement on an *ad hoc* basis. A prior agreement to settle disputes on a bilateral basis is also possible by way of compromise or submission to arbitration.

V. *Concluding observations*

The recent trends in the practice of States as well as in legal developments appear to support the following general propositions in regard to current problems of extradition.

1. The territorial State has the power to extradite a person physically present within its territory. This power is generally exercised upon request in conformity with its own internal laws, local customs and international usage.

2. The territorial State is free to grant or refuse a request for extradition, in so far as it has not otherwise undertaken by earlier contractual commitments to extradite or not to extradite in a specified class of cases.

3. International customary law does not encourage the extradition of political offenders. But as the categories of political and non-extraditable offences are subjected to increasing limitations, humanitarian considerations, fear of persecution and inhuman treatment of offenders will have to find safeguards under the heading of territorial asylum and the protection of human rights.

4. New problems will also arise in relation to the order of priority of claims for extradition among legally justified recipients.

5. Pacific settlement of disputes and order of priority of competing claims for extradition deserve closer attention.

Answers to the questionnaire

1. The existing bilateral systems is likely to continue for the foreseeable future, supplemented here and there by sporadic regional arrangements for limited purposes.

2. A multilateral system cannot be expected to attain universal or global status. It will remain at the level of regional operation for many long years to come.

3. Reservations to a multilateral convention are familiar problems in the context of the law of Treaties.

4. Such recommendation is well worth pursuing. The practice seems to be growing in favour of simplifying and facilitating procedures for extradition.

5. Refusal to extradite is always a prerogative that is difficult to challenge even where there is a treaty obligation to surrender the accused, especially if the crime complained of has a slightest taint of political colouring.

6. An answer is implicit in the question. The power of a State to grant or refuse extradition is absolute. Its power to grant or refuse territorial asylum is equally unqualified.

7. An attempt to define the legal nature of a political offence is not likely to yield any fruitful results.

8. This is going out of fashion in various regions for reasons of increasing political collaboration.

9. There is no need to emphasize any reference to the political or non-political nature of the offence; once the Treaties provide for extradition, extradition will be possible.

10. This is generally possible. A dispute may follow from non-performance of Treaty obligations, but there are other principles of international law equally compelling and binding on all States.

11. This is clearly possible. Human rights are entitled to legal protection by the State directly involved.

12. In cases of offences against humanity or against peace, or war crimes, extradition should be internationally regulated. There will be the question of priorities to be settled.

13. Territorial asylum is within the perfect right of the territorial State, which is fully empowered to grant or to refuse it at will.

14. The right of asylum is a misnomer. The State has the right or rather the power to grant or refuse asylum. The individual has no right to asylum. At best, he only has the right to apply for an asylum, political, diplomatic or territorial as the case may be. The right could be guaranteed by law but the actual granting of asylum is not readily ensured.

15. Yes, such judicial control is recommended.

16. and 17. Yes, it should be maintained and further extended as suggested.

18. This could be strengthened, but it is not an absolute rule. For example, the offence complained of might not constitute a crime in the requested State.

19. It should apply as a general rule. But it should not be considered as a sacrosanct principle, for the reason stated in 18.

20. This requires further reflection and further evolution in the practice of international legal assistance.

21. It could be introduced, but imposition is not to be welcomed, nor will it be truly useful.

22. It might be useful, but only at the risk of prejudicing the outcome of a trial, or judicial discretion.

23. At the present stage of development, the trend seems to favour non-extradition of nationals, unless otherwise mutually agreed or stipulated in a multilateral convention .

24. This is possible, but requires further examination as to the nature of such « special offences ».

25. The individual is generally entitled to such a right. It is, however, the availability of existing remedies that is in question.

26. Internationally, the State is absolutely free to extradite any person or to keep him in custody or to let him loose within the territory. If by extraditing a person the State contravenes its own municipal legislation, that is a question to be considered by the various branches of the government within the territory.

27. This is ideal. The practice is also approaching an ideal situation. But such a construction, when no express provision has been adopted, would not be consistent with the fundamental principle of consent. Sovereignty still prevails, and only by consent can there be derogation from the principle of sovereignty.

28. Unilateral decisions are always possible in the first instance. The important thing is that there should be an independent judicial control; whether it should be single or double is of far less significance.

With warm regards,

Yours sincerely,

Sompong Sucharitkul

7. *Observations of Professor Endre Ustor*

Budapest, April 1978

My dear Colleague and Confrère,

Acknowledging your letters of August 1 and November 17, 1977, both with enclosures, I should like first to offer my repeated apologies for the delay in answering your questionnaire.

As evidently all other members of the twelfth committee I am also grateful to you for the rich material with which you have furnished us and particularly for the highly interesting preliminary report on « New Problems of the international legal system of extradition with special reference to multilateral treaties ».

I appreciate very much that your preliminary report embraces a wider field than that indicated by the title of the topic. I also think that a wide approach to the problems of extradition is fully warranted. This the more so as our Commission probably wishes to submit a comprehensive draft resolution in the matter.

Here are my general comments on your report:

1. I agree with you that in the first instance « the existing legal system of extradition » has to be examined. In this respect I should like to address myself to the following passage of your preliminary report:

« No State is under a legal duty to extradite an offender, if such an obligation is not stipulated by legally binding agreement. One cannot expect that the States will give up this principle, and it would be utopian to expect that the duty to extradite could be based on customary law only, despite the fact that in the history of international law such tendencies have been frequently expressed ».

I am unable to subscribe to these statements in their entirety. I find that they do not sufficiently take into account modern developments in the field of international law. The thesis that there is no duty of States to extradite fugitive common criminals in the absence of extradition treaty cannot be considered as unassailable today as it was in the days when, in the last century, in a world so totally different from ours, the Institut adopted its previous resolutions on the matter.

2. The same applies, I submit, to the following statement in the same section of your report : « ... international law would not be in opposition to such a prohibition [*i.e.* prohibition to extradite in the absence of treaty] proposed by domestic law ».

My reasoning goes as follows :

3. I do believe that among the rules of contemporary international law the one imposing upon States the duty to co-operate with one another in accordance with the U.N. Charter is of paramout importance (*cf.* resolution of the U.N. General Assembly of Oct. 24 1974, 2625/XXV, containing a Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States). This duty of co-operation includes the duty to co-operate in the solution of *inter alia* international social problems (Articles 1, par. 3, 55 and 56 of the U.N. Charter). Criminality is a social problem and extradition is one of the means for its solution.

Thus I venture to assert that — to use the words of your thesis — there exists « a legally binding agreement » among States which commits them to co-operation in general and there is no reason whatsoever to hold that this general duty of co-operation does not extend to co-operation in the fight against one of the common evils of mankind, to co-operation in suppressing crime. The refusal of a request for extradition of a fugitive criminal, if the refusal is based merely on the absence of treaty obligation and not on some other weighty grounds (to which I shall revert below) is nowadays more than an unfriendly act. It is, I submit, an uncooperative attitude and as such it violates the refuser's duty under the rules of contemporary international law.

3. If this — admittedly held — argument holds then your statement quoted above under 2 evidently falls. It is an elementary principle of international law that a State bears full international responsibility for such legislative acts which are contrary to international law.

4. One could perhaps argue that the obligation undertaken under the Charter to co-operate is not explicit enough and does not especially refer to extradition. But is good faith not a basic principle of international law ? Interpreted in good faith can it be upheld that the refusal to extradite a fugitive criminal on the mere ground — and I have to lay an emphasis on this — on the mere ground that the request is not based on an extradition treaty is a behaviour in conformity with the Charter principle of co-operation ? My view is that such an interpretation would make meaningless a solemnly undertaken obligation of the States.

5. There is an amount of learned opinion according to which the duty to extradite is « a moral [in contradistinction to legal] obligation based on the principles of solidarity and co-operation between nations ». (Asian-African Legal Consultative Committee, Fourth Session, Tokyo, New-Delhi, 1961, p. 23). In a similar vein one author states that « there is a growing tendency that each nation, independently of treaty obligation and reciprocity, by a general law should surrender the fugitive criminals as it is of vital importance to the administration of criminal justice, and the security of the respective States,

that criminals who have committed crimes therein should not find asylum in other States. It is moreover, a moral duty of every State to expose the criminals by elevating the policy of mutual fight against crime into a legal obligation ». (*Bedi, op. cit.* in your bibliography).

6. As to the actual practice of States another source referred to in the bibliography presented by you reminds us that « extradition in the absence of treaties... has long been sanctioned by the practice of most civil law countries » (*Shearer, op. cit.*, p. 30). Speaking from personal experience I can add that during the twenty odd years when I was responsible for matters of international law in the Hungarian Ministry for Foreign Affairs this was the constant policy of my country and — according to my best knowledge — it still is. While I am fully aware that this practice is far from being universal I firmly believe that it is this practice which is in full conformity with the modern requirements of morality and law and it is this practice which is worth of the support of the Institut.

7. It is manifestly in the interest of all States to get rid of the malefactors of other countries and not to give them refuge. States are moreover compelled to do so by the force of reciprocity: they cannot hope to get their own fugitives unless they surrender those of the other nations.

The spread of organized crime and the self-interest of the States also compel them to closer co-operation in the field of criminal law.

All these factors clearly show the direction of the development in which State practice and *communis opinio* must move by force of necessity and reason.

8. Thus the situation today is that there exists a conventional rule — that of the Charter — which binds practically all States and pronounces the duty of co-operation in general terms. A *bona fide* interpretation of this rule inevitably leads to the conclusion that such co-operation must extend to the field of extradition and this conclusion is reflected by and large in State practice.

9. Admittedly a further harmonization of State practice and thereby a development in a more concrete and detailed form of the rule would be desirable. This could happen in the way as customary law develops. Although this is a slow process, it could be accelerated *e.g.* by a resolution of the U.N. General Assembly declaring that the mutual extradition of common offenders clearly follows from the duty of States of co-operation. A resolution of the Institut in the same sense could by its authority also contribute to the development of a firm rule of customary law.

I do not share the view that all this is too utopistic and even if it were, I am on the side of those who believe that « ... a map of the world that does not include Utopia is not worth even glancing at ».

10. In this connection, however, we have to consider a more direct method of law-formation, namely that which we call codification and progressive development of international law. You will recall that the Survey of International Law prepared by the late Sir Hersch Lauterpacht included the topic

of extradition among the twenty-five topics selected for the study of the International Law Commission. According to this Survey (these are *Lauterpacht's* words) : « There would seem to exist persuasive reasons counselling a unification and clarification of the law of extradition within the general task of codification. The law of extradition has traditionally served two purposes the importance and urgency of which have tended to increase rather than to diminish. In the first instance, the law of extradition is an instrument of international co-operation for the suppression of crime. Its increased importance is obvious at a time of rapid development of communications enabling offenders to leave the country where the crime was committed. Secondly, some aspects of the law of extradition have served to afford a measure of protection to persons accused of crime... »

11. Notwithstanding the cogent arguments of Sir Hersch the International Law Commission decided in 1949 not to include extradition in its list of topics selected for codification. The principal reason given was that extradition depended on the existence of similar political conditions in the two States concerned. It would accordingly be useless to attempt to create uniform rules for extradition.

12. In a recent review of the Commission's long-term program of work prepared by the U.N. Secretary-General upon the request made by the Commission, however, the question has been raised whether the reasons given for the Commission's decision in 1949 are now valid. The common interest in providing for the return and prosecution of alleged offenders would appear to be a major factor in the thinking of Governments — the Secretary General states.

13. No new action has been taken by the International Law Commission in this field but this is obviously due to its crowded programme. In my view, however, there can be no question about the fact that the question of extradition is « ripe » for codification.

Although I do not know any precedent for this, our committee might consider whether the Institut should not in a more or less direct way pronounce on the desirability of the official codification of the topic.

14. I come now very briefly to the questions raised in parts II, III and IV of your report and questionnaire and I can do no better than to quote the following passage from a book mentioned in your bibliography :

« The most intractable problem of international extradition law is said to be the definition of political offences. A remarkably high proportion of academic writing on extradition has been confined to this topic, and governments have appeared to be more sensitive to this than to other problems when consideration is directed to wider measures of international agreement on extradition. In the writer's view the problem of political offenders has been magnified to undue dimensions ; even self-styled political refugees form only a small minority of fugitives claimed in extradition proceedings. Excessive preoccupation with the question of political offences has pushed into the background other matters which might more readily be susceptible of harmoni-

zation. In the present state of world polarization no exact definition of a political offence can hope to command universal agreement... » (*Shearer, op. cit.*, p. 213).

15. In short, I believe that it is more advisable for the Institut to deal with the general question of the extradition of fugitive criminals, state the basic principle of co-operation of States explicitly in this field and outline as far as possible the contours of this duty without going unnecessarily into delicate questions — however seducing this way seems to be — which are in comparison to the huge magnitude of the whole problem of a relatively minor dimension and which do not seem to be particularly suitable for a detailed, universal regulation.

It is in this sense that I shall now briefly try to answer the questions listed by your questionnaire.

I. ad 1 and 2. Nothing less than a global multilateral system can achieve the desired results. Until this can be reached all other partial measures are welcome.

ad. 3. The question of reservations to multilateral treaties is relatively well settled in international law. The consideration of special stipulations in respect of reservations to a multilateral treaty the text of which is unknown seems to be highly premature.

ad 4. See paragraphs 1-9 of my letter.

ad II, III, IV and V. (See paragraph 14 of my letter). If the Institut deals with the extradition of common criminals in a global context — as I venture to suggest — then political offence, human rights and asylum (with the exception of a modernly fashioned attentat clause) could be referred to in a general way as grounds for a refusal of extradition provided that these grounds are *bona fide* considered to be serious enough to exempt the requested State from its general duty to co-operation in the field of extradition.

ad VI. In a general way I am in favour of substitution of prosecution in cases where extradition is not possible.

ad VII. In the present stage of the development of the community of States I believe that the principle of non-extradition of nationals has its raison d'être.

ad VIII. These are general questions pertaining to well-settled principles. I do not think that there is need to deal with them.

ad IX. The settlement of disputes by peaceful means and *inter alia* by voluntary submission of disputes to arbitration can always be recommended.

Very sincerely yours,

Endre Ustor

8. Observations of Professor B.A. Wortley

Wilmslow, 27 June 1978

Dear Colleague,

Thank you for your interesting report for the *12th Commission on Extradition*. The following replies occur to me in respect of your questionnaire.

1. Supplemented, when possible multilaterally, but not replaced. Ground gained must not be lost, see art. 3 of the European Convention on the Suppression of Terrorism (here after referred to as E.C.S.T.).

2. Time will show what is practicable : « Le mieux est l'ennemi du bien ». Total unification, as I know from a lifetime's experience, can only be a very long term ideal, and a « unification de façade » is not desirable.

3. Reservations should be discouraged, they tend to make conventions very difficult to apply, certainly no reservations should be permitted that might imperil the protection of basic human rights.

4. The matter is one for each State in view of its own special problems and in the light of the confidence it has in the State demanding extradition. There is no objection in *international* law to a State extraditing in its own discretion, even without any treaty obligation to do so, provided basic human rights of victim and offender are respected, *cf.* art. 2 of E.C.S.T.

II. Political offences.

5. The refusal to give up an all-alleged « political » offenders is a right which customary international law recognizes in States. Any argument « a contrario » could be dangerous, see answer 4 above.

6. No, but, a State granting asylum to a criminal who alleges a « political » motive for his crime should be encouraged to take powers, if the State does not already have them under its legal system, to prosecute for crimes which infringe basic human rights ; there is no inconsistency in a State prosecuting for serious crimes against human rights involving for example the killing, maiming, kidnapping, hi-jacking of the innocent, or the destruction or damaging of property, even if after punishment the State grants asylum to the criminal ; a political motive may occasionally be pleaded in mitigation but it does not render the criminal guiltless, see arts. 7 and 13 of the E.C.S.T.

7. Every State should decide for itself what is a political offence, but of course within the framework of its valid obligations under international law : a political motive may be a mitigation factor but it is not a valid excuse for violating the basic human rights of others.

8. All States, whether making regional or other arrangements for extradition, should bear in mind the general obligation to respect basic human rights. The lives and property of the innocent should be protected and not ignored for political convenience.

9. Yes, see art. I E.C.S.T. Terrorists, pirates, hijackers and offenders under the laws of war should not be immune from extradition nor from trial by the State of refugee because of an alleged political motive (see Arts. 2 and 4 of E.C.S.T.).

III. 10. Refusal of extradition should be a matter for the good sense of any State to which a request is made. All States should endeavour to protect basic human rights of victims and alleged criminals.

11. See reply to 10 and recall art. 8 (2) of E.C.S.T.

12. Ditto.

13. States have the option where they claim jurisdiction under their own, or under international law, to punish the offender themselves *cf.* art. 5 E.C.S.T., having of course due regard to basic human rights.

14. No. The « right of asylum » is the privilege of the States that wish to grant it, and not of individuals.

15, 16, 17. Yes.

18. Yes, *aut judicare aut punire* is a good maxim if honestly followed and may save expense, but there are always problems of evidence to be considered *cf.* the location of witnesses and of relevant evidence.

19. It should be generally applied when there is firm evidence available: the principle of double criminality is important.

20. See article 8 of the E.C.S.T. Legal assistance is a matter for the place of trial.

21. No. It may be recommended where time and circumstances permit.

22. No. Courts must be allowed their usual discretions, in England, as a general rule minimum sentences are not prescribed.

23 and 24. There is no universal set of rules to govern the attribution of nationality, for this one must fall back on the principle of effective nationality, see reply to question 13.

25. No. The individual must rely on his State for help unless he has a right of individual petition to an international tribunal *cf.* the European Commission of Human Rights.

26. No. Illegal immigrants for example have no right to stay in a country that they enter unlawfully, see answer to question 25 above.

27. No. It might lead to protracted proceedings and delay the administration of justice in respect of serious crimes. I do not object to articles 9 and 10 of the E.C.S.T., but I consider interstate disputes should not prevent the speedy administration of criminal justice.

28. This question seems obscure to me and I am not sure I understand it. States, like the International Court of Justice, should decide their own competence and take the consequences.

B.A. Wortley

Annex II

New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties

(Twelfth Commission)

Preliminary Report

Karl Doehring

Introduction

The preparation of the preliminary report has been delayed on account of recent events which have continually led to reconsideration of the legal situation in matters of extradition. It may be recalled that over the last few years the seizure of aircraft has been increasing and that some international disputes have arisen in this field (Federal Republic of Germany/Greece, Pohle-Case; Federal Republic of Germany/France, Abu Daud-Case). It may also be recalled that recently the European Convention on Extradition entered into force with binding effect for those European States which ratified the convention; this legal instrument assumes particular importance and should be duly observed since it seems to reflect the *opinio iuris* of States which have had considerable practice in matters of extradition and which have therefore acquired special experience.

The international legal system of extradition has been operating for more than 100 years in an almost unchanged manner, although an alteration in some particular aspects may be noted. The system is based upon somewhat contradictory efforts, i.e. the desire to grant aid for the suppression of criminality and the aim to preserve, nevertheless, the sovereignty of the members of the international community. The tension between these two goals has characterized the relations between States hitherto and its influence can be seen continually.

In questions and cases relating to the suppression of those types of crimes which every government obviously wishes to combat, the system of extradition has operated in a satisfactory manner. Mutual assistance in this field can be seen as a solid component of international relations. On the other hand, it is also evident that since the beginning of the international system of extradition, which has remained nearly unchanged, the system has suffered from problems relating to the extradition or non-extradition of so-called political offenders. The most crucial difficulty consists, of course, in the legal necessity to define the concept of « political »; we, nevertheless, must use this term to characterize that particular situation despite the fact that a commonly

accepted definition has never been reached either in general international relations or in questions of extradition. Whereas offences of a fiscal or military character, forming part of generally acknowledged exceptions to extradition and incorporated in many treaties, have been defined in a fairly satisfactory style, the practice of invoking the political character of an offence to justify non-extradition has remained the subject of permanent dispute and uncertain with regard to the characteristics and the limits of the concept of « political ».

The qualification of the so-called political offence suffers from yet another and more modern aggravation, namely, the formation of political blocs and the related rise of regional international law. Even the modes of performance of so-called political offences have undergone many alterations; the seizure of aircraft, the seizure of hostages, the practice of blackmail and other similar offences are supported by modern technical conditions which enable the use of threats to an extent hitherto unknown. The political offence which in the past could be seen as a danger that was and could be limited must now be qualified as a common danger to the world community. Typical criminality is now increasingly involved with political activity and this combination influences the selection of the means and methods of the offenders as well as personal participation. Furthermore, the politically envisaged goals of these violent activists have undergone some changes as compared with the aims of political offenders of former times. In this regard not only the increase of anarchism may be of importance; the qualification of this phenomenon may even suffer from the wellknown dilemma of defining the political nature of an offence. Still much more important, however, may be the development that, owing to a generally accepted right of self-determination of nations and peoples, the prohibition of the use of force has been restricted. The resolution of the General Assembly of the United Nations dealing with the definition of unlawful aggression clearly shows this dangerous tendency. But the problems of this fundamental principle may not be of direct interest in connection with the considerations dealt with here; it is rather the use of the means which reveals a new phenomenon. The so-called attentat clause, inserted until now in nearly all agreements on extradition, clearly demonstrates that the relatively homogeneous structure of the community of nations of former times enabled governments to pretend that assaults against a head of State or the members of a government were not of a political character. A similar homogeneity in the determination of the objects to be protected and the values considered to be important obviously cannot be achieved today in the same measure. Although assaults against other objects worthy of protection in modern life could equally well be construed as non-political offences, for instance the seizure of aircraft, there exist, nevertheless, strong doubts as to whether such a fiction would be respected by State practice.

Regarding these new developments, the most important characteristics of which can only be indicated here, the potential and propriety of the existing system have to be examined. The true issue is to ascertain whether the present system still affords an optimum or whether, and how far, recommendations should be made to establish a new and better legal system.

Compared with the lack of clarity and the difficulty in defining and applying the concept of the political offence — the problem of a mixed offence may also be recalled here —, other commonly accepted and generally applied rules regarding agreements on extradition remain relatively unproblematical. This may be especially true of the principles of reciprocity, application of identical norms and speciality. The following considerations will therefore take into account these principles only in so far as it seems necessary to refer to them in connection with the basic problems of extradition.

The following scheme may be used to analyze the problems:

I. The existing legal system of extradition.
II. The political offence.
III. The protection of human rights.
IV. The right to grant asylum.
V. The attentat clause.
VI. The substitution of prosecution by the requested State.
VII. The extradition of nationals.
VIII. The relevance of the domestic law of a State under the duty to extradite.
IX. International arbitration and domestic jurisdiction.

I. *The existing legal system of extradition*

No State is under a legal duty to extradite an offender if such an obligation is not stipulated by a legally binding agreement. One cannot expect States to give up this principle, and it would be utopian to expect that the duty to extradite could be based on customary law only, despite the fact that in the history of international law such tendencies have been frequently expressed. This clear statement must not be confounded with the question whether general international law prohibits extradition in cases where no relevant treaty is in force between the States concerned. However, even such a rule is not in existence. Only the protection of human rights could be designated a legal barrier to extradition in such cases; we shall have to come back to this problem (see III) since the protection of human rights, forming part of *ius cogens*, could be invoked even in cases where a treaty obligation exists.

On the other hand, extradition to a State which cannot base its request on a treaty obligation may, nevertheless, be hindered by the domestic law of the requested State; international law would not be opposed to such a prohibition proposed by domestic law.

The overwhelming majority of the obligations to extradite an offender have been created by bilateral treaties. The number of such treaties is so large that a survey can hardly be given. On the other hand, it can be stated that the contents of these bilateral treaties show very few differences; only some regions of States have laid down certain particular principles. Such particularities, however, will be of importance only in connection with subsequent considerations of this report.

In modern times a tendency can be ascertained toward creating the duty to extradite through multilateral treaties. There are some treaties the only object of which consists in the duty to extradite. This is especially true of the European Convention on Extradition, the Inter-American Convention on Extradition, the Convention between Belgium, Luxembourg and the Netherlands, the Convention of the Member States of the Arab League and the special part of the Convention of the Organization of the African Community (OCAM) which deals exclusively with the system of extradition. The so-called Eastern bloc States have not concluded multilateral conventions on extradition for the region of East Europe, but have until now, restricted themselves to concluding bilateral treaties. The multilateral treaties already mentioned contain the same similarities which can be found in the traditional system of bilateral treaties. So one is justified in asking what are the advantages of a multilateral system of extradition, since bilateral treaties offer more possibilities to express the interests of the parties in the text of the agreement and to respect the particularities of the specific national legal systems. The example of the European Convention on Extradition clearly demonstrates that nearly every participant expressly made one or more reservations. It follows from this that in actual fact no true multilateral consensus exists and it becomes quite clear that in the last analysis every party takes the same position in relation to the other as it would take under a system of mere bilateral obligations. Thus, the permissibility of stipulating reservations destroys the multilateral goal of the convention. However, since multilateral conventions on extradition have not as yet had a long history, the development of State practice must be awaited. These considerations may, nevertheless, be already taken into account under a realistic view.

A further system for creating obligations to extradite consists in the incorporation of such obligations into multilateral treaties which deal mainly with other aspects. Among these treaties may be cited the European Convention on the Suppression of Terrorism, the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal). These conventions only use the legal means of extradition to combat a certain modern kind of criminality. It is to be highly regretted that in the past the implementation of these conventions encountered major practical difficulties. While they respect formerly concluded treaties on extradition, the conventions are, nevertheless, meant to influence them as *leges posteriores* (for instance article 3 of the European Convention on the Suppression of Terrorism). With regard to these conventions we shall have to await future practice which alone can indicate whether success can be expected. Some particularities of the conventions will be reviewed in the considerations of the following chapters.

As already mentioned, the rules of general international law do not prohibit extradition in cases where there is no special treaty obligation. General international law would not even be infringed if the requested State received no guarantee of reciprocity in a given case; only the domestic law of the requested State may require such a guarantee. Nevertheless, in State

practice the reciprocity will be granted by special declarations if no extradition treaty is in force between the parties concerned, so that extradition will take place only if the requesting State also promises to extradite in future at the request of the other party. This formal unilateral system of declarations is also used to ensure observance of other principles, for instance to preserve the so-called speciality principle. Such declarations during a pending procedure of extradition may be qualified as being of a contractual character ; nevertheless, in the connection envisaged here it may be sufficient to contend that the declaring State agrees to be committed in the manner described here. Since general international law contains no requirement to observe certain formal procedures when obligations are under consideration, no doubts exist as to the lawfulness of such a procedure. On the other hand, this simplified procedure may meet some obstacles arising from provisions of the national legal systems concerned, because domestic law may require that no extradition may occur in the absence of an express treaty obligation. Particularities of the connection between domestic law and international law are dealt with under chapter VIII.

II. *The political offence*

One of the most invoked exceptions to the obligation to extradite consists in the refusal to include political offenders in the procedure of extradition. This hindrance to extradition is often discussed and disputed and the present solution to this problem seems to be far from satisfactory. The right to refuse extradition in such cases is inserted in almost all bilateral treaties and has also been introduced into the system of multilateral treaties, even of treaties the object of which is the suppression of modern modes of international criminality. Historical development in particular shows the difficulty of discovering rational grounds for this exception. At the beginning of the practice of extradition during the last century, it was precisely political offenders who were the subject of obligations in this respect ; later, the justification not to extradite political offenders was increasingly recognized and it is interesting to see that even in the *inter se* relations within the British Commonwealth the principle that political offenders must be extradited has been abandoned. There probably have been and still are various reasons for the practice of non-extradition of political offenders. The former practice of monarchical governments of granting mutual aid through extradition of political offenders has obviously been stopped and reversed because subsequently, at the time of the strengthening of national sovereignty, such an extradition has been qualified as an interference in the domestic affairs of other States. The question whether or how far the motive of protecting the persecuted political offender played any role may be difficult to disclose. It has often also been argued that there is no duty for any State to protect the political stability of another State and to afford foreign police forces political service. Certainly it can be said that in cases of far-reaching homogeneity in the values of the legal systems among States concerned, the tendency not to extradite political offenders decreases. As regards the former legal situation of the British

Commonwealth, relevant indications have already been given and the same is true of the legal situation of the region of Eastern Europe with respect to the communist States. It may also be evident that a certain degree of homogeneity of legal systems leads the governments concerned to defend in common their legal and social systems against actions which all of these governments qualify as a danger to a highly common interest.

Frequent attempts have been made to characterize the political offence in a legal sense. But not all of these attempts and approaches have resulted in a convincing description. In some instances a political offence was recognized only in cases where participation in a civil war was involved, as demonstrated by the example of the British practice. On the other hand, this qualification has been considered too narrow and inappropriate to protect all types of political offenders. A further controversy always existed between the so-called subjective and objective opinions. According to one view, the subjective motives of the acting political offender have been seen to be decisive, while, according to the other view, an attempt must be made to emphasize the more objective character of the action concerned, the danger it carries for the legal system of the States and the possibility of its disturbing or even destroying this system. No commonly accepted position in the community of nations has ever been developed in this field. In particular, the efforts of anarchists, which of course existed to some extent also in former times but which have reappeared today, create new difficulties for the definition of the nature of the political offence, since the primary goal of anarchists is not the establishment of a new political regime but the destruction of all forms of government; it is thus pure revolution rather than the replacement of an existing government that is envisaged. It should not, however, be overlooked that in this respect too an amalgam of political goals can be observed.

The characterization of the concept of political offence which has been attempted above and, in particular, the indisputable fact that a common generally accepted definition does not exist in the community of nations result in practice that most of the bilateral and multilateral treaties leave the qualification of political offence to the requested State. Every party to a treaty on extradition is therefore legally free to apply its own definition. Some States, for instance the Federal Republic of Germany, have introduced into their domestic laws a definition which may, nevertheless, not be dealt with here because even such national specifications do not lead to an international definition. However, there are attempts to restrict the freedom of States to define the political offence through a system of listing particular characteristics which are excluded from all definitions; this has been done for instance in the formulation of the European Convention on the Suppression of Terrorism.

The question arises whether the exercise by the requested State of the competence which is guaranteed in a treaty on extradition and which enables it to determine by itself the political nature of an offence may result in unlawful abuse of discretion. Despite the fact that legal verification exists only if the treaty has installed a system of arbitration, one can assume that the exercise of completely unrestricted freedom of discretion in this respect could be

considered to be an infringement by the requested State of the treaty on extradition. Without such a limitation on the discretion the treaty would lose all sense in this connection; in other words, an obligation to extradite would be unnecessary. The institution of an arbitration tribunal is, in this regard, only a formal help, but it cannot be concluded from this institutionalization that without it completely unrestricted freedom of discretion may exist.

As already mentioned, the European Convention on the Suppression of Terrorism gives an example of modern efforts to restrict the unilateral right to claim that a particular offence is political in nature and to refuse extradition on this ground; but it can also be demonstrated that the participating States acted inconsequently in this respect. The Convention namely lists in Article 1 offences that shall be qualified as non-political or at least shall be assumed to be non-political irrespective of their subjective or objective characteristics (seizure of aircraft, unlawful action under the Convention of Montreal, attacks against internationally protected persons, seizure of hostages, use of bombs). This system could have produced fairly clear rules, but Article 5 provides that extradition can nevertheless be refused if the requested State is prepared to grant protection on the grounds that extradition is requested on account of the political conviction of the offender. Furthermore, Article 13 admits reservations of the parties to the treaty even in respect of the offences listed in Article 1; however, it is stipulated that the parties are obliged to take into account the threat represented by the offender, if they want to refuse extradition on political grounds. Nevertheless, a convention which respects the discretion of the parties to such a far-reaching extent offers very little optimistic prospect of achieving some degree of effectivity. Once more it becomes clear that the community of nations is not able to reach a common definition of the political offence, and this may even be true of a relatively homogeneous region; even an effective limitation of the lawfulness of refusing extradition on political grounds has not been established.

The frequent use of the concept of political offence as a justification to refuse extradition gives rise to the question whether such a refusal may be lawful even if this exception has not been expressly introduced into the text of a treaty to be applied in a concrete case. The opinions of commentators are split. However, the view seems to prevail that a principle of peremptory customary law capable of influencing the interpretation of treaties has not been created by this practice. The question whether or not a permanent treaty-practice may also lead to the development of customary rules cannot be answered generally and in the abstract for all types of treaties. The long-standing and so oft repeated practice of including the political offence exception in treaties on extradition seems to indicate that States and governments recognize the necessity of expressly stipulating the exception to the obligation to extradite if a political offence comes into play. The problem, however, remains to decide whether the frequency of the political offenders clause could affirm more or less the existence of a general principle.

The special problems of the so-called mixed offence, i.e., an offence which is equally of a political and a non-political character, may be disregarded here.

As long as it appears impossible to define the exact characteristics of the political offence with binding effect for the community of nations or to eliminate this concept at all from international relations, it remains unnecessary to investigate the true nature of the so-called mixed offence. The above mentioned freedom of discretion of governments to decide on the political nature of an offence relates equally to the qualification of a mixed offence and to the question whether in the case of such a combination the political character of the offence must dominate.

A short reference to the principles dealing with the system of granting asylum may be given here, although this problem will be investigated later (chapter IV). The goals of protecting individuals through the granting of asylum and of protecting them by the principles of non-extradition are not congruent in every case. A State is permitted to grant asylum even if the requesting individual is not charged with an offence under criminal law, whereas the application of the rules of extradition always presupposes the charge of a criminal offence. Nevertheless, each of these two systems may supplement the other. If an individual prosecuted on account of a political offence also has reasons to fear political persecution, the nature of which would run counter to the principles of generally recognized human rights, then a twofold obstacle to extradition may be said to exist. Another potential situation is that of an individual who cannot be extradited because the offence is of a political character, while the same individual would not be entitled to enjoy asylum because he is not threatened by persecution incompatible with human rights but only by prosecution undertaken in accordance with the commonly accepted rule of law.

If one agrees that the application of the right to refuse extradition on political grounds leads to insoluble difficulties especially in modern times, then the question arises whether the preservation of the principle not to extradite political offenders still remains meaningful. The position could be justified that inside a politically homogeneous region the parties to a treaty on extradition would have no reason to refuse extradition on political grounds; whatever protection appears necessary against a politically motivated unfair trial could be effectuated by the application of the right to grant asylum. As regards bilateral and multilateral treaties on extradition concluded between States whose political systems are not politically homogeneous, the right of the requested State unilaterally to qualify the offence as political would in any case hinder extradition. The question may even arise whether treaties on extradition concluded between States that are not politically homogeneous serve any purpose; and a further question may then be whether it would not be more appropriate to arrange extradition only in concrete cases by *ad hoc* agreements, perhaps under the observance of the principle of reciprocity. One also could consider whether the rule of non-extradition of political offenders should be replaced by another rule establishing the right of the requested State to refuse extradition if it appears that the requesting State would not respect the commonly accepted rule of law and the protection of human rights in the prosecution, the trial and its execution. Under these auspices protection

against politically motivated extradition would show some affinity with protection through the granting of asylum. Of course, such a system may also appear doubtful since the open reproach of a State against the other party that the latter is likely not to observe the rule of law could be seen as an unfriendly act and could burden the relations between those States.

It may be repeated that it would perhaps be preferable not to conclude treaties on extradition if the parties thereto lack mutual confidence with regard to the fair application of legal rules in executing the domestic law. This problem will have to be dealt with again (chapter VI).

III. *The protection of human rights*

For very good reasons considerations have been continually put forward in connection with the question whether and how far the extradition of an offender may be lawfully refused if no guarantee exists that the requesting State will preserve the principles of generally recognized human rights. A well-founded expectation that these principles will not be followed may even be based on former experiences that the non-observance of human rights has to be feared. If, nevertheless, in the framework of an existing treaty on extradition the question arises whether the request should be refused on account of the infringement of human rights, serious arguments in support of such a suspicion must be established. The existing treaties on extradition — with exceptions that will be discussed later — do not contain express provisions justifying a refusal of the requested State on the grounds mentioned here.

Nevertheless, the Convention on the Law of Treaties, which has not yet entered into force, may clarify this problem. Two articles of the convention indicate the meaning and the importance of the so-called *ius cogens* with respect to the general law of treaties. Article 53 provides that a treaty shall be null and void if its rules are in contradiction with peremptory norms of international customary law; Article 64 states that a treaty already concluded loses its binding force if subsequent rules of *ius cogens* would create a contradiction with its provisions. Both these articles, however, would not give any direct answer to the question whether the fulfilment of a treaty may be refused if it is to be expected that the behaviour of a party would in future lead to non-observance of rules of *ius cogens*. Nevertheless, it seems appropriate to apply *per analogiam* these rules of the Convention on the Law of Treaties because of the corresponding interests in both cases. It would be hard to accept that a treaty must be performed if it is foreseeable that its performance would violate *ius cogens* since, on the other hand it is recognized that a treaty violating *ius cogens* is void and that even a validly enacted treaty can be voided by a subsequently established rule of *ius cogens*.

The possibility of refusing extradition by invoking the political character of the offence may support the protection of human rights, but such a result is not necessarily obtained in every case. Generally recognized human rights could be endangered even if a political offence did not come into play. In this connection a further point may be made. Some drafts of international conventions relating to the right of States to grant territorial asylum, for

instance a draft of the International Law Association, contain the provision that no government should guarantee asylum to war criminals or in the case of crimes against humanity. It is doubtful whether such a provision would follow basic principles of humanity and of the rule of law, since an infringement of human rights may occur even in the persecution of a war criminal or in cases of crimes against humanity; the true purpose of human rights would be negated if their application were excluded in such cases. A similar situation may occur if the application of an extradition treaty is at issue.

Although the right to grant asylum will be dealt with under a later chapter (IV), a particular point has to be made here in connection with human rights. The main purpose of the system of asylum envisages the protection of human rights. It is uncontested that international customary law embraces the right of States to grant territorial asylum. It may, however, occur that the obligation to extradite resulting from a treaty will in a specific instance be in conflict with the right of the requested State to grant asylum. Such a conflict cannot be resolved by invoking the generally recognized right to refuse the extradition of political offenders; as already mentioned, the right to grant asylum can also gain relevance if the request for extradition has nothing to do with a political offence. The question therefore arises whether the right to grant asylum can be invoked even against the duty to extradite when the treaty to be applied does not contain a corresponding clause of limitation. In general, such an invocation would have no legal relevance since the right of States to grant asylum does not create the duty to protect the refugee; a rule of *ius cogens* in this respect is not in existence in international law. Only in cases where, without the granting of asylum, the general principles of the protection of human rights would be infringed would it be admitted that the right to grant asylum could be invoked against the obligation to extradite.

The principles outlined here find a certain confirmation in the provisions of modern multilateral treaties; they permit the refusal of extradition if the requested State is sufficiently convinced that the requesting State asked for extradition in order to persecute an individual on account of the latter's racial, religious, national or political attributes. Even the danger that such qualities could negatively influence the situation of an extradited individual can be invoked against the obligation to extradite. Such a provision has been included by means of Article 3 in the European Convention on Extradition and by means of Article 5 in the draft of the European Convention on the Suppression of Terrorism.

The difficulties arising from the situation where a State has no trust in the true application of the rule of law by the requesting State and the difficulty of proving the seriousness of such doubts have already been mentioned. A similar difficulty may be created in a situation where doubts arise about the willingness of the requesting State to respect international human rights. But irrespective of these problems, the clauses just mentioned have been introduced in the European conventions. Only the further development of State practice can reveal whether the participating States will bring forward those arguments in order to refuse extradition lawfully.

IV. *The right to grant asylum*

Some essential viewpoints regarding whether the right of States to grant asylum may conflict with the obligation to fulfil the requirements of a treaty on extradition have already been given. Nevertheless, there remain many problems to be dealt with in the following considerations.

The international right to grant asylum would seldom come into conflict with a treaty obligation to extradite, since international law establishes only the right of States to grant asylum and does not provide for a duty to do so, at least in so far as the protection of human rights is not involved. This principle, on the other hand, results in the right of States to waive the granting of asylum.

A different legal situation could, nevertheless, occur if the domestic laws of the parties to a treaty on extradition, and even their constitutions, guarantee an individual right to enjoy asylum. The situation may then arise that the treaty obliges the State to extradite while domestic law forbids extradition.

There are two legal possibilities for avoiding such a conflict. If a treaty on extradition provides for the refusal of extradition when a legal hindrance exists in the domestic law of the requested State, the conflict of duties just mentioned does not exist, because the requested State is allowed to respect its whole domestic legal system. One could, of course, question whether in such cases an effective duty to extradite exists at all. A further legal possibility for avoiding such a conflict between international law and national law could be established by permitting parties to the treaty to make corresponding reservations, as is the case for instance in Article 26 of the European Treaty on Extradition. A reservation, for instance, may state that extradition can be lawfully refused if the individual right to seek asylum provided for by domestic law is in contradiction with the execution of an extradition. It is somewhat surprising that the parties to the European Convention on Extradition did not exhaust this opportunity. The reason for this attitude may be found in the fact that Article 3 (2) of this convention permits the refusal of extradition if there are grounds for believing that the requesting State intends to prosecute an individual on racial, religious, national or political grounds and that the requested State is justified in expecting such an attitude of the other party. It is, nevertheless, remarkable that even such a clause would not comprise all cases in which domestic law, for instance that of the Federal Republic of Germany, affords the individual the right to claim asylum.

In order to explain this legal situation in more detail it seems necessary to envisage those viewpoints which have had an essential influence on the construction of legal principles governing the domestic law of States with regard to the granting of asylum. Whereas the national legal systems of the States of the Eastern bloc mostly provide for the enjoyment of asylum only for individuals who are persecuted on account of their struggle for marxism, a similar homogeneous position is not held by other States and in particular not in the circle of Western democracies. In some of the Western democracies the opinion is established that a right to enjoy asylum must without exception be recognized if a political persecution of any kind is to be expected; the

concept of political persecution under such a view is applied without any differentiation. Under such a system it therefore makes no difference whether the persecution is executed on account of the political conviction of the individual or on account of the political nature of the individual's behaviour or on account of the political motives of the persecuting State; the relevance of all these viewpoints seems to be acknowledged in such a legal system. Thus, in cases where a State prosecutes, for instance, a person accused of high treason — punishable in every national legal system — an individual right to claim asylum would, nevertheless, be recognized even if a fair trial under the rule of law seems to be guaranteed and no inhuman treatment threatens the accused person. The opposite opinion will only accept the qualification of political persecution if either a prosecution is to be expected which could consist of inhuman treatment, or a prosecution has been motivated by the fact that the activity of the persecuted individual was directed particularly at the preservation and protection of the rule of law and human rights. Only under such conditions will this opinion recognize the individual's right to claim asylum. This opinion — like the attitude of communist States — presupposes sufficient homogeneity in respect of the recognition of legal values. There are good reasons to prefer this position. It would be hard to accept the position that an individual would be protected through the granting of asylum where the State whose legal system has been attacked by this individual through unlawful means defends the rule of law by legally unchallengeable measures. The evaluation of these principles should be relevant when the decision must be made whether the request of extradition may be refused by invoking the right of asylum as a legal rule of domestic law.

V. *The attentat clause*

The traditional bilateral treaties on extradition frequently provide that the political nature of an offence may justify the refusal of extradition, but that assault against the life of a head of State or of a member of a government may not be qualified as political action in the above-mentioned sense. We have before us the typical case of a fiction, since similar assaults against the lives of the members of a government must *prima facie* be seen as offences of a political nature; thus a true political offence has been declared to be non-political for the purposes of extradition. The objects to be protected through this clause have been differently described and characterized, but all these definitions resemble one another so that the particularities may be discarded here.

The reasons for introducing the attentat clause into the obligations to extradite are various in nature. In the foreground there is the consideration that the head of a State, in his quality as representative of a sovereign State in the community of nations, enjoys nearly the same appreciation in all States; a certain reciprocity in the protection of sovereignty seems to be expressed herein. It may also be evident that the creation of the attentat clause was connected with the generally accepted regime of monarchy during the 19th century. It may therefore appear surprising that the attentat clause did not expire in times when the forms of government of the majority of States

underwent the well-known change from monarchy to democracy and to the republican system. Hence, one could expect that the attentat clause would have become irrelevant for modern treaties on extradition and that it would no longer be meaningful ; indeed the composition of the government of a democratic State and even the personality of the head of State undergo constant changes, so that the need for protection based upon a special and higher dignity of such subjects may be questioned.

It seems equally surprising that modern multilateral treaties on extradition re-apply the attentat clause (see article 3 (3) of the European Convention on Extradition). Since in a democracy the State authority derives entirely from the people and since the members of parliament represent the people, the conclusion could easily be drawn that under the system of a republican democracy the representatives of the people should be among the first persons to be protected.

On the other hand, it may be of interest that a system comparable to the attentat clause just described, i.e., the system of pretending that a political offence is of a non-political character, seems to be re-created in respect of newly established relations. In particular, multilateral conventions using the duty to extradite as a helpful means of protection against attacks hitherto unknown proceed to qualify some political offences as being of a non-political character for the purposes of extradition, and through this fiction they create the obligation to extradite. This is true, for instance, of the draft European Convention on the Suppression of Terrorism (Article 1), which declares as being of a non-political character the seizure of aircraft, the endangering of the safety of civil aviation, attacks against internationally protected persons, the seizure of hostages and the use of bombs. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal) and the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague) show a similar tendency. Of course, it seems meaningful to use the attentat clause in this modern sense in order to achieve at least the result that the enforcement of those treaties cannot be stopped by invoking the existence of a political offence. The question nevertheless remains whether and to what degree the right of the requested State to grant asylum would hinder the successful implementation of the true purpose of the stipulation. This problem has already been dealt with, so that it may be sufficient to recall the appropriate considerations.

VI. *The substitution of prosecution by the requested State*

In all cases where extradition cannot be executed on legal grounds the question arises whether the requested State has a duty to introduce a prosecution relating to the offence which gave rise to the request for extradition. In this connection it makes no difference whether extradition has been refused on account of an express provision of the treaty or whether the refusal emanates from a provision of the domestic law of the requested State. It may also be excluded from this consideration whether the prosecution by the requested State, in substitution for the requesting State, is based upon an

obligation of international law or whether it is prescribed by the domestic law of the requested State.

These obligations are primarily to be found in multilateral treaties. Mention should first be made of treaties whose essential purpose is the obligation to extradite. Article 9 of the Inter-American Convention on Extradition, for instance, provides that there is an obligation to prosecute the offender if, despite the applicability of a valid treaty, the requested State does not execute the extradition. A further obligation concerns the information of the requested State about the process of prosecution. Similarly, such obligations are incorporated in the European Convention on Extradition since Article 6 foresees that in case of lawful refusal to extradite nationals the requested State shall execute autonomously the prosecution and that the requesting State shall have the duty to support these proceedings.

The system so described has also been introduced into multilateral treaties the main purpose of which does not consist in an obligation to extradite but in the enforcement of which extradition is used only as an additional measure to support the suppression of modern world-wide criminality and terrorism. Thus Articles 6 and 7 of the European Convention on the Suppression of Terrorism establish that there is an obligation on the requested State to prosecute an offender if extradition has been refused on any ground. Both conventions for the protection of civil aviation (The Hague and Montreal) contain the primary obligation to prosecute offenders but they also contain the obligation to extradite offenders in cases of non-performance of the prosecution. These conventions correspond to the principles mentioned above; they only reverse the sequence of the obligations.

The whole system is based upon good reasons, the evidence of which cannot seriously be denied since at least theoretically no gap remains in view of the effectiveness of the prosecution of criminal offenders. The application of these principles should therefore be recommended; in particular, they assume importance if the right of the requested State to refuse extradition is interpreted in an extensive sense, for instance, by invoking the right to grant asylum. Of course, this system may also be abusively applied; the promise of the requested State to prosecute the offender needs further guarantees and controls. A control by arbitration can only be considered to be effective if all relevant facts are openly presented, so that the State which complains of a partner State's insufficient performance of its duty of national prosecution is in a position to give reasons for its suspicion. It may therefore be recommended that the substitution of the prosecution by the requested State could be supervised by international observers and that such an obligation should be expressly stipulated. At the present time such obligations do not exist in general State practice.

VII. *The extradition of nationals*

Based on the practice of States during the development of international relations in matters of extradition two different systems have been established as regards the treatment of nationals of the requested State. Some members

of the community of nations are prepared to extradite their nationals if the offence in question has been committed abroad. These States generally restrict their own prosecution to offences committed in the territories under their jurisdiction. Therefore they are willing to transfer the competence for prosecution to another State because their own national provisions do not permit punishment. So the requesting State will be enabled to prosecute an offender who is a national of the requested State. The Anglo-American States especially follow this system.

Other States, however, refuse to extradite nationals even if the offence has been committed in the territory of the requesting State. Those States do not restrict their jurisdiction to the prosecution of offenders who have committed offences in their own territories; instead they are prepared to punish their own nationals on account of offences committed abroad. The reason for this attitude may be found in a particular accentuation of the so-called principle of protection which is based on a reciprocal relationship of protection by the State authority and of faith by the citizen, and which prohibits the State from conceding the supremacy of foreign jurisdiction over national jurisdiction. Some States, for instance the Federal Republic of Germany, have incorporated the principle of non-extraditing nationals in their constitutions.

Special conflicts, however, arise when the principles of the territorial restriction of the prosecution has not been brought into accord with the principle of protection of nationals. If a State restricts its jurisdiction to its territory and if the same State equally refuses to extradite nationals, the situation may occur that an offence committed abroad remains unprosecuted as long as the offender has not left the home State. However, such conflicts of legal systems have seldom occurred; appropriate harmonization through provisions of the national legal systems in question may easily be achieved.

Both the principles of extradition and of non-extradition of nationals can be protected by corresponding provisions of bilateral treaties, since the parties to the treaties may easily harmonize their municipal regulations despite different systems of extradition. Much more difficult seems the solution of this problem when the conclusion of multilateral treaties on extradition is envisaged. But even in this situation a conflict can be avoided either through special provisions in the texts of the treaties or through the legal possibility for States to make reservations. In this connection, for instance, Article 6 of the European Convention on Extradition respects the municipal legal systems. This convention obviously presupposes the principle that the refusal to extradite a national should be seen to be an exception; however, there are conflicting opinions as to whether such an exception exists. No particular difficulty will arise, because the system of the substitution of prosecution is also recognized through the provisions of the convention.

One cannot expect that a commonly accepted opinion about the principles of extradition or non-extradition of nationals could be established by the community of nations. Such a result could be reached only if a uniform position regarding the limitation of territorial jurisdictions of the States in matters of criminal law were achieved. Therefore, if a generally recognized

practice has to be excluded, the question arises once more whether a bilateral system of extradition instead of multilateral conventions may correspond in a more appropriate way to the requirements of State practice, since bilateral treaties may more easily take into account the particularities of the national provisions on extradition, whereas multilateral conventions gain their essential importance only in cases where a certain degree of uniformity of the legal systems can really be established.

VIII. *The relevance of the domestic law of a State regarding the duty to extradite*

Various conflicts may arise between the international obligation of a State to extradite and the requirements of the domestic legal rules of the same State. We have before us not only a problem of a purely theoretical nature, but a question which often arises in practice.

Such contradictions may follow from the expressly stipulated obligations of a treaty on extradition, on the one hand, and their incompatibility with a special statute on extradition under the domestic law of the internationally obliged State, on the other hand. This conflict frequently arises if the national legislature creates new rules before the validity of the treaty on extradition has expired. In general, under most of the national legal systems, the courts of the requested State would decide a case in accordance with the rule that a later statute must prevail over an earlier one. If therefore the provisions of a treaty on extradition were qualified as a normal statute under the domestic legal system of the requested State, the application of a new statute on extradition, perhaps incompatible with the provisions of the treaty, could not be avoided. Only in cases where the domestic law of the requested State grants a higher rank to international treaties than to all other provisions of domestic law have the courts had to apply the provisions of the treaty. It follows therefore that international law itself would not present a uniform solution for this conflict as long as it does not contain a rule binding upon all States and declaring the predominance of international treaties over domestic law. Nobody, however, would expect such a legal development in international law.

Similarly, the provisions of an international treaty on extradition may come into conflict with the legal provisions of domestic law relating to the right of asylum. Under those domestic legal systems which guarantee the individual the right to claim asylum and which even grant this right through constitutional provisions, national courts must observe that right regardless of the international obligation. Such conflicts, nevertheless, would arise relatively seldom since in general the right to grant asylum to politically persecuted persons and thus to refuse extradition would correspond to the right of the requested State not to extradite on account of the political nature of an offence. However, a complete congruence in such cases may not always exist because the right to grant asylum may be based only on the expectation that inhuman treatment has to be feared, so that in a given case it is not a prosecution on political grounds which justifies the asylum.

In modern times a problem arises in that the extradition of an offender would contradict domestic law if the domestic law of the requesting State provided for the death penalty but the requested State had abolished this kind of punishment perhaps even by means of a constitutional guarantee. The question whether or not extradition would in such cases be in contradiction with the domestic law could be answered in two different ways since every State is free to abolish the death penalty either for purposes of its domestic law only or also with respect to its international relations.

All the above-mentioned conflicts could be solved in various ways. The contradiction between the legal systems concerned could be avoided by lawfully renouncing the international obligation before a new statute is enacted under domestic law. Frequently, when new treaties are concluded, States take the opportunity to make reservations ; the European Convention on Extradition gives an impressive example of this practice. Some doubts about the wisdom of such practice, which may be considered excessive, have already been voiced and may simply be recalled here : once again the question arises whether a bilateral system would not better take into account the interests of States than a multilateral system.

In view of the municipal legal systems the question often arises whether the expulsion or deportation of the person concerned would unlawfully circumvent the provisions of domestic law or of a treaty forbidding extradition in a given case. A principle of international law in this respect has not been established since the discretion of a State in expelling an offender would not infringe upon the rights of another State which perhaps could request the extradition ; such an expulsion would perhaps even be in accordance with the interest of the other State which could thus easily gain jurisdiction over the offender. The problems thus characterized is therefore limited to the observance of municipal legal provisions of the requested State. It has been said that the problem could be solved through the application of the municipal law principles concerning the granting of asylum. This conclusion would, however, be too general. It is true that in many cases the political offender would be entitled equally to claim asylum ; nevertheless, the situation may occur where the right to claim asylum is not granted and at the same time a request for extradition cannot be based on the provisions of a treaty. In so far as the domestic law of the requested State contains the principle that the offender whose extradition is requested is individually entitled to invoke the protecting provisions of the treaty, a circumvention of the legal rules of extradition through expulsion or deportation would be an illegal act.

IX. *International arbitration and domestic jurisdiction*

In any case it is to be recommended that the parties to a treaty on extradition install a system of arbitration for the settlement of disputes. In particular, the disputed question about the legal nature of the political offence requires a decision by a neutral body. It may be that the parties to a treaty on extradition have already recognized an arbitration system with general competence as is the case between European States under the system

of the European Convention on Arbitration. It may also be that the States in question have recognized the competence of the International Court of Justice. Multilateral conventions have often followed this highly commendable principle as, for example, the convention for the protection of civil aviation (Montreal). The European Convention on the Suppression of Terrorism also provides in Article 10 for the settlement of disputes by a court of arbitration. In any case it may also be recommended that a court of arbitration be empowered to decide on every legal question arising from a treaty. In cases of extradition, therefore, competence would not be sufficiently established if the court of arbitration were empowered only to decide on the obligation to extradite but lacked the power to decide on the obligation of the requested State to substitute for the prosecution of the requesting State.

Under the system of Western democracies the judicial control of the lawfulness of an extradition by a competent national court today belongs to the normal and self-evident guarantees of the rule of law. This principle should not be abandoned but should, on the contrary, be strengthened. The sole power of decision on the part of the requested government, excluding the judiciary, possibly based upon the principle of act of State, the *acte de gouvernement* or the political question, should be restricted in order to protect the individual. It would of course then become necessary to inform the courts of all relevant facts and to inform the courts by forwarding the relevant documents. It could be that often the requirement of preserving the security of the State would lead to difficulties in court proceedings; in such cases the rules of procedure of the municipal courts should contain the necessary regulations.

Heidelberg, August 1977

Questionnaire

The schedule of questions corresponds to the arrangements of the report.

I. (The existing legal system of extradition)

1. Should the traditional system of bilateral treaties be maintained or should it be replaced or at least be supplemented by a multilateral system?

2. If a multilateral system is recommended, should it be extended in order to obtain world-wide operation or would it be preferable to restrict it to regional operations?

3. If a multilateral system is recommended (universal or regional), should the legal possibility to enter reservations be fully maintained, restricted or even totally excluded?

4. Should it be recommended — *de lege ferenda* — that States extradite more than hitherto without being under special treaty obligations, perhaps only under the condition that reciprocity is granted?

II. (The political offence)

5. Does the existing system of treaties on extradition enshrine the principle that the refusal to extradite a political offender would be recognized even if such an exclusion is not mentioned *expressis verbis* in the treaty?

6. Should it be recommended that the legal possibility to refuse extradition of a political offender be eliminated on condition that a State which is entitled to grant asylum may also legally refuse such extradition?

7. Assuming the foregoing question is answered in the negative, should further attempts be made to define the legal nature of the political offence for the purpose of binding States, or should the situation be upheld in which every State decides unilaterally whether an offence is of a political character, thus justifying the refusal to extradite?

8. Should at least the invocation of the political character of an offence be denied in regions of political homogeneity?

9. Should treaties whose purpose is the suppression of internationally dangerous criminality (for instance seizure of aircraft and hostages) exclude the justification of non-extradition on account of the political nature of the offence ?

III. (The protection of human rights)

10. Should States be permitted to refuse extradition on the grounds that in the specific case no guarantee exists for the preservation of human rights ? Should this be permitted even if the treaty in operation does not contain any special provision in this regard ?

11. Should States also be permitted to refuse extradition on account of a threat of violation of human rights in cases where no political persecution justifying the granting of asylum but merely « unpolitical » disregard of human rights is to be expected ?

12. Should States also be permitted to refuse extradition on account of a threat of violation of human rights in cases where the offence is of a purely criminal character or represents an offence against humanity or in cases where the offender qualifies as a war criminal ?

IV. (The right to grant asylum)

13. Should States be permitted to invoke their right to grant asylum in order to refuse a request for extradition even in cases where it is to be expected that the prosecution of the requesting State would lead neither to inhuman treatment nor to a disregard of the rule of law, but would, on the contrary, meet all the requirements of a fair trial under the rule of law ?

14. Would it be recommendable to construe the right of asylum — forming a justification to refuse extradition — as an individual right under municipal law or even as a fundamental right under national constitutions ?

15. Should judicial control through national courts be recommended if the right of the individual to claim compliance with all provisions of a treaty on extradition is recognized under municipal law ?

V. (The attentat clause)

16. Would it be recommendable to maintain the use of the traditional attentat clause (special protection of Heads of States and members of Governments) ?

17. Should the use of the attentat clause be extended to embrace major offences endangering the community of States (for instance seizure of aircraft and hostages) ?

V. (The substitution of prosecution by the requested State)

18. Should the already practiced principle imposing the international obligation to substitute prosecution by the requested State be strengthened ?

19. Should the principle mentioned above be applied in every case of justified refusal of extradition or should it be applied only in connection with major and dangerous offences (for instance seizure of aircraft and hostages) ?

20. Should an international obligation of legal assistance be recognized if, and to the extent that, the principle of substitution of prosecution is recommended ?

21. Should the admission of international and interested observers in cases of substitution of prosecution be compulsory ?

22. Would it be recommendable that in cases of substitution of prosecution a minimum standard of punishment be stipulated ?

VII. (The extradition of nationals)

23. Should the principle of non-extradition of nationals prevail or should its opposite be preferred when the conclusion of new international treaties is envisaged ?

24. Should some form of differentiation be recommended, for instance the extradition of nationals in cases of certain special offences, if general international understanding cannot be achieved ?

VIII. (The relevance of the domestic law of a State under the duty to extradite)

25. Should it be recommended that the individual whose extradition is in question be given a subjective right under municipal law to invoke the provisions of the applicable treaty if such provisions would afford protection ?

26. Should expulsion or deportation be regarded as unlawful if the treaty applicable does not require extradition and the municipal law of the requested State even forbids extradition ?

IX. (International arbitration and domestic jurisdiction)

27. Should every bilateral or multilateral treaty obligation to extradite be so construed that control by international arbitration is ensured ?

28. In cases where the competence of a court of arbitration has been established, should judicial control by the latter embrace treaty obligations as a whole or should it be restricted so that some questions remain open to unilateral decisions by the States concerned ?

New problems raised in matters of extradition (With particular reference to multilateral treaties)

(Twelfth Commission)

Final Report and Revised Draft Resolution

Karl Doehring

General Observations

The request to take into consideration my provisional report and the draft resolution has been met by Mr. *Cansacchi*, Mr. *do Nascimento e Silva*, Mr. *McWhinney*, Mr. *Oda*, Mr. *Ustor* and Mr. *Wortley*. I would like to express my cordial thanks for their critical suggestions and, frankly speaking, in particular for the views expressed in support of my own position.

Before elaborating this last report, I asked the members of the Commission whether we should restrict ourselves to solely presenting a report to be discussed in the general session or whether we should promote a resolution. A small but clear majority of the answering members of the Commission favoured the presentation of a draft resolution. I therefore complied with this decision.

The full understanding of the following final report presupposes the knowledge of both the preliminary and the provisional report. Only this assumption can avoid repetitions, in conformity with the advice of the Bureau (letter of January 19, 1980) not to overburden the Annuaire with unnecessary explanations.

General criticism concerning the provisional report and the draft resolution was delivered by Mr. *Ustor*. He feels that the draft elaborated suffers from being too detailed and does not correspond to the subject devoted to the 12th Commission. Since my suggestions laid down in the report and in the draft resolution would raise substantial controversies, we would hardly obtain a majority vote for such a complex proposal. He therefore favours a simpler and more

rudimentary approach to the subject. As an example supporting his position, he suggests dealing with questions of extradition in the absence of a treaty obligations, conceding that those problems are not new but nonetheless present new aspects (increasing number of States ; new methods of criminality ; technical interdependence of States ; duty to co-operate under the UN system) which result in the need to review the traditional methods of co-operation in this field. So in the first place he recommends emphasizing the duty of States regarding such co-operation. States should be required not to harbour criminals and they should be requested to adopt municipal statutes incorporating such requirements. On that basis a draft resolution should be presented.

If the work of the Commission and the elaboration of a draft resolution were restricted merely to such a general view, I would never have devoted myself to that subject. The requirement for international co-operation relates to many if not to all questions of international law ; it follows an idealistic goal which I highly appreciate, and Mr. *Ustor* is right in underlining the relevant principles and purposes of the UN Charter. But merely on that basis, no legal problem of any relevance has until now been settled. It may be recalled that in particular the International Law Commission could never and in no respect did restrict itself to a mere general view, but on the contrary has always been forced to deal with detailed questions in order to obtain an acceptable result. Nobody, for instance, would deny the responsibility of States for wrongful acts as a leading principle, but for the settlement of possible disputes the concept of wrongful acts needs to be defined, which is a question of detail. The same is true for all questions relating to extradition. Furthermore, the need to go into details just increases in view of modern developments as envisaged by Mr. *Ustor*. If I misunderstood Mr. *Ustor's* suggestions, I apologize for my failure. He also pointed out that his earlier suggestions were not correctly reported. I herewith affirm that in my provisional report I tried to reproduce objectively his explanations and those of the other members of the Commission, and I apologize again for any misunderstanding that might have occurred.

In order to facilitate a good comprehension of the final report, the systematic structure of the latter follows that of the revised draft resolution. Thus each chapter is introduced by the text of the draft resolution and then commented upon by reporting the remarks of

the members of the Commission and by my own suggestions. The preamble of the draft resolution is not included in this system but is to be found in the annex together with the full text of the revised draft. Some alterations of the preamble reflect the suggestions of Mr. *McWhinney,* Mr. *do Nascimento e Silva* and Mr. *Ustor* so as to give a positive expression to their recommendations.

Part I

The Treaty System on Extradition

1. Both systems of extradition currently in practice, the bilateral and the multilateral system, should be developed and amplified.

Comment : The impression prevails that, compared to the other, none of the types of treaties can be said to be preponderant in practice or more efficient. Both kinds of treaties correspond to the requirements of international co-operation. Mr. *Cansacchi* expressly recommends the intensification of each system in order not to omit any possibility for better suppressing international criminality.

2. In view of the fact that in certain respects the positions of States or of groups of States show essential differences, and in order nevertheless to promote a more useful State practice in matters of extradition, governments acting under politically homogeneous legal systems should co-operate through particularly close contacts, thus offering a greater contribution to the development of a modern system of extradition and a more effective result than may be attained solely through efforts to establish universality.

Comment : Mr. *do Nascimento e Silva* feels that such a recommendation should either be incorporated into the preamble or should be deleted. Mr. *McWhinney* remains sceptical as to whether the recommendation would lead to better results. My own position tends to uphold this invitation to broaden regional co-operation. The reasons for that view are to be found in the provisional report (chapter I)[1].

[1] See also *A. Grahl-Madsen,* Territorial Asylum, 1980, p. 11 : « Between some States there exist close ties, based on similarities in culture, language, social outlook, legal system, and political institutions ; and where such relations exist, co-operation in criminal matters may be whole-hearted and near complete. Typical in this respect is the system created between the Scandinavian States ».

A short remark, nevertheless, may again underline the recommendation. It can hardly be denied that profound differences exist between regions and blocs of States and that they stem from different political view-points which affect the evaluation of facts and legal aspects precisely in matters of extradition. To give the most significant examples : extradition of nationals ; granting asylum ; interpretation of the concept of political offence ; capital punishment ; definition of human rights ; definition of the concept of fair trial. It would, of course, be best to reconcile the different standpoints. But as long as this cannot be achieved, it would be more useful to strengthen the existing co-operation than to diminish it through attempts to construct a façade of universality.

3. The traditionally practised system of making reservations when accepting the obligations of multilateral treaties on extradition should be restricted to the cases where the national legal system concerned unavoidably requires such reservations.

Comment : Mr. *do Nascimento e Silva* recommends a restriction of the use of reservations or even a waiver. A complete abolishment of this right, however cannot be expected[2]. Some States are governed by constitutions containing principles which do not exist in other legal systems, *e.g.* the prohibition of capital punishment or of the extradition of nationals. Total exclusion of reservations would prevent many States from participating in multilateral treaties[3].

4. States should be encouraged to extradite also where binding treaty obligations do not exist.

Comment : Mr. McWhinney has some doubts as to whether such a recommendation would be necessary since some knowledge of the existing legal situation could be assumed[4]. Mr. *do Nascimento e*

[2] See *e.g.* the Draft Inter-American Convention on Extradition, art. 29 (OEA/Ser. Q/IV.14, CJI-31) ; European Convention on Extradition, art. 26 (UNTS, vol. 359, p. 273) ; the European Convention on the Suppression of Terrorism, art. 13 (International Legal Materials, vol. 15, 1976, No. 6, p. 1272).

[3] The relevant provisions of the Convention on the Law of Treaties, art. 19-23 (UN Doc. A/CONF. 39/27) may be based on that consideration.

[4] *H. Schultz*, Das schweizerische Auslieferungsrecht, 1953, p. 8 *et seq.* ; *M. Whiteman*, Digest of International Law, vol. 6, 1968, p. 732 ; *I.A. Shearer*, Extradition in International Law, 1971, p. 23 *et seq.*

Silva recommends that States may declare reciprocity in order to achieve the envisaged result if no treaty obligation exists. In my view, declarations of reciprocity merely replace treaty obligations in creating a kind of *ad hoc* treaty so that the aim to further extradition even in the absence of any mutual obligation — especially emphasized by Mr. *Ustor*[5] — would not be supported. It seems clear that the recommendation probably remains without sufficient effect since the legal systems of many States provide even under municipal law that extradition can only take place on the basis of a binding treaty. One should, nevertheless, indicate that better co-operation would be achieved by restricting the requirement of an obligation, bearing in mind that treaties do not only protect the rights of the State but equally the rights of the individual concerned. For these reasons, I recommend not to go beyond mere encouragement and not to propose the acceptance of a strict obligation.

Part II

The Political Offence

1. Even if the extradition treaty to be applied does not expressly contain the right to refuse the extradition by invoking the exception of political offence, this invocation should be considered to be permissible.

Comment: Mr. *Oda* tends to the view that the proposed recommendation only repeats a certain self-evidence since the requested State always remains free to grant asylum. The same position is taken by Mr. *do Nascimento e Silva*. Despite their arguments, I think that the recommendation is necessary in order to cover all situations, assuming that in principle its goal is accepted. Even if the treaty to be applied is silent on the question of whether extradition can be refused on account of a political offence, the obligation to extradite a political offender has been stated by some specialists of international law[6]; others, however, deny such a

[5] See also Völkerrecht, DDR-Autorenkollektiv, 1973, vol. 1, p. 350.

[6] This position is based on the assumption that the non-extradition of political offenders does not form part of the rules of general international law. See *M. Whiteman, loc. cit.*, p. 853; *M.E. Gold*, Non-Extradition for Political

duty[7]. But even if the right to grant asylum is regarded as existent in any case, we must take into account that there are situations in which political persecution by the requesting State is not intended and is not to be expected, so that the invocation of the right to grant asylum against political persecution could be considered to result in an abuse of discretion committed by the requested State. The punishment of a political offender does not necessarily also constitute a political persecution, since States normally prosecute attacks against their security, and it is not always to be assumed that in so doing they would disregard the requirements of a fair trial and the rule of law, thus violating human rights. Such a prosecution should not be considered to be a political persecution entitling other States to grant asylum[8]. This position, *i.e.* that prosecution of a political offender does not in every case constitute a political persecution which could form the basis of the right to grant asylum has now gained a certain additional confirmation with the International Convention Against the Taking of Hostages (art. 9)[9]; according to this provision non-extradition must be justified by the expectation that the requesting State will prosecute the offence not only on grounds

Offences : The Communist Perspective, Harvard International L.Jl., vol. 11, 1970, p. 192 ; *G. Dahm*, Völkerrecht, vol. 1, 1958, p. 283 ; *F. Berber*, Völkerrecht, vol. 1, 2nd ed. 1975, p. 419 *et seq.* ; *G. Schwarzenberger*, International Law, vol. III, 1976, p. 15

[7] *S. Glaser*, Droit international et pénal conventionnel, vol. II, 1978, p. 52 *et seq.* ; Conseil d'Etat, *Astudillo Calleja* (24.6.1977), Rec. Dalloz Sirey 1977, Jurisprudence, p. 695 *et seq.* ; *Schultz*, Zeitschrift für die gesamte Strafrechtswissenschaft, 1969, p. 199 *et seq.* ; the position that the non-extradition of political offenders forms part of general international law is taken by *J.H. Verzijl*, International Law in Historical Perspective, vol. V, 1972, p. 305 ; *R.C. Hingorani*, The Indian Extradition Law, Auckland Univ. L. Rev., vol. 1, 1971, p. 123 ; *R. Linke*, Revue internationale de droit pénal, vol. 38, 1969, p. 453 ; *M. Santiago*, Procedural Aspects of the Political Offence Doctrine, Philippine L.Jl., vol. 51, 1976, p. 239.

[8] See the Resolution adopted by the Institute of International Law at its Bath Session, September 1950, art. 2 (Annuaire, vol. 43/2, p. 388) referring to humanitarian duties forming the true basis of the right to grant asylum in accordance with the UN Declaration on Human Rights in 1948.

[9] International Convention Against the Taking of Hostages, UN General Assembly, 34th session, Doc. A/RES/XXXIX/146, January 24, 1980.

of its political character but also on account of the political opinion of the offender. Only under the second condition might the protection by the requested State be regarded as lawful and justified.

2. The right to refuse extradition by reason of a political offence should not be replaced by the mere right to grant asylum against political persecution and to refuse the extradition solely on this ground, since the prosecution of a political offender must not in every case be considered to be also a political persecution justifying the granting of asylum by third States.

Comment: Some reasons for that recommendation have been expounded in the comment to the foregoing paragraph. The motivation of the proposed rule is now expressly declared through its wording due to the fact that the text of the first draft was partly misunderstood. Mr. *do Nascimento e Silva* again proposes to exclude from the draft all questions dealing with the granting of asylum in order not to overburden the existing problems of extradition with politically so disputed matters. I think however that we could never escape the strict connection between extradition and the right to grant asylum, which forms one of the most important exceptions from the duty to extradite and which, for that reason, plays a decisive role in the drafting of many multilateral treaties on extradition and suppression of international criminality[10].

3. The definition of the political offence should be promoted in a negative sense, *i.e.* through a declaration that certain offences of a particularly heinous nature should not be considered to be political crimes, since further attempts to define the concept of political offence do not seem to be successful.

Comment: Mr. *do Nascimento e Silva* expresses again, in conformity with the majority of the Commission members, his view that a negative definition would lead to a more practical result. In order to strengthen this view, I placed this recommendation at the beginning of the paragraph. It can hardly be denied that a definition of the political offence through describing its elements did not

[10] See *e.g.* the European Convention on the Suppression of Terrorism, *loc. cit.*, art. 5; the European Convention on Extradition, *loc. cit.*, art. 3 (2); the International Convention against the Taking of Hostages, *loc. cit.*, art. 9; the Draft Inter-American Convention on Extradition, *loc. cit.*, art. 13.

result in a common agreement[11]. The proposal hereby submitted follows the system of the *attentat* clause and the clauses in multilateral treaties applying that system with regard to certain types of international criminality[12].

4) Consideration should be given to the question of whether the invocation of the political offence doctrine could completely be abolished between States based on politically homogeneous legal systems. The right to grant asylum on grounds of political persecution should not be affected by this abolition.

Comment : Mr. *do Nascimento e Silva* suggests with regard to the first wording of the draft resolution that the protection of human rights could be endangered through such tight co-operation. In altering the text of the draft, I respected his view so that the right to grant asylum is expressly preserved. It may, nevertheless, again be emphasized that not every prosecution of a political offender involves at the same time political persecution requiring protection through asylum. If the prosecution should disregard the principles of fair trial and of the rule of law, then, of course, the protection should be ensured.

5. That paragraph of the first draft resolution has been deleted. Mr. *do Nascimento e Silva* with good reasons indicated that the proposed recommendation already formed part of paragraph 3, the now revised text of which is also meant to clarify the principle concerned.

[11] *D.P. O'Connell*, International Law, vol. II, 2nd ed 1970, p. 729 : « The only conclusion to which one can come is that the characterization of an offence as « political » must be left to the law of the requisitioned State, which must adopt its own standards in the light of its own policies » ; *I.A. Shearer, loc. cit.*, p. 187 *et seq.*

[12] *E.g.* the OAS Convention to Prevent the Acts of Terrorism, International Legal Materials, vol. 10, 1971, p. 255, art. 2 ; the Traité d'extradition et d'entraide judiciaire en matière pénale entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas, 27 juin 1962, UNTS, No. 8893, 1968, p. 80, art. 3 (2) ; the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 16, 1970 ; United States Treaties and other International Agreements, vol. 22, part 2, p. 1644, art. 8 (1).

Part III

The Protection of Human Rights in Matters of Extradition

Comment: The question was raised whether or not a special part of the resolution should be devoted to human rights. Mr. *McWhinney* fears that the different concepts of human rights in East and West could lead to a certain ineffectiveness of the main proposals under consideration. Mr. *Cansacchi* expresses the view that human rights have in every case to be protected. Mr. *do Nascimento e Silva* asks whether the protection of human rights could practically be effectuated. I appreciate all these considerations and doubts. Nevertheless, the express reference to human rights may perhaps not result in their optimal protection but, on the other hand, it would also not diminish the weight of the other recommendations laid down here. Since it is commonly agreed that States decide unilaterally and in their own discretion about their right to grant asylum, an abuse of that right could only be corrected by arbitration, as recommended in the last part of the draft resolution. Further sceptical suggestions are offered by Mr. *do Nascimento e Silva*, reflecting the problem of human rights by way of examples of discrimination. If I rightly understand his approach to the problem, he fears that it would be too easy to circumvent obligations through invoking human rights. That possibility, however, always exists and could be limited only by arbitration stating that not every difference in treatment must be considered as a discrimination infringing human rights[13].

1. The invocation of the duty to protect human rights should justify non-extradition in any case, in particular in cases where political persecution does not exist and where thus the granting of asylum cannot be based on that ground.

Comment: Mr. *Oda* considers this recommendation somewhat superfluous since the extradition of political offenders could in any case be refused. He perhaps overlooks the fact that a violation of human rights may be a threat to persons who are not political

[13] On those grounds the European Convention on Human Rights, in its article 14, provides equal treatment only in respect of the rights and freedoms expressly granted by the Convention.

offenders and who are not even persecuted on political grounds, so that neither the political-offence doctrine would be involved nor would one be in the typical situation where political asylum generally is granted. Violation of human rights may occur without any connection with situations of a political nature. Mr. *do Nascimento e Silva* states that there are legal systems which do not differentiate between political rights and human rights. Such a concept, would nevertheless not hinder the protection of human rights in a broader sense. The recommendation in the draft is solely meant to express the idea that a threat to human rights eliminates the need for further consideration into special exceptions from the duty to extradite[14]. I do not overlook the fact that it may be hard for an arbitrator to reproach a State for being suspected of violating human rights. But the occurrence of such a situation cannot be excluded.

2. In cases where the violation of human rights is to be expected, neither differentiations with respect to the personal attributes of the individual whose extradition is requested, nor differentiations regarding the offence committed, should be of any relevance.

Comment : No further statement has been made with respect to that recommendation. Nevertheless, a short remark may again clear up its true meaning. It has often been emphasized that asylum should not in principle be granted to offenders like war criminals and criminals against humanity[15]. Without overlooking the aim of such a limitation — which is not meant to protect individuals who themselves are violating human rights, but rather to protect the principles justifying the granting of asylum — one should not exclude them

[14] *A. Verdross and B. Simma*, Universelles Völkerrecht, 1976, p. 598, point out that there does not exist a general prohibition to extradite, « mit Ausnahme der allgemeinen und zwingend geltenden Humanitätsschranke » ; regarding multilateral treaties, this principle is contained *e.g.* in the European Convention on the Suppression of Terrorism, *loc. cit.*, art. 5, and in the European Convention on Extradition, *loc. cit.*, art. 3 (2).

[15] Draft Convention on Territorial Asylum, art. 1 (d), Report of the Fifty-Fifth Conference of the International Law Association, New York 1972, p. 208 ; the Convention Relating to the Status of Refugees, July 28, 1951, UNTS, vol. 189, p. 150, excludes through article 1 (F) such individuals from all benefits granted by the Convention, in particular from the principle of non-refoulement ; see also *L. Bolesta-Koziebrodzki*, Le droit d'asile, 1962, p. 44.

from the guarantees of the rule of law. If under municipal law every criminal, regardless of his motivation and the kind of offence committed, must have the right to a fair trial under the rule of law, it is not clear why international protection should be left behind as regards such guarantees. Even offenders of the type mentioned — to give an example — have to be protected against torture. When asylum is granted, the granting State can and should be in the position to execute substituting prosecution under the rule of law[16], so that such criminals would not remain unpunished.

Part IV

The Relationship between Protection through Granting Asylum against Political Persecution and the Duty to Extradite.

1. The right to refuse extradition by invoking the right to grant asylum against political persecution should not be exercised where there is no doubt that the requesting State will prosecute the offender with due observance of all requirements, both substantial and procedural, of the rule of law. The right to refuse the extradition on account of the prosecution of a political offender depends on the provisions of the treaty to be applied.

Comment: Mr. *Cansacchi* agrees with the principle of this position, *i.e.* that extradition should be performed if observance of all the requirements of the rule of law can be expected with reasonable assurance and if the treaty to be applied provides for extradition. Whether or not this situation exists has to be decided by the requested State or by arbitration. Mr. *Oda* has some doubts about the probability that the authorities of the prosecuting State would exclude all political motivations, even acting under due observance of the rule of law. Mr. *do Nascimento e Silva* repeats his standpoint that the draft resolution should not combine problems of asylum and of extradition. I, nevertheless, tend to uphold the recommendation, the meaning of which may again be described as follows: asylum should be granted if political persecution is to be feared, but no such persecution exists if a State prosecutes under the control

[16] Draft Convention on Territorial Asylum, ILA, *loc. cit.*

of independent courts, observes fundamental guarantees of procedure, and respects all the principles contained in the UN Covenant on Political and Civil Rights and the European and American Conventions on Human Rights[17] ; acting on that basis, the State meets the requirements of the so-called natural justice. A question which must be answered separately relates to the duty to extradite which derives from the content of the treaty to be applied. If, for instance, the treaty contains the *attentat clause* — perhaps in an extended modern form — the unrestricted right to grant asylum would make such a provision completely inapplicable and meaningless. The unilateral and unrestricted invocation of the right to grant asylum should therefore be considered as an exception, to be applied only to prevent extreme disregard of the rule of law as described above. The Draft Inter-American Convention on Extradition reflects this situation in its article 13 : no provision of this convention may be interpreted as a limitation of the right of asylum when its exercise is in order.

2. Whether the individual is entitled to personally invoke before municipal courts the right of asylum against political persecution must be left to the legal system of the requested State if the treaty to be applied does not clearly have a self-executing effect through express stipulations by the States concerned. In order to ensure better protection of individual rights, such stipulations are recommended.

Comment : Mr. *do Nascimento e Silva* favours a legal situation in which the individual is entitled to invoke provisions of a treaty designed to protect his rights. This principle was already envisaged by a resolution of the Institute of International Law in 1894. I agree

[17] Regarding this problem see *J.-G. Castel* and *M. Edwardh*, Political Offences : Extradition and Deportation - Recent Canadian Developments, Osgoode Hall L.Jl., vol. 13 (1975), p. 89 *et seq.*, ; *F. Mantovani*, Le délit politique, limite de l'extradition, Revue internationale de droit pénal, vol. 39 (1968), p. 644 *et seq.* ; *V. Epps*, The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence, Harvard International L.Jl., vol. 20 (1979), p. 61 *et seq.* ; *D. Franke*, Politisches Delikt und Asylrecht, 1979, p. 48 and p. 81 ; *B.C. Keith*, Asylum or Accessory : The Non-Surrender of Political Offenders by Canada, Univ. of Toronto Faculty L. Rev., vol. 31 (1973), p. 93 *et seq.*

with that position. Nevertheless, an express treaty provision is needed, since the practice of most States has, until now, not been in line with that recommendation (see also part VIII, 1).

Part V

The Attentat *Clause*

1. The traditional *attentat* clause should in principle be maintained, and its application should be extended to representatives of States, in particular to members of diplomatic missions.

Comment: Mr. *McWhinney* indicates on good grounds that the old *attentat* clause has lost some of its importance as regards its limitation to heads of States and members of governments. The recommendation herewith presented therefore extends the protection without giving up the principle, in order to cover all the cases which have become relevant. This extension also finds expression in the Convention on Protection of Internationally Protected Persons Including Diplomatic Agents[18].

2. The application of the *attentat* clause should be extended *in rem* to particularly heinous international crimes.

Comment: The extension regarding new and serious international crimes has again been recommended by Mr. *McWhinney* and supported by Mr. *Cansacchi*[19]. Mr. *do Nascimento e Silva* emphasizes that the invocation of human rights should not be accepted from individuals who themselves have violated human rights. As just pointed out (part III, 2), the rule of law protecting human rights should be applied to all individuals without exception. Nevertheless, the last sentence of the first draft has been cancelled

[18] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, December 14, 1973, International Legal Materials, vol. 13, 1974, art. 8.

[19] The European Convention on the Suppression of Terrorism, *loc. cit.*, art. 1, may serve as an example for many treaties. The tendency is described by *M.Ch. Bassiouni*, International Extradition and World Public Order, 1974, p. 416 *et seq.*; *V. Epps*, *loc. cit.*, p. 61 *et seq.*; *M. Kittrie*, Reconciling the Irreconciliable: The quest for international agreement over political crime and terrorism, Yearbook of World Affairs, vol. 32 (1978), p. 208 *et seq.*

because the protection of human rights has already been expressed in part III as a general rule.

Part VI

Substituting Prosecution

1. The system of substituting prosecution should be strengthened and amplified.

Comment : Mr. *Cansacchi,* Mr. *McWhinney,* Mr. *do Nascimento e Silva* and Mr. *Oda* confirm the appropriateness of this principle. Their position differs only as regards the following paragraph. I therefore upheld the principle as such in the first paragraph. It corresponds to nearly all multilateral conventions existing in this field.

2. The system of substituting prosecution should be completed by stipulating detailed methods of legal assistance.

Comment : Mr. *do Nascimento e Silva* thinks that such a recommendation, designed to improve substituting prosecution, would not be promising, and one should therefore restrict the draft resolution to the mere invocation of the principle. Mr. *Oda* inclines to this view in pointing out that substituting prosecution mainly covers the cases where a national of the requested State has not been extradited. One should, however, also take into account the situation in which extradition is refused with reference to the right to grant asylum. It is in such a situation that substituting prosecution becomes necessary. Since Mr. *do Nascimento e Silva* recommends not including questions of asylum, my argument will probably not convince him. On the other hand, it may be recalled that the recommendation follows the provisions of many multilateral conventions[20].

3. When governments act in substituting prosecution, the interested governments — and in particular the government of the

[20] See *e.g.* the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *loc. cit.*, art. 10.

territory in which the offence was committed — should be entitled to send observers to the trial unless serious grounds, in particular with respect to the preservation of State security, would justify their non-admittance.

Comment: In the view of Mr. *do Nascimento e Silva* this recommendation could not be applied in practice, and his doubts are well founded. On the other hand, the recommendation cannot be disadvantageous with regard to further developments of co-operation but it is objectively meaningful[21].

4. In cases of substituting prosecution, if the tribunal concerned determines that the accused is guilty, an appropriate penalty should be imposed, similar to that which would be applied to nationals in a cognate case.

Comment: It is generally not denied that an appropriate punishment should be imposed in the exercise of substituting prosecution[22]. I also agree with Mr. *Cansacchi* that the duty to punish should not be avoided through expelling the accused from the territory. Since, however, there are many possibilities to escape the duty to punish, one cannot enumerate all of them, and therefore a statement of general advice may suffice to achieve the desired goal. The recommendation of Mr. *McWhinney* to compare the penalty to be envisaged with a hypothetical penalty of nationals has been inserted in the draft[23].

Part VII

The Extradition of Nationals

Every State should in principle remain free to refuse the extradition of nationals. If extradition is refused on that ground, the refusing State should be obliged to punish the offender.

[21] A corresponding proposal is to be found in the debates of the International Law Association concerning international terrorism, Report, *loc. cit.*, p. 126, suggestion of *K. Hailbronner*.

[22] See the Draft Outline of Single Convention on Legal Control of International Terrorism, art. II (1), ILA Report, *loc. cit.*, p. 145.

[23] This tendency is followed by *e.g.* the European Convention on the Suppression of Terrorism, *loc. cit.*, art. 7; the International Convention against the Taking of Hostages, *loc. cit.*, art. 8.

Comment : It cannot be expected that States whose legal systems or even whose constitutions prohibit the extradition of nationals would abandon that principle[24], despite the fact that there are serious arguments for the opposite position. Thus the view of Mr. *Cansacchi* in favour of abolishing the right to refuse extradition on that ground — at least as regards serious international criminality — is fully comprehensible. Nevertheless, I do not expect that a recommendation to that effect has any chance of being observed, and I have therefore altered the draft. There are too many States preserving this right, and the European Convention on Extradition also respects the national views in that field. The same seems to be true for the proposal of Mr. *do Nascimento e Silva* to eliminate this right and to replace it by declarations of reciprocity[25]. His further proposal to recommend the obligation to exercise substituting prosecution in such cases has been inserted in the draft.

Part VIII

The Relationship between the International Obligation to Extradite and the Requirements of Municipal Law

1. In the conclusion of treaties of extradition and related matters, the parties to such treaties should stipulate direct application thereof in municipal law (self-executing effect), so that the individual whose extradition is requested would be entitled to invoke before national tribunals those provisions of the treaty which ensure his protection.

Comment : Mr. *McWhinney* does not favour this recommendation and maintains the position that treaties should create rights and duties only between the States concerned. I concede that this view corresponds to the traditional State practice which affords protection in that sense through the invocation of municipal rules only[26]. However, the recommendation can be promoted without

[24] *E.g.* for multilateral treaties : the European Convention on Extradition, *loc. cit.*, art. 6 (1) ; for regional treaties : Traité d'extradition et d'entraide judiciaire (BENELUX), *loc. cit.*, art. 5 (1).

[25] A certain reciprocity is provided in the Draft Inter-American Convention on Extradition, *loc. cit.*, art. 9.

[26] *F. Berber, loc. cit.*, p. 424 ; *G. Dahm, loc. cit.*, p. 280.

restricting the rights of States, because in the end the municipal tribunals concerned have to decide about the observance of both international and municipal law. The proposal made here would, on the other hand, strengthen the position of the individual[27]. Mr. *Oda* points out that the envisaged self-executing effect can only be established by the treaty itself. That, of course, is true, but States are free to provide for that effect in complying with an obligation under the treaty. The proposal of Mr. *Cansacchi* also tends toward this direction. Mr. *do Nascimento e Silva* recommends amending the text through the insertion of the words « all related matters » in order to include all treaties in which extradition is only part of the obligations incurred (*e.g.* the Conventions of The Hague and Montreal Against Seizure of Aircraft; the UN Convention on the Suppression of the Taking of Hostages).

2. The right to expel an alien should not be regarded as being restricted by the fact that it could produce an effect similar to that of an extradition prohibited by municipal law. It should be left to the States to harmonize their municipal provisions on extradition and expulsion. The exercise of the right to expel an alien should internationally be limited only by the duty to respect human rights, in particular the duty to avoid deportation of the individual to a persecuting State.

Comment: The tendency of this recommendation was criticized by Mr. *do Nascimento e Silva*, who proposed just the contrary. He may, however, have overlooked the fact that there may be situations where it cannot be expected from a State that it will grant residence to an alien whose presence would constitute a serious danger for the State's security[28]. The expulsion should, of course, not commit the alien to a State whose government threatens him with political

[27] *M.Ch. Bassiouni, loc. cit.*, p. 558 *et seq.*; *H. Schultz*, Les problèmes actuels de l'extradition, RIDP, vol. 46, 1975, p. 500 *et seq.*; *A..M Orie*, Magazijn Themis, 1978, p. 138 *et seq.*

[28] Regarding this problem see *I.A. Shearer, loc. cit.*, p. 76 *et seq.*; *M.Ch. Bassiouni, loc. cit.*, p. 133 *et seq.*; *P. O'Higgins*, Disguised Extradition: The Soblen Case, Modern Law Review, vol. 27, 1964, p. 521 *et seq.*; *K. Buschbeck*, Verschleierte Auslieferung durch Ausweisung, 1973; ILA, Belgrade Conference (1980), Committee on International Terrorism, Third Interim Report, p. 5 (art. II, 3, of the Draft Convention).

persecution. However, even such a situation cannot completely be excluded since no State is obliged to receive an alien and only the State of an alien's own nationality has the obligation to receive him. The Geneva Convention on Refugees also foresees that extreme possibility[29]. Therefore, the recommendation by Mr. *Cansacchi* to avoid such *refoulement* in any case can hardly be observed. The proposed text tends at least to respect the maximum of human rights protection which could be attained. The question raised by Mr. *Oda* as to how to clarify the meaning of « prohibited extradition » is answered by the reference made to municipal law.

Part IX

Arbitration and Settlement of Disputes

The observance of obligations under treaties on extradition or related matters should be controlled by courts of arbitration or by other institutions appropriate for the objective settlement of disputes. The competence of such institutions should relate to all applicable provisions of the treaty concerned.

Comment : The indication by Mr. *McWhinney* that not only courts of arbitration should be envisaged, since there would exist some other appropriate methods to settle disputes, has found expression in the revised text of the draft[30].

Heidelberg, November 1980

[29] Convention Relating to the Status of Refugees, *loc. cit.*, art. 33 (2).

[30] See *e.g.* the International Convention against the Taking of Hostages, *loc. cit.*, art. 16.

Revised draft resolution

The Institute of International Law,

Whereas the traditional system of extradition can be considered to have offered for a long period an adequate basis for the international relations in this field and in so far may be considered to form an appropriate starting point for regulating the now-existing inter-State relations;

Whereas the modern development of the community of nations has undergone essential alterations through the increasing quantity of sovereign States as well as the increasing interdependencies in a technical world;

Whereas there are new tendencies in the types of criminal offences committed and the manner in which they are being committed;

Whereas the former resolutions of the Institute on matters of extradition (Oxford 1880, Geneva 1892, Paris 1894) need revision on account of the developments of international law mentioned above,

Adopts the following resolution:

I. *The Treaty System on Extradition*

1. Both systems of extradition currently in practice, the bilateral and the multilateral system, should be developed and amplified.

2. In view of the fact that in certain respects the positions of States or groups of States show essential differences, and in order nevertheless to promote a more useful State practice in matters of extradition, governments acting under politically homogeneous legal systems should co-operate through particularly close contacts, thus offering a greater contribution to the development of a modern system of extradition and a more effective result than may be attained solely through efforts to establish universality.

3. The traditionally practised system of making reservations when accepting the obligations of multilateral treaties on extradition should be restricted to the cases where the national legal system concerned unavoidably requires such reservations.

4. States should be encouraged to extradite also where binding treaty provisions do not exist.

II. *The Political Offence*

1. Even if the extradition treaty to be applied does not expressly contain the right to refuse the extradition by invoking the exception of political offence, this invocation should be considered to be permissible.

2. The right to refuse extradition by reason of a political offence should not be replaced by the mere right to grant asylum against political persecution and to refuse the extradition solely on this ground, since the prosecution of a political offender must not in every case be considered to be also a political persecution justifying the granting of asylum by third States.

3. The definition of the political offence should be promoted in a negative sense, *i.e.* through a declaration that certain offences of a particularly heinous nature should not be considered to be political crimes, since further attempts to define the concept of political offence do not seem to be successful.

4. Consideration should be given to the question of whether the invocation of the political offence doctrine could completely be abolished between States based on politically homogeneous legal systems. The right to grant asylum on grounds of political persecution should not be affected by this abolition.

III. *The Protection of Human Rights in Matters of Extradition*

1. The invocation of the duty to protect human rights should in any case justify non-extradition, in particular in cases where political persecution does not exist and where thus the granting of asylum cannot be based on that ground.

2. In cases where the violation of human rights is to be expected, neither differentiations with respect to the personal attributes of the individual whose extradition is requested, nor differentiations regarding the offence committed, should be of any relevance.

IV. *The Relationship between Protection through Granting Asylum against Political Persecution and the Duty to Extradite*

1. The right to refuse extradition by invoking the right to grant asylum against political persecution should not be exercised where there is no doubt that the requesting State will prosecute the offender with due observance of all requirements, both substantial and procedural, of the rule of law. The right to refuse the extradition on account of the prosecution of a political offender depends on the provisions of the treaty to be applied.

2. Whether the individual is entitled to personally invoke, before municipal courts, the right of asylum against political persecution must be left to the legal system of the requested State, if the treaty to be applied does not clearly have a self-executing effect through express stipulations by the States concerned. In order to ensure better protection of individual rights, such stipulations are recommended.

V. *The* Attentat *Clause*

1. The traditional *attentat* clause should in principle be maintained, and its application should be extended to representatives of States, in particular to members of diplomatic missions.

2. The application of the *attentat* clause should be extended *in rem* to particularly heinous international crimes.

VI. *Substituting Prosecution*

1. The system of substituting prosecution should be strengthened and amplified.

2. The system of substituting prosecution should be completed by stipulating detailed methods of legal assistance.

3. When governments act in substituting prosecution, the interested governments — and in particular the government of the

territory in which the offence was committed — should be entitled to send observers to the trial unless serious grounds, in particular with respect to the preservation of State security, would justify their non-admittance.

4. In cases of substituting prosecution, if the tribunal concerned determines that the accused is guilty, an appropriate penalty should be imposed, similar to that which would be applied to nationals in a cognate case.

VII. *The Extradition of Nationals*

Every State should in principle remain free to refuse the extradition of nationals. If extradition is refused on that ground, the refusing State should be obliged to punish the offender.

VIII. *The Relationship between the International Obligation to Extradite and the Requirements of Municipal Law*

1. In the conclusion of treaties of extradition and related matters, the parties to such treaties should stipulate direct application thereof in municipal law (self-executing effect), so that the individual whose extradition is requested would be entitled to invoke before national tribunals those provisions of the treaty which ensure his protection.

2. The right to expel an alien should not be regarded as being restricted by the fact that it could produce an effect similar to that of an extradition prohibited by municipal law. It should be left to the States to harmonize their municipal provisions on extradition and expulsion. The exercise of the right to expel an alien should internationally be limited only by the duty to respect human rights, in particular by avoiding the deportation of the individual to the persecuting State.

IX. *Arbitration and Settlement of Disputes*

The observance of obligations under treaties on extradition or related matters should be controlled by courts of arbitration or by other institutions appropriate for the objective settlement of disputes. The competence of such institutions should relate to all applicable provisions of the treaty concerned.

Annex

Observations of Members of the Twelfth Commission on Professor Doehring's Provisional Report

1. Observations de M. Giorgio Cansacchi

Turin, le 15 mai 1979

Mon cher Confrère,

Je vous félicite pour la clarté et l'ampleur de votre rapport ; j'approuve votre projet provisoire de résolution selon le texte français et je n'ai pas de modifications à vous proposer.

Je suis, moi aussi, d'avis qu'il serait souhaitable que nous ayons un échange de vues entre membres de la Commission pendant la session d'Athènes.

Selon mon opinion, les points les plus importants qui méritent une discussion approfondie sont les suivants :

a) Les Etats qui agissent dans le cadre de systèmes juridiques politiquement homogènes devraient être amenés à conclure entre eux des traités d'extradition dans lesquels seraient définis les éléments qu'ils considèrent comme « délits politiques » et pour lesquels l'extradition pourrait être refusée ; les Etats ne présentant pas ce caractère d'homogénéité politique devraient quand même énoncer dans leurs traités d'extradition les délits considérés comme « non politiques » ; pour combattre la grande criminalité internationale actuelle, la liste de ces délits devrait être très étendue.

b) Le refus de l'extradition devrait toujours être considéré comme légitime lorsque l'Etat requis a des raisons de croire que l'Etat requérant ne respectera pas les droits fondamentaux de l'homme, spécialement dans le domaine des poursuites pénales ; si, au contraire, l'Etat requérant effectue les poursuites pénales selon les règles d'un Etat constitutionnel avec le plein respect de la personnalité des accusés, l'extradition devrait être généralement accordée.

c) Les Etats devraient maintenir la clause d'attentat dans son ampleur actuelle et même l'élargir jusqu'à y comprendre les grands crimes internationaux ; en présence de tels crimes, les Etats devraient même permettre l'extradition de leurs nationaux.

d) Il serait souhaitable que, si un Etat exerce la justice substitutive, les juges de cet Etat frappent les accusés, si leur culpabilité est constatée, d'une peine proportionnée à la gravité du délit commis, selon un *standard* minimum d'évaluation criminelle.

e) Il me semble qu'il y a contradiction entre le refus de l'extradition et l'expulsion ultérieure de l'accusé vers l'Etat requérant ; dans ce cas, l'expulsion devrait uniquement se faire vers un Etat tiers.

Veuillez croire, mon cher Confrère, à l'expression de ma haute considération.

Giorgio Cansacchi

Observations complémentaires de M. Giorgio Cansacchi

Turin, le 6 janvier 1980

Mon cher Confrère,

En réponse à votre lettre du 24 septembre et ayant lu les observations des membres de notre Commission, je vous expose mon opinion en me référant à mes communications antérieures.

Personnellement, je préférerais que notre Commission puisse aboutir à la rédaction d'une résolution sur les problèmes actuels de l'extradition et non seulement à un simple rapport, mais si ce but ne pouvait être atteint, je me rallierais à la décision de la majorité des membres.

Selon moi, les points les plus importants que nous devons discuter et signaler aux gouvernements sont les suivants :

a) recommander aux Etats d'accroître le nombre des traités bilatéraux et multilatéraux en matière d'extradition, en vue de faciliter la coopération inter-étatique contre une criminalité toujours croissante ;

b) étendre — dans les traités d'extradition — la liste des crimes qui ne sont pas considérés comme « politiques » et pour lesquels l'extradition est accordée ; comprendre, parmi ces crimes, ceux qui, dans la doctrine actuelle, sont dénommés « crimes contre l'humanité », et spécialement ceux qui donnent lieu à des massacres indiscriminés de plusieurs personnes par l'emploi d'armes très dangereuses (bombes, mitrailleuses, fusées, etc.) ;

c) consentir même — dans ces cas — à l'extradition des propres citoyens ;

d) prévoir, dans les traités d'extradition, l'obligation pour l'Etat requis, lorsqu'il refuse l'extradition, de soumettre le criminel réfugié sur son territoire à un procès pénal régulier en lui infligeant une peine proportionnée au crime commis et de ne pas se soustraire à une telle obligation par l'expulsion du criminel ;

e) établir, lorsque le traité d'extradition est introduit par une loi dans les ordres juridiques internes des Etats contractants, que les règles du traité doivent non seulement conférer des droits et imposer des devoirs aux gouvernements, mais aussi accorder de véritables droits subjectifs aux criminels réfugiés ; les inculpés pourraient ainsi, sur la base de ces règles de droit interne, s'opposer à leur remise à l'Etat requérant lorsque le crime pour lequel l'extradition est demandée ne rentre pas dans le champ d'application du traité.

En conclusion, comme je vous l'avais déjà signalé, j'approuve votre projet provisoire de résolution selon le texte français et je n'ai pas de modification à vous proposer.

Croyez, mon cher Confrère, à l'expression de ma haute considération.

Giorgio Cansacchi

2. *Observations of Professor Edward McWhinney*

Vancouver, October 16, 1979

My dear *confrère,*

I must compliment you, at the outset, upon a remarkably lucid and balanced Provisional Report that has succeeded so very well in establishing the points of consensus and difference among the individual members of our Commission, and also in communicating the nuances and finer points of the individual opinions. We are dealing with a very difficult and complex area of law, with many openings, in the formal legal categories, to « political » elements ; and so a good many of the inter-systemic, ideological conflicts of the earlier « cold war » era and of the present period of transition in international relations are necessarily carried over to our Commission's work in the interstices of legal doctrine and jurisprudence.

Your letter of September 24, 1979, raised the question of whether we should try to offer a project of Resolution to the 1981 general session of the *Institut,* or whether we should not, in contrast, profit from the decisions of the Institut's 1973 (Rome) general session and content ourselves with the simple presentation of our Commission's Final Report, accompanied by a formal Resolution for its adoption or even its simple « reception ». I believe that our Commission's subject lends itself admirably to following the 1973 (Rome) reforms in *Institut* practice ; and provided you can, as *rapporteur,* maintain the same skills of synthesis that you have displayed in the Provisional Report and can include a final chapter, in the Final Report, containing a succinct, point-by-point, *résumé* of our accord and disaccord in specific areas, that should suffice. The Project of Resolution that accompanied the Provisional Report seems to me to be fully capable of serving, with appropriate adjustments to take account of the further expressions of opinion from our Commission's members, as the basis for such a final chapter, point-by-point *résumé.*

You already have my written responses, *seriatim,* to the detailed questions set out in your Preliminary Report, and you have my additional comments at our meeting, in committee, during the 1979 (Athens) session of the *Institut.* I shall therefore content myself now with observations designed to supplement my original answers in the light of the comments since made by our colleagues, in writing and also orally ; and I shall formulate these supplementary comments in the specific context of the different sections and divisions of the Project of Resolution accompanying your Provisional Report :

Preamble

Paragraph 1 : I suggest changing the formulation so that it would now read — « be considered to form an appropriate starting point for regulating inter-State relations ».

I am not persuaded that the existing international law of extradition does, in fact, respond to all present needs or, certainly, to conceived future necessities,

of the international legal system ; and I think the Provisional Report should reflect this point of view more fully.

I. *The existing treaty system*

Paragraphs 1 and 2 : I remain sceptical as to the possibilities of achieving any really comprehensive, multilateral treaty-based approach to regulation of the problem, or at least of achieving a multilateral treaty-based coverage that really has teeth in it or that can realistically be expected to be observed and respected by States. There is a certain evident intellectual schism, or point of differentiation, within the Commission's ranks, between those who are most closely associated with national foreign ministries and those whose avocation is primarily in the Universities, with the former group seemingly more optimistic as to the practical possibilities of the multilateral treaty-based route.

We would all, of course, favour developing and accentuating what might be called the mini-multilateral treaty approach — the limited, « regional » approach concentrating on multilateral treaties binding countries that are ideologically more or less homogeneous or at least sharing the same basic legal values. The irony remains, however, that it is precisely those countries that need, least of all, to have multilateral treaties to regulate their legal relations *inter se*. Nevertheless, there is undoubtedly an incremental-educational value, for the world community at large, in proceeding step by step, as it were, by this « regional » route to some more nearly universal system of treaty regulation of the problem ; and even within the one regional community with substantially identical legal values and ideals — the European Communities' countries, for example — basic differences of intellectual outlook can develop over issues like the control of local dissident (or self-determination) movements, and there are merits in trying to reconcile the competing legal interests necessarily present in such problem-situations under the rubric of the same, common, treaty-based rules.

Paragraph 4 : In the light of the comments from our colleagues in response to your Preliminary Report, I suggest deleting the opening part — « Despite the existing legal situation... claims in matters of extradition ».

II. *The political offence*

I agree in general with your formulation, though I have doubts as to the place given in it to the international law concept of asylum which has always appeared to me as an essentially closed legal category, with a special, largely « regional », legal connotation and significance, and with only limited capacity for « progressive development » or generic extension.

III. *The protection of human rights in matters of extradition*

I think we would all support the abstract, general formulation, but recognise the enormous practical difficulties in the way of translating it, at the present time, into objectively verifiable decisions in concrete cases, granted

the present situation of an ideologically plural world community where different conceptions of human rights coexist, involving radically different views not merely of what constitute such rights (political *versus* economic rights) but also of the hierarchical ranking *inter se* to be accorded to competing rights (individual *versus* group rights). The present international climate of Big Power political confrontation over human rights and the polemicisation, for example, of the discussion of the so-called Human Rights « basket » of the Helsinki Final Act of 1975, is hardly propitious for the development of concrete and operational, detailed secondary principles in this area of our Commission's mandate.

IV. *The relationship between the right to grant asylum and extradition*

See my comments under *Section II* (*The political offence*), *supra*.

V. *The attentat clause*

I would suggest that we indicate that our focus is less upon the original, and historically dated, conception of the *attentat* clause — crimes against the titular head-of-state, which might or might not be important today, — than upon its essential thrust and purpose as extending to crimes of a particularly heinous character that revolt the conscience of humanity, and that presumably would be deserving of obloquy in all main legal systems. By way of enumeration, such crimes, to which the *attentat* clause should apply, might include today the killing or injuring of hostages or torturing of innocent victims.

VI. *Substituting prosecution*

The empirical record, in the Aerial Piracy cases, of application of the principle of prosecution by national criminal courts in lieu of surrender of the criminal delinquent and his extradition to those jurisdictions most actively interested in pursuing him, reveals, too often, casual and careless follow-up and humorously light criminal sentences — and this on the part of those countries with the most highly respected legal systems. I suggest we upgrade the recommendation (in *paragraph 4*) for a « minimum penalty » to one stipulating a penalty not less than that which would be applied by the jurisdiction concerned to its own nationals in a cognate case.

VII. *The extradition of nationals*

I would suggest that the development of an effective body of international law as to State duty on extradition requires that each State should be prepared to extradite its own nationals on demand of another State, on the same legal basis as it would allow the extradition of nationals of a third State. The only reasonable exceptions — apart from the « political offences » category and situations where there is ground to suspect a probable violation of human rights after extradition — would seem to be situations where the crime for which the extradition is sought is not an offence under the law of

the State from which extradition is requested ; or perhaps also situations where the conditions of criminal detention before trial or after conviction, in the country seeking extradition, fall significantly below the standards of the country from which extradition is requested.

VIII. *The relationship between the international obligation to extradite and the requirements of municipal law*

Paragraph 1 : I continue to have the reservations already communicated to you.

Paragraph 2 : I agree.

IX. *Arbitration*

This stipulation should, in my view, be reworded to make it clear that it includes not merely court-based arbitration, but also, for example, arbitration by special, *ad hoc* commissions set up by the parties on a consensual basis, and other, more informal modes of dispute-settlement (diplomatic methods, and the like) — all this in line with the delineation of the Procedures for dispute-settlement contained in recent authoritative formulations like the U.N. General Assembly's Declaration of 1970 on the Principles of Friendly Relations and Cooperation among States in accordance with the U.N. Charter.

Sincerely yours,

Edward McWhinney

3. *Observations de M. Riccardo Monaco*

Rome, le 16 juillet 1980

Mon cher Confrère,

Je suis vraiment confus de répondre avec tant de retard à votre aimable lettre du 24 septembre 1979 et je vous prie très vivement de m'en excuser. Comme vous le savez, j'avais beaucoup souhaité faire partie de votre Commission dans l'espoir qu'il me serait possible de donner une contribution substantielle à vos travaux.

Malheureusement, tout un ensemble de circonstances adverses m'ont empêché de faire un examen approfondi des textes du projet de résolution et de vous envoyer mes observations à temps.

Cependant, je tiens à vous préciser que j'ai pris connaissance de tous les travaux antérieurs et que j'ai gardé à l'esprit les débats que nous avons eus à Athènes lors de la réunion de notre Commission. Tout cela me conduit à réfléchir sur la seconde partie de votre lettre, dans laquelle vous posez la

question de savoir quelle serait la meilleure façon de présenter le résultat de nos travaux à la prochaine session de l'Institut. Il me semble que les divergences de vues existant entre les membres de la Commission et qui découlent, à mon avis, aussi de la structure différente des systèmes de droit auxquels ils appartiennent, laissent persister des distances qu'il serait difficile de combler au moyen de discussions qui auraient lieu au sein de l'Institut.

C'est pour cela que je préfère l'idée de ne pas présenter à l'Institut un projet de résolution, et de se borner à soumettre un rapport. Naturellement, ce rapport devrait se terminer par des conclusions très claires : à cet égard, j'ai une nette préférence pour les idées que vous avez vous-même exposées lorsque vous avez passé en revue les différentes opinions des Confrères qui ont répondu au questionnaire. En effet, c'était la voix de la compétence et de la sagesse qui s'exprimait par vos considérations.

En vous renouvelant mes excuses pour tant de retard, je vous prie, mon cher Confrère, de bien vouloir agréer l'expression de mes sentiments cordiaux.

Riccardo Monaco

4. Observations of Ambassador G.E. do Nascimento e Silva

Bogota, 26 November 1979

My dear *Confrère,*

Congratulations on your Provisional Report in which you so ably managed to conciliate the conflicting views of the other members of our Commission.

I have the following observations in response to your draft Resolution.

I consider the adoption of a Resolution as highly desirable, since the I.D.I. with its authority can stress once again the necessity of the reformulation of the basic principles on extradition. The Resolution should however concentrate itself on the main issues such as the necessity of extradition being granted even if there is no treaty obligation. By acting *de lege ferenda,* the Institut would show the way to a solution to the present situation in which there are more than 150 members of the international community, and a network of treaties linking them is impossible. Secondly, the Institut should try to formulate a definition of political offence, which could be of a negative character, enumerating those crimes in which extradition should be obligatory. Such a definition would be of a doctrinary character and not an international treaty in other words the Institut has a flexibility that an international conference does not enjoy.

In the preamble a reference should be made to the previous resolutions of the I.D.I. and to the increase in the number of members of the international

community with the resulting difficulty of States to sign extradition treaties even with a small percentage of them.

I. *The existing treaty system*

1. This paragraph should be reformulated in order to take into account the granting of extradition independently of an existing treaty. Since we should act *de lege ferenda*, the Commission cannot ignore the existing practice of many countries that consider the granting of extradition as an international duty aimed at combating crime in order that laws and justice be respected world-wide. The Institut cannot go back on its previous resolutions accepting the principle that in the absence of a treaty States should grant extradition.

2. As drafted, the paragraph is a mere observation devoid of legal weight. The first phrase could be included in the preamble ; the second is unnecessary.

3. There is no doubt as to the right of States to make reservations to multilateral treaties on extradition. States should however avoid recourse to such reservations or abusive interpretations and should be invited periodically by the depositary to withdraw them.

4. I would prefer the following : « States should be encouraged to grant extradition even in the absence of a binding treaty, as long as a declaration of reciprocity is given ». The fact that many States only permit extradition if a formal treaty obligation exists does not mean that international law should be adapted or modified in order to take such a practice into account.

II. *Political offence*

1. I would prefer a more concise rule : « States may refuse extradition in the case of purely political offences ».

2. In spite of the highly qualified opinion of some of the members of the Commission I feel that the problem of territorial asylum should not be linked to that of extradition. It will only complicate matters.

3. I would prefer a more concise text : a definition of political offences should be made preferably in a negative sense, *i.e.* that certain offences should not be considered as being of a political nature or that the evocation of the political motive should not be a reason for not granting extradition.

4. This paragraph is open to very serious criticism. I imagine it has in view Western European practice, but I am sure that if in other politically homogeneous legal systems which differ from it the extradition of certain individuals were simplified, *i.e.* certain formalities were passed over, such an act of co-operation would be considered by the Western European press as a violation of human rights.

5. This paragraph is closely linked to paragraph 3. If the Institut should adopt a definition of political offence, naming these serious international

crimes, States would be obliged to grant extradition and paragraph 5 would be superfluous.

III. *The protection of human rights in matters of extradition*

From a purely theoretical point of view I might accept the idea that a threatened violation of a human right should justify non-extradition. In practice such a position would only increase the confusion in an already complex subject, especially if we accept the tendency of certain authors to limit human rights to political rights. If a foreign worker does not enjoy the same rights as those granted to nationals (as occurs in most Western European countries), should such a violation of human rights be considered as an obstacle to the granting of extradition? And if there is any form of racial discrimination? We must not forget that the problem of conditions in prisons has already been considered as violating human rights, in which case extradition could be refused on the ground that the person whose extradition is requested would be subject to undue hardship in the prisons of the requesting State.

IV. *The relationship between the right to grant asylum and extradition*

In my previous answer I said that « it would be advisable not to link extradition and asylum ». I might add that this point of view was adopted by the U.N. Group of Experts which met in Geneva in April 1975 to prepare the draft Convention that was to be the basis of the discussion at the U.N. Conference on Territorial Asylum held in Geneva in 1977.

The adoption of such a principle would represent a step backwards by the Institut. The fact that certain national courts adopt such a position should not serve as an example and influence the position of the Institut which should reassert its resolution of 1894 in the sense that the person to be extradited should be enabled to invoke not only municipal law but also a treaty on extradition between the two countries.

V. *The* attentat *clause*

The last phrase of paragraph 2 should be dropped. No political motivation or invocation of human rights can justify non-extradition in the case of a serious international crime, such as kidnapping, holding of hostages, hijacking of planes, murder of innocent people and other equally odious crimes. To invoke human rights in such cases is illogical since the authors obviously have not the slightest intention to respect human rights but make a mockery of the principal human right, namely the right to live.

VI. *Substituting prosecution*

1. In my previous answer I was in favour of this system, which is accepted by Brazilian law. The two conventions on aerial piracy (The Hague, 1970, and Montreal, 1971) contain rules on this matter.

But after reading the answers of the other members of the Commission, I wonder if at this stage it is advisable to go further than paragraph 1, that is : « The system of substituting prosecution should be strengthened and amplified ».

In many legal systems the territorial principle in criminal matters is such that I feel that the possibility of a change is slight. You also recall that it is « well known that in many States, and particularly in cases of interest here, the proceedings are performed with the exclusion of the public ». Once again I doubt if these States would be willing to modify their policy in this matter.

Grosso modo, the possibility of substituting prosecution would arise in the cases of political asylum and of non-extradition of nationals and if a violation of human rights is expected. Once again a complex problem becomes even more complex by the introduction of subjects which are alien to it, *i.e.* territorial asylum and human rights. If we remove these two stumbling blocks, we remain with the question of the judgement of nationals who have committed crimes abroad, which is much simpler. I would prefer to include this question in the next chapter.

VII. *The extradition of nationals*

Taking into account my remarks in the previous paragraph, I would draft paragraph 1 as follows : « Every State remains free to refuse the extradition of nationals. In this case the Government of which he is a national must submit him to judgement ».

2. In the case of paragraph 2 a reference should be made to the obligation of the requesting State to make a declaration of reciprocity, *i.e.* that in the case of an equally serious international crime it would agree to extradite one of its nationals.

VIII. *The relationship between the international obligation to extradite and the requirements of municipal law*

1. I would suggest a reference to « treaties on extradition or related matters » (I have in mind the The Hague Convention of 1970 and that of Montreal of 1971).

2. In my opinion the opposite rule should be adopted. Expulsion and deportation of aliens are decided in most countries by the Executive : Ministry of Justice, immigration authorities or the police ; the granting of extradition is authorized by the Supreme Court or another high ranking judiciary tribunal. This rule could easily result in abuse, since an individual whose extradition might be refused can simply be expelled. It is quite true that the last phrase could avoid such abuse, but in this case it would only be an exception to the basic rule which I deem unacceptable.

IX. *Arbitration*

I would rather say that it would be desirable to include in future treaties on extradition an article creating courts of arbitration in order to decide upon disputes regarding the application of the provisions of the treaty.

G.E. do Nascimento e Silva

5. *Observations of Judge Shigeru Oda*

16 August 1979

Dear Professor Doehring,

re: The Twelfth Commission of the Institut de Droit International

Thank you for your note of 11 April 1979 together with the draft of the resolution and the provisional report.

First of all I should like to congratulate you on the completion of such a distinguished piece of work, particularly on so delicate and complex a subject as extradition. My opinion was presented on 12 Avril 1978 in response to your questionnaire and is also referred to in your provisional report. There is not much to add to what I have already suggested, but if I may supplement by previous remarks I would say the following:

II-2. The State is always free to refuse extradition unless otherwise obliged by extradition treaties, except in the case of reciprocity, and generally such treaties provide for the right to refuse extradition of political offenders. Is it the intention of this paragraph to cover only those cases where extradition treaties lack a clause providing for non-extradition of political offenders? As in most cases in the past, extradition treaties should contain such a clause but if such a provision is lacking in the case in point, refusal of extradition should be dealt with as a case of granting political asylum which may be covered by general international law.

III-1. This seems to be related to what I suggest in connection with II-2. If not bound by the extradition treaty, the State is always free not to extradite criminals. Is this paragraph intended to cover the case when an extradition treaty exists but does not provide for the non-extradition of political offenders? If so, it seems to be sufficient to suggest that the non-extradition of political offenders is a *sine qua non* for extradition treaties.

IV-1. I wonder if « the requested State » on line 3 is not a mistake for « the requesting State ». This problem is certainly very controversial, but I am

of the view that, if there is any risk of political persecution, it may occur whether or not the domestic legal system is well-organized to implement constitutional safeguards. It seems very doubtful whether due observation of all requirements of the rule of law can totally eliminate the existence of political persecution.

IV-2. I think that the political offender should be allowed under the law of the requested State to invoke the relevant treaty provisions — in other words, a clause for non-extradition of political offenders — before the courts of the requested State. This problem is certainly related to the question raised in VIII-1.

VI and VII. My view, as expressed in my previous reply though not reflected in your provisional report, is that a substitute prosecution is necessary only when a State, while under treaty obligation to extradite criminals, refuses to extradite *its own nationals*.

VIII-1. This paragraph seems to be related to IV-2. When the duty to extradite is provided for in the extradition treaty, a State party to the treaty will, of course, be obliged to organize its domestic legal system so as to comply with the treaty requirements. If a clause for non-extradition of political offenders is contained in the treaty, this simply means the exemption of the duty of that State from its treaty obligation, and it is a matter of logic that the arrangement of the domestic legal system for this particular purpose cannot be a duty imposed in its relation to the other State party. The question is one of enabling the political offender concerned to rely on this exemption clause before the courts of the requested State. Again, this cannot be a treaty obligation, but can only be a duty imposed by general international law.

VIII-2. I do not fully understand what « prohibited extradition » would mean. As I have previously stated, the extradition of political offenders is not a matter to be prohibited by the treaty itself but the non-extradition of political offenders is simply an exemption from the general treaty-obligation of extradition of criminals. If there is anything which is to be prohibited under international law it will only be the expulsion of political asylees, which may become a rule of general international law.

I have possibly failed to grasp, here and there, the proper meaning of what you stated in the draft resolution, but I nevertheless hope this supplementary opinion may be of some use for your future consideration.

Yours sincerely,

Shigeru Oda

Letter of Judge Shigeru Oda

5 November 1979

Dear Professor Doehring,

With regard to your letter of 24 September, I was one of the few who had already responded to your second questionnaire just before the Athens meeting, and I think it is not necessary for me to repeat my previous comments. I note

that you refer to the possibility of not making a resolution but merely presenting a report at the forthcoming session. Personally I would have preferred it if our deliberations could have resulted in the completion of a draft resolution to be acceptable by the Institut itself.

Yours sincerely,

Shigeru Oda

6. Observations of Professor Endre Ustor

Budapest, 30 July 1980

My dear *Confrère,*

I apologize for my lateness in replying to your circular letter of 24 September 1979 as follows:

I

As to the question whether the 12th Committee should make use of the provision of Article 4 paragraph 7 of the Rules (Règlement) of the Institut and submit a report without presenting a draft resolution:

Does this provision really entitle the Committee to abstain from submitting a draft resolution or does it give right only to the session to set aside a draft resolution and terminate the discussion by approving the report or by taking note of it? I am not quite sure.

In any event I would opt for the submission of a draft and I believe that both you and the other members of the 12th Committee would be much happier if your work could be crowned by a resolution of the Institut.

I come now to the question of what kind of draft should we submit? To raise this question may seem to be awkward in view of the draft resolution which you prepared and which we partly discussed in Athens. I hope, however, you will forgive me if I do not hide my doubts and hesitations in this respect.

First, I think that your project is far too ambitious and detailed. Second, it goes well beyond the task set for the 12th Committee as indicated in its title: « New problems of the international legal system of extradition with special reference to multilateral treaties ». Third, if it contained too many controversial points — as it does at least in its present form —, it would be extremely difficult to have it adopted by a substantial majority.

II

On the basis of the above considerations I should like to submit to your judgement the idea that we prepare a less detailed, less abstract and perhaps

less controversial text which would embrace from this huge material only one or two important points. In choosing such a point or points my preference would be to turn to such aspects which are really new or at least topical, to problems which are practical and can be solved.

The following is an illustration of the way in which I imagine one item could be elaborated for the purpose of a resolution. The point chosen by way of example is : « extradition in the absence of treaty ». You may ask : is this a new problem ? I shall come back to this question in a moment.

Common law countries on the whole and several others make extradition conditional on the existence of a treaty. More than hundred years ago this practice was criticized by a Royal Commission on Extradition in Great Britain. The Commission in its report of 1878 stated *inter alia :*

« We would... suggest that extradition treaties with other States... should no longer be held indispensable, and that... statutory power should be given to the proper authorities to deliver up fugitive criminals whose surrender is asked for, irrespectively of the existence of any treaty between this country and the State against whose law the offence has been committed. It is as much to our advantage that such criminals should be punished, and that we should get rid of them, as it is to that of a foreign State that they should be brought within the reach of its law » (Report of the Royal Commission on Extradition, c. 2039/1878 ; 6 British Digest, 805/1965, quoted by Shearer, p. 29).

Two years later, in 1880, the Institut in its Oxford resolution declared that the conclusion of extradition treaties was desirable (par. 2), but at the same time favoured extradition of malefactors also in the absence of treaties (par. 3 and 4).

All this is, of course, an old story, but still topical and a number of new elements are now involved, which call for urgent action. Which are these new elements ? They are as follows :

a) the number of independent States has sharply increased ;

b) crime has assumed new and wider dimensions, and new forms, and it frequently transcends national boundaries ;

c) the enormous development of the means of transportation and communication has greatly facilitated the escaping of criminals from their homelands ;

d) States have solemnly declared their readiness to co-operate with one another in accordance with the U.N. Charter.

In this situation : .

a) it becomes more and more important that no State's territory be used for a place of refuge of common criminals and hence it is in the interest of all States to promote their co-operation in matters of extradition and make their co-operation more effective ;

b) this goal can practically not be achevied by weaving a net of bilateral extradition treaties, as envisaged at Oxford (because, if we count 160 independent States, 12720 bilateral treaties would be needed altogether for covering the whole field — my mathematics, subject to expert correction) ;

c) while it is expected that codification of international law and its progressive development will sooner or later extend to the international aspects of extradition, still the conclusion of one universal or more regional multilateral treaties and moreover their entry into force in respect of all States could not be achieved in the foreseeable future;

it would seem to be right if the Institut, following the path of the Oxford resolution, took stand again in the matter.

It could *e.g.*:

a) recall the duty of States to co-operate with one another in accordance with the U.N. Charter;

b) declare that that duty extends to the co-operation in matters of extradition, as extradition is an important means in the fight against crime;

c) express its expectation that States will refrain from harbouring persons who committed common crimes in foreign countries;

d) reiterate its desire expressed in par. 4 of its Oxford resolution that each State adopt a reasonably drafted extradition statute setting out the procedural and other conditions for the extradition of criminals to countries with which it is not bound by treaty. (It could possibly outline the main elements of a model law).

All this is, of course, only raw material and subject to improvement and correction.

A resolution on these lines could, I submit, catch the attention of the interested U.N. bodies, as *e.g.* that of the U.N. Congress on the Prevention of Crime and Treatment of Offenders, and could entail in this way official action.

I do not know if I am not too optimistic in hoping that at least some of the ideas outlined above will be attractive to you and to the other members of our Committee.

III

Before terminating this letter I have to say one or two words in connection with your provisional report circulated in April 1979.

1. Speaking of the age-old problem of whether an objective definition of the concept of « political offence » was desirable or the qualification of the offence should be left to the discretion of the requested State, on page 87 of your report you said the following:

« In so far as the extradition is executed without a contractual obligation, the problem mentioned here does not exist: if a State is free to refuse the extradition on account of the lack of a treaty obligation, there are no obstacles to conceding to the State the unilateral definition of the political offence. If, however, one adopts Mr. Ustor's opinion that there is an obligation to extradite even without the existence of a binding treaty, it follows that the requested State is not free to justify the non-extradition solely by a unilateral definition of the political offence ».

With all respect I venture to submit that this is a *non sequitur*. When I believe that States are expected to co-operate in the field of extradition of fugitive common criminals even if not bound by formal treaties, it does not follow that in my view States must grant each and every request for extradition and shall not be allowed to refuse requests which do not meet the generally required procedural or other conditions, *e.g.* requests which relate to the extradition of persons not belonging to the category in question (*i.e.* the category of fugitive common criminals).

2. On page 87 of your report you refer to my view on the tractability of the question of political offence and state that Mr. Ustor « considers the whole problem to be irrelevant and believes that it is a hindrance to further developments in matters of extradition ». If you will kindly re-read paragraphs 14 and 15 of my letter you will yourself have to admit that this statement does not reflect faithfully what I have written there.

I would be much obliged if you could make the necessary corrections in the final text of your report.

With best regards I remain,

Yours sincerely,

Endre Ustor

7. *Observations of Professor Ben Atkinson Wortley*

Wilmslow, 26 February 1980

Dear Colleague,

Thank you for your letter of 24 September 1979. I do not find any help in volume I of the latest Annuaire de l'Institut, but on principle I should like to say that it would seem to me an admission of defeat not to present a draft resolution and I would, in every case, hope for at least a majority decision on any resolution.

Yours sincerely,

B.A. Wortley

The effects of armed conflicts on treaties

*(Fifth Commission)**

Provisional Report and Proposed Draft Resolution[1]

Bengt Broms

Introduction

In the first place I would like to express my best thanks to those members of the Fifth Commission who have sent their replies to the questionnaire concerning the Effects of Armed Conflicts on Treaties.

The first part of the provisional report includes a survey of the replies to the first three questions of the questionnaire concerning the mandate of the Commission. Special attention has been focused on the clarification of the terms « armed conflicts » and « treaties » as they appear in the mandate of the Commission. The second part deals with the following five questions concerning the main principles which can be deduced from the rules of international law governing treaties and from the more recent practice of States. The last part of the report covers the remaining two questions, dealing with the form in which the conclusions of the Commission are to be expressed as well as their material content.

A proposed draft resolution is annexed to the provisional report and there is another annex containing the replies given by members to the questionnaire[2]. It is hoped that at the forthcoming session in Oslo the members of the Commission will be able to discuss the

* The initial composition of the Commission was as follows : MM. Broms, *rapporteur*, Briggs, Dehousse †, von der Heydte, McDougal, O'Connell †, Rosenne, Tomsic †, Verosta, Sir Humphrey Waldock, MM. Yokota, Zemanek, Zourek †. Since 1978 the Commission is composed of MM. Broms, *rapporteur*, Briggs, Castrén, von der Heydte, McDougal, Rosenne, Schindler, Ténékidès, Verosta, Sir Humphrey Waldock and M. Yokota.

[1] See also *Addendum* to the Provisional Report and Proposed Draft Resolution p. 261.

[2] See Annex II, p. 248.

contents of the provisional report and that subsequently as many members of the Commission as possible will indicate their views prior to the drafting of the final report.

I

1. The members were first asked whether it was their opinion that the Commission had to define the kind of armed conflict (including wars) which may have effects on treaties ? If the answer to this question was positive, there followed an additional question as to what the criteria concerned should be ?

As to the first part of this question the replies indicate that opinions are divided. Among those members who represented the view that the Commission need not define the notion of « armed conflict » various grounds were mentioned. *Stephen Verosta* refers to the Resolution of the Institute of International Law of 1912 which in dealing with the effect of war on treaties and international conventions only mentioned « outbreak and continuance of hostilities ». *Verosta* also makes a reference to Article 73 of the Vienna Convention on the Law of Treaties ; this speaks of the « outbreak of hostilities » which could cover armed conflicts, acts of aggression and war. His conclusion is that the Commission should therefore proceed accordingly. *Herbert W. Briggs* combined his replies to the first two questions and maintains that it is not the function of the Fifth Commission to provide definitions of « war », « civil war », « armed conflict », or to determine when they exist. *Briggs* goes on to note that in paraphrasing the terms of reference the Bureau apparently wished the Commission to go beyond the problems of the effects of war on treaties and to examine also the effects of certain hostile acts or phenomena short of war. While recalling that traditionally hostile measures short of war have included such behaviour as retorsion, intervention, reprisals, retaliation and the threat or use of force *Briggs* states that these have not always involved the use of force and even fewer have involved armed conflict, « with which alone we are here concerned ». *Myres McDougal* is of the opinion that the Commission might concern itself with all intense coercion, which includes employment of the military instrument. In his opinion

ambiguous and tautological definitions of « war » and « armed conflict » serve no useful purpose.

Jaroslav Zourek adopts the opposite attitude to these views in saying that it would be indispensable to define by precise criteria what are the armed conflicts which have an effect on treaties. In the introduction to his reply *Zourek* recalls that on account of the prohibition to use force in the international relations of States the word « war » has ceased to be a legal notion. Three other concepts, *i.e.*, aggression, self-defence and international sanctions, have taken its place. In this connection the definition of aggression adopted in Resolution 3314 (XXIX) of the General Assembly of the United Nations was referred to. *Zourek* goes on to say that even if the rules of humanitarian law apply in the case of aggression it would not be possible for the aggressor by declaring a state of war to create in his favour other rights which the belligerent parties enjoy in accordance with the laws of war. For instance, the aggressor could not create for other States any obligations of neutrality by a declaration of war. Nor would it be in the interest of the State that is the victim of an aggression to accord the aggressor by a reference to a state of war a better legal position than he would otherwise have. Nor may the operations undertaken to fight an aggressor or another party violating international law — *i.e.*, the coercive measures employed — be assimilated with the operations of war. Thus there is no justification for speaking of a war of sanctions in this connection. On the basis of this argumentation *Zourek* draws the conclusion that the state of war has no importance anymore in the light of the evolution of international law.

Accordingly, *Zourek* is of the opinion that the Commission should not dwell particularly on war or state of war. Instead attention should be paid to the fact of whether there is an armed conflict between States and furthermore whether a conflict of this kind has reached such a magnitude that it can be distinguished from a simple boundary incident. However, *Zourek* would hesitate to include the element of time — because a sufficiently well armed State may destroy a weak neighbouring State within a few hours and before anything but symbolic resistance can be made.

When these differing views are submitted to investigation it becomes clear that the majority view is that there is no need to define the kind of armed conflict (including wars) which may have

effects on treaties. It is here submitted, however, that this attitude — should it be adopted — requires some qualification. There might be no need to define the term « armed conflict » in this context but we should have a fair agreement as to what we are talking about when dealing with our main problem. This is probably what *Zourek* wants to point out when he speaks of an armed conflict between States and of measuring its magnitude.

The problem reminds me of the debate in the Special Committee to Define Aggression which was set up by Resolution 2230 (XXII) of the General Assembly of the United Nations. Eventually it was agreed that in accordance with the definition an act of aggression was to be limited to the use of armed force by a State against another State together with a *de minimis*-clause. The subsequent practice of the Security Council seems to indicate that members of the Security Council seem to be thinking in terms of action short of war while the term « war » were reserved for cases in which the parties either have declared war upon another State or where the fighting is carried out in a manner corresponding to the intensity with which the major wars of the past have been fought.

In connection with the work of the Fifth Commission « armed conflicts » has evidently been used as a term covering not only measures short of war but also the state of war itself. While there may be no need for a definition of « armed conflict », there could possibly be broad agreement here as well, since there might be sufficient support for the idea that « armed conflict » has to fulfil the requirements of a *de minimis*-clause in so far, for instance, that a boundary skirmish — as has been rightly pointed out by *Zourek* — need not be considered as a case giving rise to the problem of whether the treaty relations between the parties have been affected. In the same connection, it should be noted, too, that the armed conflict has to take place between States which have treaty relationships with one another. This is a practical condition for our problem to arise in a specific case.

2. The second question was closely related to the first one and it was merely intended to clarify the task assigned to the Fifth Commission. Was it the intention that the Commission was to pay more attention to the effects of war on treaties and were the armed conflicts mentioned rather to cover cases where the conflict has the

magnitude of a war but where parties do not admit that they are involved in a state of war ?

The replies differ here, too. *Shabtai Rosenne* is of the opinion that we should examine the matter that has been excluded by the International Law Commission. Article 73 of the Vienna Convention on the Law of Treaties provides that the provisions of the Convention « shall not prejudge any question that may arise in regard to a treaty... from the outbreak of hostilities between States ». While *Verosta* replies « yes » *McDougal* says as emphatically « no », adding that this would leave our focus too ambiguous to be manageable. *Briggs* asks if there is any evidence of practice in which treaties are terminated or suspended by the mere fact of armed conflict and where no legal status of war exists ? *Zourek* refers to his preliminary observations and thinks that once the armed conflicts are classified in the manner he proposes in his reply to the first question it would be futile to have different solutions so far as wars and armed conflicts are concerned. Furthermore, *Zourek* feels that such a distinction would be contrary to the present state of international law.

On the basis of the replies it seems as if the Commission should consider the question of whether there are different sets of legal rules governing the effects of war and those of armed conflicts on the treaties ? In the replies no evidence is presented of cases where the problems of the effects of armed conflicts on treaties had been discussed as a separate aspect of the effects of war on treaties. Due to the outlawry of war it seems, nevertheless, important to follow the designation of our task and to speak of « armed conflicts » in this context. This would comply also with the reply given by *Rosenne* including a reference to the Vienna Convention on the Law of Treaties. The reasoning of *Zourek* leads to the same conclusion.

The fact that the cases concerning the effects of armed conflicts on treaties are apparently scarce and difficult to find might be an indication of the fact that the courts are still thinking in the conservative way in terms of wars only. If cases falling into the group sought after in this context, *i.e.*, where the effects of armed conflicts are discussed, were to be found by members of the Commission it would, indeed, as *Briggs* points out, be worth while to analyze them.

3. The third question was intended to clarify the situation as to

the adequacy for our purposes of the definition of a treaty as provided in the Vienna Convention on the Law of Treaties. *Briggs*, *Verosta* and *Zourek* share the opinion that the Commission should limit its work in this respect and follow the Vienna Convention. Article 2, par. 1 (a) provides as follows in defining the term « treaty ». It

« means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ».

McDougal is, however, of the opinion that few agreements « not in written form » may raise over general problem, « but it would appear unwise so to limit ourselves ». To this he adds that « our concern should be for all factual agreements, any communications between State officials that create shared expectations of commitment ». *Rosenne* is of the opinion that the definition of treaty in the Vienna Convention should certainly suffice. However, he wishes to remind us of the definition in Article 2 of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission in a preliminary form in 1974.

On the basis of these replies one may conclude that the definition included in Article 2 of the Vienna Convention should be accepted as a basis for the work of the Commission. Of course, a problem may arise in connection with other than written agreements, too, as was said by *McDougal*, but such cases are bound to be few. It is also quite probable that the same rules that are expected to be applied to cases concerning international agreements between States in written form and governed by international law might be applied to these cases.

II

4. In so far as the main principles which can be deduced from the rules of international law governing treaties and from the more recent practice of States are concerned the enquiry was about a possible preference regarding the main theories on the effects of armed conflicts on treaties. As could be expected opinions differ.

McDougal takes a negative attitude in suggesting that the main

theories appear useless or positively antithetical to rational community policy. *Rosenne* prefers a pragmatic approach, eschewing theoretical considerations as much as possible — thus following the approach of the International Law Commission and of the Vienna Conference on the Law of Treaties. At all events, he wants to reserve his position on theoretical aspects until later. *Briggs* also adopts a negative attitude with regard to the theories in saying that the Commission should be more interested in collecting and analyzing examples from the practice of States.

Verosta and *Zourek* adopt a positive approach. *Verosta* suggests that any assessment in this respect has to take into account the object and purpose (or nature or type) of the particular treaty and the intention of the parties. He goes on to say that the Institute was in 1912 much closer to such an assessment than the theory of annulment of treaties which would have led to absurd consequences, even bestowing a legal advantage on the aggressor. *Zourek* points out that in his opinion no single theory could provide answers about the various categories of treaties. While recalling the three main theories, he concludes that the Commission should examine the various categories of treaties in order to decide in the light of international law what the effects of armed conflict are in each case.

Here I would like to clarify a point concerning the questionnaire. It was not intended that members should be obliged to choose *a priori* a certain theoretical model for the solution of the main problem. It is but natural that the solution has mainly to be sought in analyzing past practice.

5. The members were also asked for their opinion on the criteria best suited for the classification of treaties. Among the members *Briggs* is of the opinion that *a priori* classifications should be avoided and the classification be made only where the expression of a rule requires it.

McDougal points out that treaties might be classified in terms of every feature of the process of agreement. This statement leads him to list the following features: (1) The parties: number and character; (2) The purposes in terms of values sought (security, alliance, commerce, other wealth transactions, human rights, protection of health, promotion and dissemination of knowledge, protection of the family, and so on); (3) Context of commitment (geographic

range, duration, institutionalization, expectations of crisis) ; (4) Bases of power of parties (large or small, developed or developing) and (5) Strategies of negotiation (relative emphasis upon persuasion and coercion). As another relevant classification of agreements *McDougal* mentions one which might be built upon function and attending expectations of permanency. He mentions as examples (1) Contractual (commitment to a future policy by a limited number of parties) ; (2) Law-making ; (3) Constitution-making and (4) Conveyances (« Executed agreements » creating expectations of permanency in commitment).

In his reply *Zourek* mentions two large categories of treaties which merit particular attention by the Commission. In the first place are the treaties having the character of contracts and the law-making treaties. *Zourek* goes on to say that in a great majority of cases this distinction conforms with the distinction between multilateral and bilateral treaties although this is not true in all the cases. He mentions as a special case in this connection a situation where a bilateral treaty was concluded on the one side by a party consisting of several States. In the opinion of *Zourek*, furthermore, a clear distinction is to be drawn between executed and executory treaties or clauses.

For practical purposes in so far as the work of the Commission is concerned *Zourek* proposes examination of the following categories of treaties : (1) Treaties which include a provision to the effect that they will not be terminated by the outbreak of an armed conflict ; (2) Treaties which by their nature have to be applied during hostilities ; (3) Political treaties ; (4) Treaties of commerce ; (5) Treaties which create a status or an international régime ; (6) Treaties which create an international organization or agency ; (7) International private law treaties and (8) Treaties which include among their parties also States which do not belong to the belligerent parties.

On the other hand *Rosenne* adopts a different attitude in pointing out that in his opinion no further classification of treaties is required beyond that adopted by the International Law Commission on the law of treaties. *Verosta* mentions that the main classification of multilateral and bilateral treaties should be « political » and « non-political » treaties. He points out the difficulty which the Institute faced in 1912 when an enumeration of political treaties produced only the general clause : « and generally treaties of a political

character ». What *Verosta* proposes that the Commission should do is to try and give a general definition of « political treaty ».

After comparing the replies it seems clear that the expression of the rules on the effects of armed conflicts on treaties requires the classification of treaties. It is also evident that there are various alternative solutions in this respect. The Commission may profit from a combination of various proposals presented by members. Practicable solutions are offered, among others, by the division into bilateral and multilateral treaties, treaties having the character of contracts and the law-making treaties as well as executed and executory treaties or clauses.

It is submitted here that all of these classification grounds are applicable to the main problem under investigation. In so far as the proposal to divide treaties into « political » and « non-political » is concerned, it seems as if the creation of a definition of a « political treaty » might lead to difficulties due to the vagueness of the term « political » as applied to treaties. It may quite well be argued that all treaties are « political » even if their motivation — strictly interpreted — could be classified otherwise. To give an example one could ask whether a treaty whereby State A agrees to provide war materials to State B in return for the right to place its troops on a limited part of the territory of the latter to further strengthen the defence of State B is a political or non-political treaty? On the surface one might call it a political treaty but State A could also claim that the treaty was entered into solely for commercial purposes — to create a market for surplus war materials. Again one could argue that any treaty is « political » because it is ratified by political organs and even a treaty regulating cultural relations between neighbouring States may have a political motive. Therefore, it appears to be advisable not to choose this ground as a criterion in this context.

Further grounds for classification are to be found in those treaties which include clauses indicating what their fate at the outbreak of an armed conflict will be. In so far as treaties falling into this class are concerned, it seems clear that the treaties should be implemented in accordance with the specific provisions.

In summary it seems as if the selection of the grounds for classification should be rather limited in this context. Furthermore, there is probably no need to classify the treaties extensively on the

basis of their subject matter because the classification and the rules proposed would most likely become too complicated.

6. The first part of the sixth question asked the members to mention important recent cases or studies which in their opinion should be taken into account in addition to those which were referred to in the preliminary report. The latter part of the question asked the members to describe the dominant theory of their own Governments and courts in view of the effect of armed conflicts on treaties.

In so far as the practice of the United States is concerned, both *Briggs* and *McDougal* refer to *Marjorie M. Whiteman,* Digest of International Law, Vol. 14, pp. 490-510. *McDougal* refers also to a letter dated November 10, 1948, addressed to the Attorney-General by the acting Legal Adviser Jack B. Tate. In this letter the dominant theory in the United States was described as follows : « the determinative factor is whether or not there is such an incompatibility between the treaty provision in question and the maintenance of a state of war as to make it clear that the provision should not be enforced ».

In so far as the practice of Israel is concerned *Rosenne* explains that the question has not really arisen ; neither for the Courts nor for the Government. *Zourek* is of the opinion that the practice of States prior to the refusal to make use of force in international relations need not be taken into account anymore. He goes on to warn against the dangers of investigating the most recent practice because it might, in fact, be contrary to international law.

Verosta explains first that during the German occupation no Austrian Government was in operation and Austria was not at war with any country. Accordingly the treaties concluded by Austria since 1918 were considered as suspended. Since its liberation Austria has resumed its diplomatic and consular relations and occupied its seat in all international organizations where it was a member prior to the annexation. Austria has also applied again all multilateral and bilateral treaties concluded since 1918. Some additional protocols were needed to meet the new circumstances.

Between 1945 and 1955 Austria had during armed conflicts continued its treaty relations with both sides in the armed conflicts. After having gained the status of permanent neutrality in 1955, Austria has fulfilled and will fulfil, should an armed conflict occur, its

obligations under multilateral and bilateral treaties to its treaty-partners on both sides of the conflict until the supervening circumstances would make the performance impossible. *Verosta* concludes that for Austria as a permanently neutral State the outbreak of hostilities as a rule has no effect on treaties. As a rule the Austrian courts act in conformity with the legal standpoint of the Government.

Virtually no references to new cases are given by the replies. This seems to indicate that there are relatively few such cases relating to the problems with which the Commission is concerned. The recent cases are usually concerned with the effects of the outbreak of war on treaties and the courts seem to follow rather closely those precedents which have been decided during the years following the end of the Second World War. Apparently the courts have not paid sufficient attention to the fact that since the adoption of the Kellogg-Briand Pact and, more recently, the creation of the Charter of the United Nations the significance of the existence of a formal state of war is no longer a prerequisite for the consideration of problems of the effects of armed hostilities on treaties. There is still a tendency to pay attention to the existence of a formal declaration of war. However, States try to avoid giving such a declaration while they are mindful of the outlawry of war.

For these reasons it is submitted here that the preamble of the draft resolution to be adopted by the Institute ought to include a provision to the effect that the formal declaration of war is not decisive in judging the effects of an armed conflict on treaties. A similar solution was applied by the General Assembly of the United Nations when it adopted Article 3 of the Definition of Aggression on 14 December 1974. As it is not reasonable to begin to consider the effects on treaties of an insignificant armed conflict, it is submitted here that it is worth while including in the draft resolution a mention of the principle that the armed conflict in order to affect the treaties has to be of sufficient gravity. Further than that specification it seems to be difficult to go, because the judgment as to the « sufficient gravity » has to be made *in casu* in the light of the relevant circumstances. This statement could also be included in the preamble of the draft resolution.

7. The members were also asked whether it is possible to conclude that in the light of recent practice there is a general trend towards

considering the effects of an armed conflict on multilateral treaties establishing international agencies as minimal ? A further additional question was asked as to how far suspension affects such treaties during a state of armed conflict.

In this case the replies were somewhat similar. It was generally felt that such a trend existed or, as *McDougal* put it, that certainly the presumption should be in favour of minimal impact. *Zourek* affirms that the validity of the treaties establishing international organizations is not affected by an armed conflict. In this connection he points out that, on the contrary, the treaties may be suspended by a decision of the Security Council based on Article 41 of the Charter of the United Nations where a State is guilty of aggression. In this regard *Rosenne* wishes to recall Article 5 of the Vienna Convention on the Law of Treaties, suggesting that it may have some relevance. Article 5 lays down the principle that the Vienna Convention applies to any treaty which is a constituent instrument of an international organization. However, in this context one has to remember that the Vienna Convention left open the problem of the effect of armed hostilities on treaties.

Verosta also gives an affirmative reply. In more detail he states that the extent of a possible suspension of treaties establishing international organizations will mainly depend on the size — regions affected, weapons used etc., — of the armed conflict. *Verosta* also mentions that an armed conflict between the permanent members of the Security Council would certainly have an effect on the Charter of the United Nations or its operation. In this context it is submitted here that such an armed conflict may quite well have an effect on the operation of the United Nations in a particular case, but it does not necessarily have an effect on the Charter of the organization.

In summary it may be said that this conclusion may well be defended in the light of the recent practice of States. It is submitted here that a corresponding rule ought to be inserted in the draft resolution.

8. The following question also consists of two parts. The first part refers to the work of the Institute of International Law in 1912 and the members were asked whether the results of that work anticipated the present trends. The latter part of the question included an enquiry as to whether it should be the goal of the Commission

to lay down rules which as far as possible limit the effects of armed conflicts on treaties.

As to the first part of this question *McDougal* presents the opinion that the previous work does not seem to have anticipated and affected some trends. *Verosta* also replies affirmatively. He goes on to say that as a result of the subsequent practice of States some of the rules that were drafted in 1912 have become obsolete. The reason for this development is to be found in the fact that they have been bypassed in a trend of « *favor contractus* ». *Zourek* points out that the resolution adopted by the Institute in 1912 under totally different circumstances in so far as the resort to force was concerned cannot be considered as a basis for later developments.

In so far as the latter part of the question is concerned, *Rosenne, Verosta* and *Zourek* give an affirmative reply. *Briggs* points out, correctly, that it should not be our goal to lay down rules abstractly desirable but to discover and set forth the governing principles of international law that emerge from a comprehensive analysis of State practice. *McDougal* suggests that the Commission should have as its goal the achievement of an appropriate balance « between the interests of states in the continuity of agreements, in the minimizing of impermissible coercion, and in the application of lawful coercion ».

It seems as if the work of the Institute in 1912 had a relatively strong influence on the cases which were decided during the First World War and immediately thereafter. It was often cited by the courts in various countries and proved to be of value. In so far as the goal of work of the Commission is concerned, a majority of members is in agreement on the desirability to draft rules which would as far as possible limit the effects of armed conflicts on treaties. Needless to say this does not mean the creation of mere *piae desiderata* but such formulation which — in the light of the existing practice — can be materially defended, too.

III

9. The members were also asked as to their opinion concerning the way in which the rules governing the effects of armed conflicts were to be presented. Should this be in the form of a draft code or

would it suffice to give certain guiding principles based on recent practice ?

The majority of the members is of the opinion that mere guiding principles suffice. *McDougal* refers to the conclusion of the Harvard Research that our problem is not susceptible to a treatment in the rigidity of a code. *Rosenne* would like to see the guiding principles laid down along the lines of the Wiesbaden resolution on the inter-temporal law. *Verosta* favours a solution in form similar to that adopted by the Institute in 1912. *Zourek* similarly favours a formulation of the guiding principles but he underlines in this connection that these principles cannot be based solely on the practice of States. In his opinion the Commission should have as its goal the progressive development of international law. He points out, furthermore, that since the Kellogg-Briand Pact was signed the value of State practice has diminished because the refusal to use force or to threaten to use force forms an imperative norm. *Zourek* warns even in this context that one has to be careful to distinguish between State practice which is in accordance with international law and that which violates international law.

The only member who does not share the opinion of the others is *Briggs*, who believes that the work of the Commission might result in a draft code. In fact the choice between a draft code and the mere listing of guiding principles is not altogether easy to make. This solution does not necessarily affect the conclusions of the Commission, a point important to bear in mind in this regard. It seems as if this problem could well be settled in the light of the provisions that are to be included in the draft resolution. At this stage, nevertheless, a majority prefers the listing of guiding principles apparently following the precedent of 1912.

10. The last question was directed to those who accepted the idea that the work should result in a draft code. They were asked to propose what kind of principles they wanted to see included in a draft code. In addition to *Briggs*, *McDougal* and *Verosta* have replied to this question.

In the reply *Briggs* points out that he is not presenting any code but that, *inter alia*, the principles he mentions should be examined with a view to the formulation of the draft. The first principle in his list is the statement that the outbreak of war between opposing

belligerents does not *ipso facto* terminate all treaties between them. To this *Briggs* adds a query: does war *ipso facto* terminate *any* treaties? The second principle is that the outbreak of war does not prevent the conclusion of new contractual relationships between enemy States. The third principle is based on Article 35 (a) of the Harvard Research draft on the Law of Treaties. This includes the principle that a treaty which expressly provides that it is to be performed in time of war or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war is not terminated or suspended by the beginning of a war between two or more parties.

In addition to these principles *Briggs* asks six questions. The first one of these comprises the question whether States at war (in armed conflict) have a legal right under international law to terminate (or regard as terminated) or to suspend (or regard as suspended) treaties with States with which they are at war (in armed conflict) as incompatible (in their judgment) with a state of war (or armed conflict). In this connection the question is also presented whether the determinations as to the intent of the parties regarding the operation of a treaty in time of war between the parties to it are judgments which the practice of States (international law) leaves to each party to the armed conflict. To this is added that neither test operates automatically.

In view of certain multilateral treaties *Briggs* points out that it was already foreseen in 1912 by the Institute that they would be unaffected by war, except to permit suspension of their operation between States at war. He goes on to say that there is considerable subsequent practice available on this point.

The next question is whether the practice of the treaties of peace, and the terminology employed, provide evidence of clear rules of international law concerning the effect of war on treaties other than of a right to suspend performance with regard to enemy States. In connection with the peace treaties *Briggs* also puts the question whether the draft code should propose residual rules as to the survival of treaties in those cases where the parties to the peace treaty have failed to include provisions on the matter.

The last question presented by *Briggs* is concerned with the problem of whether the draft should include such provisions as those found in Articles 9 and 10 of the resolution of the Institute in 1912

as to treaties between belligerents and third States. Article 9 provided that multilateral treaties remain in force as between each belligerent and the third States and that they cannot be altered by the treaty of peace to the disadvantage of the third States without their consent. Article 10 simply provided that the treaties concluded between a belligerent State and a third State remain unaffected by the state of war.

In his reply *Verosta* formulates tentatively the following principles. In the first place no treaty, whether multilateral or bilateral, political or non-political, is automatically annulled by the mere outbreak of hostilities. Taking this as his starting point *Verosta* is of the opinion that multilateral treaties continue to be in force between the parties not involved in the armed conflict in their relations with the parties involved in an armed conflict. As between the parties to an armed conflict multilateral treaties may be suspended in the case of supervening impossibility of performance.

Following the same line of reasoning *Verosta* also concludes that bilateral treaties between parties to an armed conflict and third States remain in force. However, political bilateral treaties between parties to an armed conflict are suspended but not annulled. Finally, non-political bilateral treaties between parties to an armed conflict are presumed to be suspended unless these parties decided — unilaterally or by special (tacit) agreement — to continue their operation. *Verosta* is of the opinion that Chapter V of the Vienna Convention on the Law of Treaties could, by way of a thorough analysis, help to formulate more rules in so far as the main problem which the Commission is investigating is concerned.

As a starting point *McDougal* explains that the significance of an outbreak of armed hostilities between the parties to an agreement is a function which has an impact upon the original and continuing expectations of the parties and upon the general community policies of promoting stability and minimizing the effects of impermissible coercion. The principles most appropriate for recommendation would have reference to several factors. These include at least the features of the process of agreement and, respectively, of coercion, the detailed claims made by the parties against each other (for suspension, modification, or termination of what provisions, about what promised performance, and so on). The next factor to be taken into account would be, in *McDougal*'s opinion, the impact of the process of coercion

upon the possibilities of performance of the agreement in accordance with the original and continuing expectations of the parties. Finally, attention should be paid also to the costs and benefits to each of the parties and to the general community of the different options in decision.

Regardless of the form in which the conclusions of the Commission are to be presented, their formulation is the main task. All members giving replies are in agreement as to the feasibility of formulating the guiding rules. As to the contents of such guiding principles, views differ. The opinions give, however, enough material background for a draft proposal.

The first conclusion seems to be that there are no treaties which would be annulled *ipso facto* as a result of the outbreak of an armed conflict between the parties. It seems fair to conclude that there is no reason to presume that the mere outbreak of an armed conflict would prevent the parties to it from concluding new treaties between themselves — not to mention their continuous capacity to conclude treaties with other States. Similarly, the treaties concluded between the parties to an armed conflict and third States remain unaffected by the outbreak of an armed conflict.

As to the right to terminate or suspend treaties as a result of the outbreak of an armed conflict, the decision has to be based on the circumstances of each particular case. State practice indicates that to deny the existence of this right would not be based on the facts relating to the known practice of States. The situation ought to be clarified in actual practice as early as possible and, therefore, it would be important for the decision of a Government, either to terminate a treaty or to suspend its operation, to be made known to the parties to the particular treaty. On the other hand it is possible for the parties to an armed conflict to decide either unilaterally or by special agreement that the operation of a particular treaty will be continued. In those cases where there are doubts this would be recommendable.

It would also be important to adopt a practice to indicate at the end of the armed conflict what the intentions of the governments are with regard to such treaties which may have been affected by the armed conflict. Should the parties not do this, the Commission would do well to recommend a presumption to the effect that the treaties which existed prior to the outbreak of the armed conflict continue to

be in force unless there is a supervening impossibility of performance in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. The parties should also indicate at the end of the armed conflict whether they have regarded a particular treaty or some of its clauses as having been affected during the armed conflict. This is not needed in those cases where the situation is sufficiently clear in view of previous pronouncements. In this connection one might add that practice shows many cases where in the past the situation has remained unclear in so far as the time of the armed conflict or war is concerned, because the parties have not paid sufficient retrospective attention to this problem.

There will, however, always remain disputed cases. To solve such cases the Commission ought to formulate certain guiding rules of interpretation. In so far as bilateral treaties are concerned the basic rule to be recommended seems to be that only a supervening impossibility of performance should lead to their suspension during the armed conflict. The impact of the process of coercion upon possibilities of performance of the treaty in the light of the contents and purpose of the treaty taking also into account the intention of the parties should be the guiding principle in this connection. Detailed claims by the parties together with ensuing costs and benefits to each of the parties and to the general community might also have an effect on the interpretation. In so far as the separability of the treaty provisions is concerned, the application of the corresponding provisions of the Vienna Convention on the Law of Treaties is to be recommended.

Due to their nature multilateral treaties deserve to be dealt with separately in the draft resolution. In comparison with the bilateral treaties there is the presumption that these treaties remain in force as such between the parties involved in an armed conflict and the other parties. Between the parties to an armed conflict a supervening impossibility of performance may lead to the suspension of the operation of the treaty concerned. On the whole the same principles of interpretation that are to be applied to bilateral treaties apply also to multilateral treaties. The position of third States has to be guaranteed at the end of an armed conflict against possible amendments to the treaties.

Lastly treaties establishing an international organization or agency deserve special attention. Such treaties are not affected by the

outbreak of an armed conflict. The only exception is the case where there arises a supervening impossibility of performance in accordance with the provisions of the Vienna Convention on the Law of Treaties.

Helsinki, 2 June 1977

Proposed Draft Resolution

The Effects of Armed Conflicts on Treaties

The Institute of International Law

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties ;

Having regard for the need to take into account the fact that the use of force in international relations has since been forbidden as well as the provisions of the Charter of the United Nations and the Vienna Convention on the Law of Treaties ;

Considering also that it is by now correct to speak of the problem of the effects of armed conflicts on treaties and that an « armed conflict » in this context covers cases, regardless of a possible declaration of war, which include the use of armed force by one State against another in their international relations including the fact that the acts concerned or their consequences are of sufficient gravity to have any effects on treaties and that for the purposes of the present resolution « treaty » means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ;

Noting that the practice of States in so far as the effects of armed conflicts on treaties are concerned varies and that the rules of international law cannot as yet be regarded as having been formulated to a satisfactory extent ;

Considering, however, that there is an urgent need to indicate some guiding principles to cover cases where an armed conflict occurs and where there are treaties in existence between the belligerent parties either on a bilateral or multilateral basis ;

Adopts the following Resolution :

I

1. The occurrence of an armed conflict does not *ipso facto* lead to the annulment of the operation of any of the existing treaties between the parties to the armed conflict.

2. The parties to an armed conflict are not prevented by the mere fact of the outbreak of armed hostilities from concluding new treaties between themselves.

3. A treaty which expressly provides that it is to be performed in time of war or during an armed conflict or which by reason of its nature or purpose was manifestly intended by the parties to be operative during an armed conflict is not terminated or its operation suspended by the beginning of an armed conflict between two or more parties.

4. A treaty which has been concluded between one of the parties to an armed conflict and a third State remains unaffected by the outbreak of an armed conflict.

II

5. The parties to an armed conflict have a legal right to regard as terminated or suspended treaties with States with which they are in armed conflict if a particular treaty is in their judgment incompatible with the state of an armed conflict. Such a decision should be made known to the other parties to the particular treaty. It is also possible that the parties to an armed conflict decide either unilaterally or by special agreement that the operation of a particular treaty will continue despite the occurrence of the armed conflict.

6. At the end of the armed conflict the parties should indicate their intentions as to the application of all those treaties which may either by means of a unilateral decision, a special agreement or otherwise have been affected by the armed conflict. There is a presumption that where the parties do not specifically indicate their intentions in this respect at the end of an armed conflict the treaties which existed between the parties before the outbreak of an armed

conflict continue to be in force unless there is a supervening impossibility of performance in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. It is to be recommended that the parties indicate also at the end of the armed conflict whether they regarded a particular treaty or some of its clauses as having been affected during the continuation of the armed conflict unless this has been sufficiently indicated already before or during the armed conflict.

III

7. In cases where the effects of an armed conflict on a particular treaty have not been adequately regulated by the parties either before, during or after the armed conflict the following rules of interpretation are to be recommended to cover disputed cases.

8. As to the bilateral treaties between the parties to an armed conflict only such treaties may be regarded as suspended in their effects during the armed conflict in respect of which there is a supervening impossibility of performance in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. The transitory or dispositive treaties continue to be in force despite the outbreak of an armed conflict if they have produced results before the outbreak of the armed conflict. Treaties concerning commerce, technical and social matters as well as matters of private international law and the like are to be judged in the light of the relevant circumstances, the presumption being that their operation is suspended during an armed conflict unless the parties choose otherwise. Special attention should be paid to the impact of the process of coercion upon possibilities of performance of the treaty in accordance with the contents and purpose of the treaty, taking also into account the original and continuing expectations of the parties.

9. As to the multilateral treaties between parties to an armed conflict and other States, such treaties remain in force between the parties not involved in the armed conflict in their mutual relations as well as in their relations with the parties involved in the armed

conflict. Between the parties to an armed conflict multilateral treaties may be suspended if there is a supervening impossibility in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. At the conclusion of an armed conflict the multilateral treaties cannot be altered by the mutual arrangements of the parties to an armed conflict to the disadvantage of the third States without their consent.

10. The occurrence of an armed conflict between parties to a multilateral treaty establishing an international organization or agency does not affect the operation of such a treaty unless there is a supervening impossibility of performance in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

11. If the ground for terminating or suspending the operation of a treaty 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 or it 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.

Annex I

The effects of armed conflicts on treaties
(Fifth Commission)
Preliminary Report

Bengt Broms

Introduction

Only a few problems concerning the law of treaties were left open at the United Nations Conference on the Law of Treaties which met at Vienna in 1968 and 1969. One of these was the problem concerning the effect of an outbreak of hostilities between the parties to a treaty. The International Law Commission had earlier concluded that it was justified in considering this problem to be wholly outside the scope of the general law of treaties which was to be codified in the draft articles[1]. An express mention of the problem was included in Article 73 by the Conference. In accordance with this article rules relating to State succession, State responsibility and the outbreak of hostilities on treaties are excepted from the scope of the Convention[2].

Although this voluntary, but from the point of view of the Fifth Commission regrettable, omission left the problem concerning the effect of armed conflicts on treaties open, other aspects of the Convention are nevertheless helpful to the Fifth Commission. In the light of Article 2, 1 (a) of the Convention a new discussion on the definition of a treaty is unwarranted. Accordingly, a treaty can be said to be « an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

[1] Yearbook of the International Law Commission, 1966, Vol. II, p. 268.

[2] As to the legislative history of this provision see *Shabtai Rosenne*, The Law of Treaties, Leyden 1970, pp. 372-377 and *Francesco Capotorti*, L'extinction et la suspension des traités, RCADI, 1971, III, Vol. 134, pp. 554-555.

whatever its particular designation »[3]. Furthermore, Article 26 confirms the principle of *pacta sunt servanda* and several other provisions included in Part V of the Convention on the invalidity, termination and suspension of the operation of treaties are well worth keeping in mind when the effect of armed conflicts on treaties is being discussed[4].

At this stage one should point out that, indeed, as the Institute of International Law has decided in establishing the Fifth Commission, it is no longer proper to speak solely of the effects of war on treaties. Taking into account the present theory as to the inadmissibility of the state of war and also noting the fact that to draw a line between the state of war and other types of armed conflicts is not always so easy, it seems well established that nowadays this problem comprises also armed conflicts[5]. On the other hand one may conclude that coercitive measures other than war or armed conflict similar to war do not influence treaties[6].

As to defining the state of war it seems *prima facie* that taking into account the multitude of wars even during the more recent past as well as the devotion of energy by authors on international law questions to problems connected with war, it should be possible to solve this task. The attempted definitions by learned authors indicate, however, that the problem to be confronted is not an easy one. The main difficulty seems to lie in the fact that theorists are faced with the difficult task of putting into legal terms a concept which is finally not a legal one, neither one that is readily definable as such and whereby the social element is somewhat decisive[7]. It is submitted here that no definition of war is useful unless it provides an answer

[3] See also Yearbook of the International Law Commission, 1956, Vol. II, pp. 107, 117-118.

[4] *Ibid.*, pp. 108 and 118.

[5] On the relationship between war, armed conflict and belligerent reprisals see *Frits Kalshoven*, Belligerent Reprisals, Leyden 1971, pp. 33-44.

[6] *Charles Rousseau*, Droit international public, tome I, Paris 1970, p. 219. It is worth noting that Article 63 of the Vienna Convention on the Law of Treaties includes a provision to the effect that the severance of diplomatic or consular relations does not affect the legal relations established between States by a treaty.

[7] On the definition of war see *L. Kotsch*, The Concept of War in Contemporary History and International Law, London 1956.

to the question « when does a war exist » ? Recent State practice, since the Kellogg-Briand Pact, and in view of the provisions of the Charter of the United Nations, shows a reluctance to admit that a state of war exists[8].

How can one determine the existence of a state of war ? If the parties themselves pronounce declarations of war or otherwise admit publicly that the state of war exists, then the matter is settled. More often than not, however, hostilities are opened without a declaration of war and it may also take considerable time till the parties make any pronouncements. It is also clear that the declaration of war is not a prerequisite of the existence of a state of war[9]. From the legal point of view the possible existence of a state of war has to be determined in the light of certain factors. These factors include the attitudes of parties, the extent and kind of hostilities and their intentions[10].

It is submitted that in so far as the present topic is concerned only international wars, *i.e.*, wars between States, need to be considered[11]. In addition to this the Institute has decided to extend

[8] As an example of this reluctance the armed hostilities between China and Japan which began in 1931 might be recalled. China estimated her casualties by 1941 to almost three million soldiers and civilians and the casualties of Japan were not lagging much behind. Yet neither party admitted that a state of war existed, third States were not asked to declare neutrality and the League of Nations, for political reasons, refrained from calling the hostilities a war, although such a conclusion to many seemed to be the only right solution.

[9] In a situation like this it is up to third States to decide. See also *Clyde Eagleton*, The Attempt to Define War, International Conciliation, June, 1933, No. 291, pp. 237-287, esp. p. 266.

[10] *Louis Delbez* has said that war consists of four elements : organic, psychologic, material and teleologic. La notion juridique de la guerre (Le critérium de la guerre), Revue générale de droit international public, 1953, vol. 57, pp. 177-209. *Clyde Eagleton, op. cit.*, p. 237 *et seq.*, suggested that the answer depends upon four elements : 1. The element of force, 2. The elements of intention, 3. What force constitutes war and 4. The parties to war.

[11] To draw a line between a civil and an international war is, however, not always an easy task. Attention has to be paid to the fact whether at least two of the opposing parties are States. Furthermore, the third States are bound not to intervene in a civil war, whereas an international war leads to a status of neutrality. This criterion presupposes, nevertheless, that the nature of the particular war has already been determined and it cannot be used as a criterion to define the situation in legal terms. A further difference is that an international war results in *jus belli* which is not the case with a civil war.

the topic to cover the effects of armed conflicts on treaties. War belongs to armed conflicts in the wide sense of the word while it may also be regarded as the most flagrant type of armed conflict. Perhaps one might say that our problem here is to limit the sphere of other armed conflicts which fall within the survey while war clearly belongs to the conflicts to be studied. Indeed, some guiding principles ought to be found to determine the point at which an armed conflict is of such magnitude as to have an effect on treaties.

Needless to say, all armed conflicts have to be judged in this connection taking into account the special circumstances. One has to stress once again that although in accordance with the Kellogg-Briand Pact war has been denounced « for the solution of international controversies » and as « an instrument of national policy » there still remains the fact that any State committing an illegal act according to the terms of the Kellogg-Briand Pact creates a state of war. Consequently, the rules of war apply to this state of war and those legal effects arise which are customarily connected with the state of war. Here, however, arises the question : « Do armed conflicts, less than a state of war, have similar effects, if any, on treaties » ?

In this connection it should be noted that an armed conflict does not have to be called war to have effects on treaties. However, as a general rule it seems justifiable to say that such armed conflicts ought to be comparable in magnitude with the state of war. It is difficult to give any further guidelines if one thinks in terms of wars between great and small States in their respective groups. What amounts to a major armed conflict to a small State might only be an insignificant skirmish to a Great Power. Accordingly, it might not be necessary to propose any requirements as to the actual extent of armed conflicts having an effect on treaties. This will have to be judged *in casu*. In any case the armed conflict must be between at least two different States.

The effect of war on treaties has always belonged to the problem areas of international law. It has even been called an « obscure » topic[12]. Taking into account the fact that there have been traditionally three main theories concerning this problem, it is somewhat surprising that neither the theorists nor the practitioners have reached anything even close to unanimity.

[12] *D.P. O'Connell*, International Law, vol. I, 2nd ed., London 1970, p. 268.

According to the first theory, war annuls treaties at the outbreak of the state of war. This theory resulted mainly from a logical deduction that as *contractus est duorum pluriumve in idem consensus* and as there existed following the outbreak of war a *bellum contra omnes*, there was no basis left for treaties according to the principle *inter arma silent leges*. Some extremist defenders of this theory have argued that war annuls every treaty. This extreme theory was defective in so far as there are treaties which are intended to survive the outbreak of war. Examples are treaties regulating warfare. Once this was realized, the defenders of the extreme form of the annulment theory were forced to admit exceptions. This led to the advocacy of the other two main theories.

In accordance with the second theory — and this is one which the members of the Institute of International Law adopted at their session in Christiania in 1912 — the outbreak of war had as a rule no effect on treaties. At the time of its appearance this theory gained some support, but shortly afterwards, during the First World War, it became clear that practice did not confirm this theory.

As could be expected, this situation was bound to lead to the appearance of a third theory which its proponents afterwards presented as a compromise between the two extreme views. It was that the effect of war on treaties had to be assessed in the light of the intention of the parties as well as taking into account the type of treaty concerned. In addition to these criteria various other additional guidelines have been proposed[13].

It has been customary to regard the character of the war concerned as the decisive factor in determining the effect of war and armed conflicts on treaties. As long as this opinion prevailed, it was usual to divide the treaties into large groups and to make sweeping statements to solve the problem. Eventually a new attitude gained ground and more importance was attached to the special character of the treaty rather than of the war. The defenders of this theory were prepared to solve the issue on the basis of the nature of the particular treaty and even of a single provision of that treaty.

[13] The main theories have been described in detail among others by *Friedrich Klein*, Kriegsausbruch und Staatsverträge, Jahrbuch für internationales Recht, 3. Band, 1954, pp. 30-41 and *Richard Ränk*, Einwirkung des Krieges auf die nichtpolitischen Staatsverträge, Uppsala 1949, pp. 24-38.

After the First World War another approach was proposed by *Hurst*, who submitted that just as the duration of contracts in municipal law depended on the intention of the parties, so the duration of treaties must depend on the intentions of parties. To this *Hurst* added that « the treaties will survive the outbreak of war or will then disappear, according as the parties intended when they made the treaty that they should so survive or disappear »[14].

It is submitted that if one admits that the outbreak of an armed conflict does not by itself bring the existing treaties to an end, it is only by using criteria as to the nature of the treaty or its stipulations and as to the intention of the parties to a treaty that a solution can be found to the problem of the effect of armed conflicts on treaties. It is further submitted that, although these two criteria may at the first glance seem to be quite different, they will probably lead to the same results if they be applied to a particular treaty.

Moreover, this application belongs in the last instance to the Executive and the Judiciary ought to try to ascertain the opinion of the Executive before trying to solve the problem. Where the Executive has expressed rules as to its position on treaties during the state of war, these rules have to be followed by municipal courts.

Previous work of the Institute of International Law

At its session in Christiania in August 1912 the Institute of International Law adopted a project on the effects of war on treaties and international conventions. In presenting his report *Politis* pointed out that there was a new idea in accordance with which war was regarded as a battle only between the organized armed forces of the belligerent States. Therefore, the effects of war should be limited as much as possible. In the opinion of *Politis* the old conception of war having an annulling effect on all treaties would be « contre les tendances de notre temps »[15]. For the purpose of defining the present position of the Institute of International Law it seems that this early declaration has more than mere historical value.

[14] *Sir Cecil Hurst*, The Effect of War On Treaties, The British Year Book of International Law, 1921-1922, pp. 37-47, esp. p. 40.

[15] *Annuaire* de l'Institut de droit international, 1910-1912, vol. 24, pp. 201-202 and 207-208.

Article I declared that « the outbreak and continuance of hostilities do not impair the force of treaties, conventions and agreements concluded by belligerents with each other, whatever may be their wording and object ». The resolution went on to mention in Article II two groups of treaties to which « nevertheless the war rightfully puts an end ». To the first group belonged agreements of international associations ; treaties establishing a protectorate and supervision ; treaties of alliance, of guarantee, of subsidy ; treaties providing a right of security or a sphere of influence ; and treaties of a public nature in general. To the second group belonged all those treaties the application or interpretation of which may have been the direct cause of the war. The official acts before the outbreak of hostilities of one of the belligerent governments were to be the test. As the criteria for determining disputed cases in actual practice Article III suggested that the content of the treaty must be taken into account ; in cases where the particular treaty was an indivisible document, the entire treaty became void ; and if there were clauses of different purport in the same treaty, only those which came under categories enumerated in Article II were annulled.

According to Article IV, treaties remaining in force must be observed as in the past. The belligerent parties can reject them only in so far and as long as the necessities of war require. Article V included a special clause providing for the implementation of treaties which came into operation during the time of war. Article VI provided that the rules mentioned in the preceding articles shall serve to interpret and to supply any omissions in a treaty of peace.

In a situation where there is no formal clause in the treaty of peace, the following rules of interpretation were given. First, treaties affected by war are definitely annulled. Second, treaties which have not been affected by war, whether or not they have been suspended during the hostilities, are tacitly confirmed. Third, treaties in conflict with the treaty of peace are implicitly abrogated. Fourth, the abrogation of a treaty, whether formal or tacit, does not retroactively affect the past effects of the abrogated text.

The second chapter of the resolution dealt with treaties between belligerent States and third States. In general, the provisions of Articles I to VI applied, in the relations of belligerent States, to the treaties concluded between them and third States. There were,

however, certain reservations, which were mentioned in the remaining articles.

According to Article VIII, in a situation where the obligations which bind belligerent States had the same object as their obligations to third States, such provisions must be implemented in the interest of the latter. Thus, collective treaties of guarantee remained in force regardless of the outbreak of war between two of the contracting parties. Article IX laid down the rule that collective agreements remained in force in the relations between each of the belligerent States and third contracting States. Without the consent of the latter, the collective agreements could not be altered, even by the treaty of peace, to their prejudice.

The provisions of the remaining two articles confirmed the general practice. According to Article X, treaties concluded between a belligerent State and third States were not affected by war. Article XI included, however, a provision that if there was no formal clause to the contrary or a provision leaving no doubt as to the intention of the parties, collective treaties concerning the law of war applied only under the condition that all the belligerents were parties to the convention.

The effects of peace treaties

The effect of war and armed conflict on treaties must be decided, in the first place, on the basis of the effect of the outbreak of armed conflict and, in the second place, on the basis of the subsequent peace treaty. This dual approach of course applies only to cases where the treaty of peace includes provisions pertaining to prewar treaties.

Such dual approach was not necessary until the twentieth century for two reasons. One was that States announced at the outbreak of hostilities that all treaties between the belligerents were either annulled or suspended by the outbreak of hostilities, and the other was that peace treaties often included a provision to the effect that all prewar treaties were renewed in all parts other than those in conflict with the peace treaty. This situation, however, changed at the time of the Versailles Treaty of Peace and its counterparts at the end of the First World War. The last mentioned treaties included elaborate provisions dealing with prewar treaties which were divided

into bilateral and multilateral treaties[16]. In the Versailles Treaty of Peace Article 289 dealt with the former and Articles 282-287 with the latter.

The general principle embodied in Article 289 was that victorious States had the opportunity to choose those treaties which they wanted to enforce. No choice was given to the vanquished. In accordance with Article 289 all other treaties, *i.e.*, those which were not notified to Germany « are and remain abrogated ». The last paragraph of Article 289 provided that the same principles applied to all bilateral treaties or conventions existing between all the Allied and Associated Powers signatories of the peace treaty and Germany even if they had not been in a state of war with Germany[17].

These provisions are ample support for the dual approach, *i.e.*, that concerning the direct effect of the armed conflict and that concerning the indirect effect of the peace treaty on treaties. They also prove the wide discretion of the victors. This is to be regretted, as such practice undermines the value of customary international law. In addition to this, such practice is likely to cause resent of the States compelled to agree with the terms of the peace treaty.

At the end of the Second World War the victors during the Paris Peace Conference in 1946 were faced with the same basic problem as their predecessors in 1919. Should the new peace treaties include elaborate provisions concerning prewar treaties, thus following the previous example, or should these provisions be limited in scope ? The latter alternative was accepted. The peace treaties which were ratified in 1947 between the Allied Powers and Bulgaria, Finland, Hungary, Italy and Rumania include similar provisions as to prewar treaties. Such provisions are included in a single article. For example, Article 12 of the peace treaty with Finland provides as follows :

[16] The provisions of the Versailles Treaty of Peace are similar to those of the treaties of Neuilly, Saint-Germain and Trianon.

[17] The provision was inserted to Article 289 in the interests of Bolivia, Costa Rica, Equador, Peru and Uruguay, which had only broken off their diplomatic relations with Germany. Similar provisions concerning bilateral treaties were inserted for instance in Article 168 of the Treaty of Neuilly, because Belgium had not declared a state of war with Bulgaria, but only discontinued diplomatic relations.

« 1. Each Allied or Associated Power will notify Finland within a period of six months from the coming into force of the present Treaty which of its bilateral treaties with Finland it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the abovementioned Treaties.

2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

3. All such treaties not so notified shall be regarded as abrogated ».

When these provisions are compared with those of the peace treaties at the end of First World War, the major change of legal importance is the lack of any rule governing multilateral treaties. Such rules had earlier been even more specific than those concerning bilateral treaties.

Why, then, were these supposedly important rules deleted ? The answer is to be found in the prevailing opinion at the Conference of Paris, according to which the legal position of multilateral prewar treaties was sufficiently clear so as to need no provisions in the peace treaties[18].

Pursuant to the relevant provisions of the peace treaties the Allied Powers gave the notifications to the other parties according to the requirements mentioned in these provisions[19]. The wording

[18] This was illustrated by a reply of the Soviet delegate at the Sixth Meeting of the Legal and Drafting Commission of the Paris Conference given to a question presented by the Dutch delegate. He said that « according to the opinion at present generally prevailing in international law, the *communis opinio*, multilateral treaties are only suspended by war. It is therefore unnecessary to deal with the re-establishment of such Treaties in the Peace Treaty ». He went on to say that the effects of these treaties, after peace has been concluded, are re-established between the parties concerned. 3 Documents of the Paris Peace Conference (C.P.) J.R., 6th meeting, p. 348. It should be mentioned also that *Fitzmaurice* has explained that an additional reason to leave this matter out of the scope of the peace treaties was that it would have been a complicated matter to investigate individual multilateral treaties in detail. *G.G. Fitzmaurice*, The Juridical Clauses of the Peace Treaties, RCADI, 1948, II, vol. 73, p. 308.

[19] A list of those prewar treaties which the Government of the United Kingdom wanted to keep in force or revive is to be found in International Law Quarterly, vol. 2, 1948, pp. 535-538.

used by the Government of the United States in the notification to the Government of Hungary included a statement to the effect that the United States « desires to keep in force or revive the following pre-war bilateral treaties and other international agreements with Hungary... »[20] : This formula as well as its counterparts seem to prove that the actual wording used in the peace treaties was intended to signify the idea that all prewar bilateral treaties between the opposing belligerents did not have the same destiny at the outbreak of the Second World War. On the contrary, it shows that there must also have existed bilateral treaties that were either suspended or unaffected by the state of war. This is an important difference in comparison with Article 289 of the Versailles Treaty of Peace.

Although there is such a distinct difference between the provisions concerned, *Niboyet* has presented the opinion that the draftsmen of the peace treaties at the end of the Second World War represented the abrogation theory[21]. However, it may be mentioned in this connection that, had the draftsmen thought that all bilateral treaties between opposing belligerent States were abrogated by the mere outbreak of war, it would have been unnecessary to add to the peace treaties a provision that treaties which were not included to the notification list were abrogated[22].

An important means of assessing the effect of war on treaties was a provision in the 1947 peace treaties to the effect that treaties which have been notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations. As all bilateral treaties not so notified were regarded as abrogated, it becomes clear that a proper machinery had been established to settle the fate of the prewar treaties during the time subsequent to the giving of the notification. Treaties which were

[20] The Government of the United Kingdom used in similar notifications the following statement : « His Majesty's Government will register with the Secretariat of the United Nations the bilateral treaties and other agreements which are kept in force or revived... ».

[21] See *Niboyet*, Sirey, 1949, vol. 1, p. 161. *Niboyet* concludes that the changed wording did not have any legal significance and that it resulted mainly of the fact that he draftsmen in Paris were bad lawyers.

[22] The idea presented by *Niboyet* may be criticised on other grounds, too.

not included in the notifications were abrogated at least from then onwards, if not before.

However, it is submitted that there is still no device to settle the destiny of bilateral treaties from the outbreak of war until that time when the notifications were given. By their terms the peace treaties did not answer this question. The notifications which were given to the Axis Powers do not provide an answer and those interpreting this problem in actual practice have to use their own judgment.

It is further submitted that the peace treaties drafted after the First and Second World Wars do give a general idea of the prevailing opinion of those governments who were responsible for the drafting work, but the treaties themselves do not include satisfactory rules to solve the problem. It was left to the victorious States to decide which of the prewar treaties they desired to be kept in force or revived. In actual practice the notifications have only listed the treaties in the order of their original conclusion, instead of making a distinction between treaties which are revived and those which are to continue to be in force. Accordingly, there is no real guidance as to the problem of the direct effect of war or armed conflict on treaties for the simple reason that it is not the purpose to deal with this problem at all in treaties of peace. These treaties deal only with the way treaty relations should best be established between the once hostile States in the future. Thus, the most recent practice shows that the legal problem is not the decisive factor. The intention is instead to provide rules for a convenient way of establishing treaty relations between the hostile States after the conclusion of the peace treaty. Even if the older peace treaties did not have very elaborate provisions as to the fate of prewar treaties, they dealt with the problem in a legal way indicating what was regarded as the correct legal solution at any given period of time. The recent peace treaties are different. It is submitted that the pre-twentieth century practice was legally more helpful than that developed since the end of the First World War.

In this connection it should be noted that as the peace treaties after the First and Second World Wars left the decision-making power as to the revival of the prewar treaties to the victorious States, the manner in which they acted in fact is important from the point of view of our topic. After the First World War the victorious States

chose to revive very few prewar treaties[23]. After the Second World War almost all prewar bilateral treaties were revived[24].

In the case of Japan the United States sent the notification on 22 April 1953. A reference to Article 7 (a) of the peace treaty of 8 September 1951 with Japan was made in connection with the statement that « the Government of the United States of America desires to keep in force or revive the following prewar bilateral treaties and other international agreements with Japan ». After the list the notification went on to say that it was understood, of course, that either of the two governments may propose revisions in any of the treaties included in the list. Such provisions in the treaties listed which may be found in particular circumstances not to be in conformity with the peace treaty were to be considered to have been deleted as far the application of the treaty was involved. With respect to matters not covered by the peace treaty they were to be regarded as being in full force and effect. By means of a supplementary Declaration Japan recognized the full force of all the multilateral treaties to which Japan was a party on 1 September 1939 and resumed all its rights and obligations under such treaties[25].

It should be added that there was a certain difference of interpretation among the victorious States after the Second World War as to the date when the prewar treaties came into force. The Soviet Union was of the opinion that the correct date was the date

[23] See the Department of State, publication 2724, Conference series 92, The Treaty of Versailles and After, Washington 1947, pp. 576-577. The Department of State concludes that a considerable network of bilateral engagements was cleared away by the provision of Article 289 that all treaties not specifically revived by any Allied and Associated Power were abrogated as of 10 January 1920, *ibid.*, p. 576. Articles 282-288 included references to numerous multilateral treaties mainly of economic or technical character which were to apply again between parties to the peace treaty.

[24] See for instance the list of revived treaties published by the United States Department of State, United States Treaty Developments, Appendix III (A). This practice has been further confirmed by *Stuart Hull McIntyre*, Legal Effect of World War II on Treaties of the United States, The Hague 1958, pp. 319-339. There were 69 treaties revived by the United States as compared with only three revived treaties after the First World War.

[25] See *Elmer Plischke*, Reactivation of Prewar German Treaties, American Journal of International Law, vol. 48, 1954, p. 250.

of the peace treaty rather than the date of notification. The other States concerned preferred to choose the latter date.

Owing to the absence of a peace treaty with Germany and the division of Germany the Allied High Commission promulgated Directive No. 6 on 19 March 1951[26]. A procedure was established to revive treaties of the former German Reich. The Federal Government was to transmit notices to the Allied High Commission indicating which prewar treaties should be revived. The Allied High Commission then considered the matter and declared whether the treaties were binding upon the Federal Republic of Germany. In this case the Federal Republic of Germany was in a better position as to the revival of prewar treaties because it could make an initiative, although the final decision depended on the Allied High Commission representing the victorious States[27].

Let it be mentioned in this connection that the State Treaty of Austria which was signed on 15 May 1955 does not include any provisions on the prewar treaties. This was apparently due to the fact that Austria was regarded by the Allied Powers as a liberated country and there was legally no state of war.

State practice

The practice of courts in various countries cannot be subjected to a detailed examination in this brief resumé. However, some trends should be indicated. The study has here been limited to French and United States decisions[28].

In France the courts have tended to support the annulment theory. This theory was defended by the *Cour de Cassation* in 1854 in a case concerning the consular privileges on the basis of treaties concluded between France and Great Britain in 1786, 1787 and 1802.

[26] There had been a previous proclamation no. 2 of 20 September 1945 by the Control Council declaring all the treaties concluded by the German Reich invalid.

[27] As to the reactivation of former Reich treaties in practice see *Plischke, op. cit.*, pp. 256-261.

[28] The British practice has been described by *Lord McNair*, The Law of Treaties, Oxford 1961, pp. 696-728. The Dutch practice has been described by *Richard Rănk*, Modern War and the Validity of Treaties, Cornell Law Quarterly, vol. 38, 1952-1953, pp. 528-531. As to the German practice see *ibid.*, pp. 531-533.

Soon thereafter the French courts began to draw a line between general political treaties and treaties of amity and commerce. Treaties belonging to the former group were regarded as annulled by the state of war whereas treaties belonging to the latter group were only suspended[29].

Turning to the French cases since the outbreak of the Second World War one may conclude that the annulment theory has been often applied. Many of these cases have dealt with the continued existence of the Convention on Establishment between France and Italy, of 3 June 1930, signed in Rome[30]. The Convention gives to the Italian nationals residing in France the same treatment as to private rights as to the French nationals. Reciprocity is not a precondition.

The first cases defended the annulment theory[31]. However, in the case of *I.v.V.*, decided by the *Tribunal civil de Marseille*, this theory was not supported[32]. The Court considered as having been annulled treaties of a political nature or treaties being the direct cause of the war or incompatible with a state of hostilities. Treaties relating to the enjoyment of private law rights and in particular treaties dealing with contracts relating to pecuniary obligations, the transfer of movable or immovable property, mortgages, leases and tenancy agreements remained in full force.

The same novel trend was followed by the *Cour de Cassation (chambre sociale)* in the case of *Bussi v. Menetti* which came to have a profound effect on French jurisprudence[33]. This trend was later followed by the *Cour de Cassation* in several other cases[34].

[29] *Featherstonhaugh v. Boffi*, Sirey 1854.1.811. *Cour de Cassation*, 25.12.1854, as compared With *Isnard-Blanc v. Pezzales*, Sirey 1859.2.605. *Cour imp. d'Aix*, 8.12.1858 ; *Bucci v. Hospices de Saint-Quentin*, Clunet 1888, p. 99, *Tribunal de Saint-Quentin*, 30.10.1885.

[30] Journal Officiel de la République Française, 30.1.1935.

[31] *S. v. P., Tribunal de la Paix de Marseille (5e Canton)*, 25.10.1943. Gazette du Palais, Supplément provisoire, novembre 1943, p. 169 ; *C. v. B., Tribunal de la Paix de Toulouse*, 18.11.1943.

[32] *I. v. V.*, Gazette du Palais, Supplément provisoire, novembre 1943, p. 169.

[33] *Cour de Cassation (chambre sociale)*, 5.11.1943. *Dalloz*, Recueil critique, 1944, Jurisprudence, p. 84, with a note by M. Basdevant ; Sirey, 1945, I, p. 98 ; Gazette du Palais, Supplément provisoire, novembre 1943, p. 168. See also a note by *Charles Rousseau*, Revue générale de droit international public, 1948, pp. 426-429.

[34] *Poet v. Deleuil*, 21.4.1944 ; *Hutard v. Margerit*, 25.7.1946 ; *Juidi v. Fassin*,

The *Cour de Cassation* (*chambre civile*) returned, however, to the annulment theory in the case of *Artel v. Seymand* which was decided on 10 February 1948. The Court said in part « The reciprocal obligations assumed by the high contracting parties in a treaty relating to matters of private law by reference to conditions prevailing in time of peace lapse, by operation of law, on the outbreak of war ». The Court also referred to the armistice which suspended hostilities and concluded that this did not end the state of war[35].

On the same day the *Cour de Cassation* (*chambre sociale*) decided the case of *Girardi v. Goux* and on 13 February 1948 the case of *Sylvestri v. de Vallende* following in both cases the theory established in *Bussi v. Menetti*[36].

The diversity of opinion between the chambers of the *Cour de Cassation* was so grave that the next case concerning this issue *Lovera v. Rinaldi* was decided in *chambre civile, assemblée plénière*[37]. The Court declared that the state of war annuls (« rend caduques ») reciprocal obligations of the parties in a treaty dealing with questions of private law nature for the state of peace. This decision reflects the valid French practice.

In the case of the *Society for the Propagation of Gospel v. New Haven* (1823), 8 Wheaton, 464, the Supreme Court of the United States declared that « treaties stipulating for permanent rights, and

21.3.1947 ; *Pinna v. Crépillon*, 20.5.1947 and *Amadio v. Diduant*, 13.2.1948. See also the case of *Rosso v. Marro*, decided by the *Tribunal de la Paix de Grasse*, 18.1.1945, which included some interesting passages. Revue critique de droit international privé, vol. 36, 1947, p. 294 ; Annual Digest and Reports of Public International Law Cases, 1946, pp. 232-233.

[35] Sirey, 1948, I, p. 49 *et seq.* with a note by *Niboyet*. The Court's words were : « la guerre rend de plein droit caduques » the obligations assumed by the parties. *Niboyet*, correctly, argued that the treaties were not only suspended but annulled at the outbreak of war.

[36] Dalloz, 1948, Jurisprudence, p. 214.

[37] The case was decided on 22 June 1949. Journal de droit international, vol. 77, 1950, p. 125 ; Annual Digest and Reports of Public International Law Cases, 1949, pp. 381-382. *Rousseau* has concluded that since the case of *Lovera v. Rinaldi* reaffirming the traditional doctrine of the annulling effect of war on treaties the French practice has not changed. *Charles Rousseau*, Droit international public, tome I, Paris, 1970, p. 222. See also *Jacques Maury*, L'effet de la guerre sur les traités de droit privé, Revue critique de droit international privé, vol. 39, 1950, p. 279 *et seq.*

general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace », are « at most, only suspended while it lasts ». Whereas the Supreme Court of the United States has usually followed a relatively liberal line in considering the effect of armed conflicts on treaties, there is one notable exception. That is the case of *Karnuth v. United States*[38]. In this case the Court held that Article 3 of the Jay Treaty of 19 November 1794 between the United States and Great Britain was abrogated by the War of 1812[39]. The Court stated that « treaties of amity, of alliance, and the like, having a political character, the object of which is to promote relations of harmony between nation and nation are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war ». The Harvard Draft Convention on the Law of Treaties includes a comment to the effect that this « decision is to be regretted, it cannot be defended in the light of practice and jurisprudence »[40].

Since the Second World War there have been several cases concerning the effect of war on treaties. In the case of *Clark v. Allen*, decided in 1947, the Supreme Court declared that the outbreak of war does not necessarily suspend or abrogate treaty provisions[41]. The Court explained that as there was no reliable evidence as to the intention of the parties at the time the treaty in question was concluded, the Court applied the test of compatibility with national policy[42]. As tests the Court mentioned incompatibility between a treaty provision and the maintenance of the state of war, national policy as formulated by the legislature and the views of the executive

[38] 279 U.S. 231 (1929).

[39] The Court of Chancery held in 1830 in the case of *Sutton v. Sutton*, 1 Russell & Mylne, 665, that Article 9 of the Jay Treaty of 1794 relating to titles to real property had not been affected by the War of 1812 between Great Britain and the United States.

[40] American Journal of International Law, Supplement, vol. 29, 1935, p. 1187.

[41] 331 U.S. 503 (1947).

[42] This test had been used already in *Techt v. Hughes*, 229 N.Y. 222, 243, 128 N.E. 185, 192 (1920) when it was stated that the Court has to determine whether a provision in a treaty is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace.

department. This precedent has later been followed in many other cases[43].

There are but few exceptions to the general rule that has been described above. These are the cases of *In re Schacht* and *Ex Parte Zenzo Arakawa*[44]. Under the circumstances it seems clear that in accordance with the general rule war does not automatically terminate treaties affecting private rights in the light of the present United States practice.

Conclusions

The problem of the effect of armed conflicts on treaties has been regarded generally as a difficult one[45]. This attitude has led authors and practitioners to a situation where this problem has been regarded with great suspicion. However, one is tempted to ask whether such prejudice is still warranted ? It is submitted that, especially in the light of the recent material, some new conclusions may be drawn.

In the first place it is true that both theory and practice vary. This seems to be partly due to unwarranted generalizations leading to misinterpretations. Leaving this aside it seems possible to conclude that the effect of armed conflicts on treaties cannot be solved by any sweeping statement, but that the treaties have to be classified into various groups[46]. The classification into bilateral and multilateral treaties is a practicable first criterion in this case.

[43] See for instance *In re Knutzen's Estate*, 31 Cal. 2d 573, 191 P. 2d 747 (1948) and *Meier v. Schmidt*, 150 Neb. 383, 34 N.W. 2d 400 (1948), rehearing denied, 150 Neb. 647, 35 N.W. 2d 500 (1948).

[44] 68 F. Supp. 216 (N.D. Tex. 1946) and 79 F. Supp. 468 (E.D. Pa. 1947).

[45] See the statement by *Sir Cecil J.B. Hurst, op. cit.*, p. 88 : « There are few questions upon which people concerned with practical application of the rules of international law find the text-books less helpful than that of the effect of war upon treaties in force between belligerents. Both the practice of States, as exemplified in the provisions of treaties of peace, and the pronouncements of statesmen appear to conflict with the principles laid down by the text-books ».

[46] In this respect see *Arnold D. McNair*, The Functions and Differing Legal Character of Treaties, British Year Book of International Law, vol. 11, 1930, p. 101 *et seq.*

Let us take, first, bilateral treaties. It may be said that the belligerent parties may, if they so wish, conclude treaties among themselves during the state of war. Such treaties have usually as their object for instance an armistice or an exchange of prisoners[47]. There is no intrinsic impossibility of entering into treaty relations even during the duration of an armed conflict. The same naturally applies to multilateral treaties.

As to bilateral prewar treaties there may be treaties which include a provision to the effect that they will be executed also during a state of war. Such treaties, of course, continue to be in force.

Where the bilateral treaty itself does not include any provision as to its execution during the time of war the situation depends on the contents and purpose of the treaty. This seems to be a better criterion than the intention of the parties, which has widely been defended in theory as being of decisive importance. The explanation for my preference is that only in exceptional cases at the time of the conclusion of a bilateral treaty do the parties indicate what their intention is should there be an armed conflict between them later. Even so — the result of the interpretation would in most cases be the same no matter which criterion is applied in any given case.

The so-called transitory or dispositive treaties belong to the class of treaties surviving the outbreak of armed conflict. An exception is made in the case of a treaty which is the direct cause of armed conflict. Such a treaty will be regarded as suspended until its fate has been decided by the parties themselves at the end of the armed conflict. Let us take as an example a boundary treaty or a treaty of cession. Rights *in rem* that have been created by such a treaty are not affected by the mere outbreak of an armed conflict[48]. The transitory or dispositive treaties will already have produced results before the outbreak of the armed conflict. A ceded part of territory remains ceded until there is another treaty arrangement.

A difference exists when treaties disposing of rights *in rem* are compared with treaties permitting the nationals of a foreign State to acquire rights of property. Such treaties are usually reciprocal and

[47] In the above quoted case of *Techt v. Hughes* the Court said emphatically « treaties which regulate the conduct of hostilities of course survive war ».

[48] See *Arnold D. McNair, op. cit.*, pp. 101-105 and *Charles Rousseau, op. cit.*, p. 223.

one may conclude that rights continue to be in force if acquired on the basis of such a treaty before the armed conflict began. On the other hand it is possible that a belligerent State would not allow nationals of an enemy State to acquire new property rights in its territory while an armed conflict exists between the two States. This need not necessarily be the case. It depends merely upon the policy of the State concerned. Once the armed conflict is over the execution of the treaty continues to be in force as before.

Treaties concerning commerce, technical and social matters and matters of private international law and the like form that group of treaties where there is wide divergence in the practice of States. It may be concluded, however, that these treaties must be judged in the light of special circumstances. The presumption is that they are suspended during an armed conflict but the parties may choose not to regard them as suspended. In any case these treaties are not annulled by the outbreak of armed conflicts.

Let us now turn to multilateral treaties. As has been pointed out above, during the last century and even at the beginning of this century, multilateral treaties were regarded as at least suspended at the outbreak of a war. The situation is now changed[49]. On the basis of material available from the duration of the Second World War and its aftermath one may conclude that multilateral treaties continue as a rule to be in full force at least between the non-belligerent parties and also in their relations with the individual parties to an armed conflict[50]. They may be suspended as between the belligerent parties if their execution is not possible. This has often been the case in fact.

Further support for this general conclusion is to be found in the view of the Judicial Commission of the Paris Peace Conference of 1946 which explained that there was no doubt as to the continued existence of multilateral treaties and especially those of a technical

[49] There are a few multilateral treaties which include a provision giving the right to suspend the effects of the treaty during the period of hostilities. See for instance Article 22 of the Five Power Naval Treaty formulated at the Washington Conference in 1922.

[50] The theoretical basis of this doctrine is that a multilateral treaty does not result from an exchange of proposals, but from a legal *régime* which has been created for an acceptance by the parties. Even if one party unilaterally wants to give up the treaty, this has no effect on the treaty relations between other parties. *Charles Rousseau, op. cit.*, p. 224.

nature. Accordingly, most of the international agencies for humanitarian and economic matters based on multilateral conventions continued their work during the Second World War[51]. It seems that, even if some parts of such multilateral conventions were regarded as suspended by some belligerent States during the actual hostilities, such provisions were revived as soon as possible thereafter. Thus, a liberal attitude has been adopted lately as to the execution of multilateral conventions. It is nowadays rather an exception that multilateral conventions or parts thereof are regarded as suspended during the state of an armed conflict. This results largely from the desire of States to see in multilateral conventions an important and necessary element in the ordering of stable international relations. Much depends on the discretion of the parties to the armed conflict but the general rule is nowadays that save in exceptional cases multilateral conventions continue to be in force throughout the period of the armed conflict and are not suspended in their effects.

As to the effects of the peace treaties, it is submitted that there is a recent situation where a treaty of peace has not been signed even thirty years after the end of the hostilities. This is the case of Germany after the Second World War, but such a case is rare. In this case the effects of war on treaties were clarified relatively soon after the end of the hostilities by means of administrative arrangements. For several reasons, which have been alluded above, the practice has evolved in a direction of giving the victorious States a dominant position to decide the fate of prewar treaties. This has led to some surprising results which seem to deviate from the general practice. It should be remembered, however, that this situation results not only from the direct effect of war on treaties but rather from the peace treaty which again, in principle, is a different legal situation.

On the whole, it is submitted, the time is ripe for the adoption by the Institute of International Law of a resolution on the effects

[51] As to the details see *Stuart Hull McIntyre, op. cit.*, p. 341 *et seq.* International governmental institutions might create some difficulties. However, neither the Covenant of the League of Nations nor its successor, the Charter of the United Nations are affected by an armed conflict between parties to them.

of armed conflicts on treaties[52]. It seems that such a resolution might provide guidance which is well needed by both national and international organs dealing with this issue.

New York, 21 February 1976

[52] Here I differ from the 1958 opinion of *Stuart Hull McIntyre*, *op. cit.*, p. 361, when he wrote that States will continue for a long time to decide for themselves which treaties remain in force, which are suspended or which are abrogated by war between parties. To this he added : « One may conclude from this that the legal effect of war on treaties appears to be one of the areas in the law of treaties which is not susceptible to codification at this time in view of the lack of agreed law ».

Questionnaire

1. Is it your opinion that the Fifth Commission has to define the kind of armed conflict (including wars) which may have effects on treaties? If your answer is positive, what should the criteria concerned be?

2. Is it to be understood that even if the Commission has been asked to pronounce on the effect of armed conflicts on treaties, the intention has been to pay more attention to the effects of war on treaties and that armed conflicts have been mentioned to cover cases where the conflict has the magnitude of a war but where the parties do not admit that they are involved in a state of war?

3. In case the definition of a treaty provided by the Vienna Convention on the Law of Treaties does not suffice for our purposes what criteria do you propose?

4. Which of the main theories concerning the effect of armed conflicts on treaties do you prefer or would you rather use other criteria?

5. When determining the effects of armed conflicts on treaties these should be classified. What criteria would you regard as best suited for the classification of treaties? How should a) bilateral and b) multilateral treaties be classified from the point of view of the work of the Commission?

6. Are there any important recent cases or studies outside those which have been referred to above and which should be taken into account? What is the dominant theory your Government and courts follow in view of the effect of armed conflict on treaties?

7. Is it possible to conclude that in the light of recent practice there is a general trend towards regarding the effects of an armed conflict on multilateral treaties establishing international agencies as minimal? How far does suspension affect such treaties during a state of armed conflict?

8. Is it possible to conclude that the previous work of the Institute of International Law in 1912 showed results predicting the present trends in this

problem area ? Should the goal of the Commission be to lay down rules which as far as possible limit the effects of armed conflicts on treaties ?

9. Should the Commission present the rules governing the effect of armed conflicts on treaties in the form of a draft code or would it suffice to give certain guiding principles based on recent practice ?

10. What kind of principles do you propose to be included in a draft code in the event that you have replied to the affirmative to the first part of the previous question ?

Annex II

Observations of Members of the Fifth Commission in Reply to the Preliminary Report and the Questionnaire of Professor Bengt Broms

1. Observations of Professor Herbert W. Briggs

Ithaca, 30 April 1976

My dear Colleague,

In reply to the Questionnaire attached to your Preliminary Report of February 21, 1976, on « The Effects of Armed Conflicts on Treaties », I submit the observations set forth below.

1 and 2. It is not the function of our Fifth Commission to provide definitions of « war », « civil war », « armed conflict », or to determine when they exist.

In phrasing our terms of reference as « The Effects of Armed Conflicts on Treaties », the Bureau apparently wished the Commission to go beyond the effect of war on treaties and to examine the effect of certain hostile acts or phenomena short of war. Traditionally, hostile measures short of war have included such behavior as retorsion, intervention, reprisals, retaliation and the threat or use of force. Not all of these involved the use of force and even fewer involved armed conflict, with which alone we are here concerned. Is there any evidence of practice, where no legal status of war exists, that treaties are terminated or suspended by the mere fact of armed conflict? No such evidence appears in your Report. If it exists, it should be analyzed and presented to the *Institut*, even though, as your second question suggests, our main task will be to treat the effect of war on treaties. On this latter point, we need more evidence of State practice than a summary limited to French and United States decisions.

3. It is not our task to define the word « treaty ». We should follow the 1969 Vienna Convention on the Law of Treaties.

4. We should be less interested in theories than in collecting and analyzing the practice of States.

5. Avoid *a priori* classifications and classify only where the expression of a rule requires it.

6. The United States position is set forth in Marjorie M. Whiteman, *Digest of International Law*, Vol. 14, pp. 490-510 (1970).

7. Yes.

8. Our « goal » should not be « to lay down rules » abstractly desirable but to discover and set forth the governing principles of international law emerging from a comprehensive analysis of State practice.

9. I believe our work could result in a draft code.

10. Without attempting here to draft such a code, I believe the following principles, *inter alia*, should be examined with a view to the formulation of our draft.

(1) The outbreak of war between opposing belligerents does not *ipso facto* terminate all treaties between them.

(Query : does war *ipso facto* terminate *any* treaties ?)

(2) Nor does the outbreak of war prevent the conclusion of new contractual relationships between enemy States. *Cf.*, U. S. Exec. Agr. Series 255, Arrangement for Repatriation of Prisoners, etc., concluded between the United States and Germany in March 1942, despite the existence of a state of war between them as from December 1941.

(3) As the 1935 Harvard Research draft in the Law of Treaties provides in its Article 35 (a) (29 A.J.I.L. Supplement (1935), Part III, p. 1183) :

« A treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties. »

(4) Do States at war (in armed conflict) have a legal right under international law to terminate (or regard as terminated) or to suspend (or regard as suspended) treaties with States with which they are at war (in armed conflict) as incompatible (in their judgment) with a state of war (or armed conflict ?)

(5) Are determinations that a particular treaty is or is not incompatible with the conduct of war (armed hostilities), and determinations as to the intent of the contracting parties regarding the operation of a treaty in time of war between parties to it, judgments which the practice of States (international law) leaves to each party to the armed conflict ? (Neither test operates automatically.)

(6) At least as early as the 1912 Christiania resolution of the *Institut*, it was foreseen that certain general multilateral treaties would be unaffected by war, except to permit suspension of their operation between States at war. Considerable subsequent practice is available on the point.

(7) Does the practice of confirming, reviving, or terminating pre-war treaties in treaties of peace, and the terminology employed, provide clear evidence of rules of international law concerning the effect of war on treaties other than of a right to suspend performance with regard to enemy States ?

(8) Should our draft code propose residual rules as to the survival of treaties where the parties to a peace treaty have failed to include provisions on the matter ?

(9) Should our draft include provisions such as those found in Articles 9 and 10 of the Christiania resolution of the *Institut* as to treaties between belligerents and third States ?

Sincerely yours,

Herbert W. Briggs

2. Observations of Professor Myres S. McDougal

New Haven, July 29, 1976

Some random comments upon an excellent paper :

P. 225. I see ni reason why one should conclude that intensely coercive measures of any kind do not affect the continuity of agreements.

P. 225. The « existence of a state of war » must depend on what problem is. The reluctance of various bodies to make a characterization should be irrelevant. The inquiry should be as to degrees of intensity in coercion and the bearing this has upon the practical problem to be decided.

P. 227. Internal coercion might become so intense as to make relevant *rebus sic stantibus*.

P. 227. It isn't the « magnitude » of the conflict alone that is relevant.

P. 227. Other guidelines depend upon the characteristics of the treaty and many other features of the context.

P. 228. Both the intensities of the coercion and the contents of the agreement are of obvious importance.

P. 229. The difficulty with the Hurst theory is that the parties may not have had any intention or if they did, that their intention was contrary to basic community policy.

P. 229. The Executive would not necessarily have the last word within the United States.

P. 237. The annulment theory would appear utterly oblivious of any relevant policy.

P. 242. Beyond the bilateral or multilateral character of a treaty its detailed content is relevant.

P. 242. The kind of treaty is indeed relevant, irrespective of intent.

P. 243. The provisions of some multilateral treaties might be incompatible with intense coercion.

P. 226. Note 11 may be an oversimple consideration of civil war.

Answers to specific questions :

1. The Commission might concern itself with all intense coercion, which includes employment of the military instrument. Ambiguous and tautological definitions of « war » and « armed conflict » serve no useful purpose. See McDougal and Feliciano, *Law and Minimum World Public Order* (1961), Ch. 1 and 2.

2. No. This would leave our focus too ambiguous to be manageable.

3. Few agreements « not in written form » may raise over general problem, but it would appear unwise so to limit ourselves. Our concern should be for all factual agreements, any communications between state officials that create shared expectations of commitment.

4. The main theories appear useless or positively antithetical to rational community policy.

5. Treaties might be classified in terms of every feature of the process of agreement :

(1) The parties : number and character.

(2) The purposes in terms of values sought (security, alliance, commerce, other wealth transactions, human rights, protection of health, promotion and dissemination of knowledge, protection the family, and so on).

(3) Context of commitment (geographic range, duration, institutionalization, expectations of crisis).

(4) Bases of power of parties (large or small, developed or developing).

(5) Strategies in negotiation (relative emphasis upon persuasion and coercion).

(For a more complete and homogeneous exposition, see McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order* (1967) Ch. 1.)

Another relevant classification of agreements might build upon function and attending expectations of permanency, such as :

(1) Contractual (commitment to a future policy by a limited number of parties).

(2) Law-making.

(3) Constitution-making.

(4) Conveyances (« Executed agreements » creating expectations of permanency in commitment).

6. The various theories employed in the United States are adequately outlined in the following sources :

14 Whiteman, Digest of International Law (1970) 490-511.
Harvard Research, The Law of Treaties (1935) 1183-1204.

American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965) 482-484.

Briggs, The Law of Nations (2d ed. 1952) 934-946.

Friedmann, Lissitzyn, and Pugh, Cases and Materials on International Law (1969) 425-427.

10 Whiteman, Digest of International Law (1968) (on war and armed conflict).

In a letter dated November 10, 1948, addressed to the Attorney General, acting Legal Adviser Jack B. Tate describes the dominant theory in the United States as follows : « the determinative factor is whether or not there is such an incompatibility between the treaty provision in question and the maintenance of a state of war as to make it clear that the provision should not be enforced. » (14 Whiteman 502).

7. I have not studied this practice. Certainly the presumption should be in favor of minimal impact.

8. The previous work of the Institute does seem to have anticipated, and affected, some trends.

The goal of our Commission in its recommendations should be to achieve an appropriate balance between the interests of States in the continuity of agreements, in the minimizing of impermissible coercion, and in the application of lawful coercion.

9. I am inclined to agree with the conclusion of the Harvard Research that this problem is not susceptible to treatment in the rigidity of a code. Our best contribution would appear to lie in a careful formulation of the problem and the suggestion of guiding criteria.

10. The significance of an outbreak of armed hostilities (or other intense coercion) between the parties to an agreement is a function of its impact upon (a) the original and continuing expectations of the parties to the agreement, and (b) the general community policies of promoting stability in the shaping and sharing of values by agreement and minimizing the employment (and effects) of impermissible coercion.

The principles most appropriate for recommendation are, accordingly, principles that might facilitate the examination and evaluation of all the important features of the controversy in its larger context. Such principles would make reference at least to the following :

(1) The features of the process of agreement.

(2) The features of the process of coercion.

(3) The detailed claims made by the parties against each other (for suspension, modification, or termination of what provisions, about what promised performance, and so on).

(4) The impact of the process of coercion upon possibilities of performance of the agreement in accordance with the original and continuing expectations of the parties.

(5) The costs and benefits to each of the parties and to the general community of the different options in decision.

Myres S. McDougal

3. Observations of Ambassador Shabtai Rosenne

Jerusalem, 15 June 1976

Dear Friend and Colleague,

I have read with great interest and admiration your preliminary report prepared for the Fifth Committee on the effects of armed conflicts on treaties. Pressure of work in connection with the Conference on the Law of the Sea prevents me at this stage from doing little more than formulating provisional and summary replies to your questionnaire, reserving my position generally until you have been able to set forth your ideas for a draft resolution. I hope that my remarks will be of use to you. I would say, however, that I do find myself in general agreement with your conclusion, especially as regards multilateral treaties, subject to a minor linguistic change, namely that it is the operation of the treaty rather than the treaty itself, that is suspended in given circumstances (we discussed this at length in the International Law Commission, and in the Institute's Eleventh Committtee in 1967).

On the origin of the exclusion of the effect of the outbreak of hostilities on treaties by the International Law Commission, allow me to refer you to paragraph 29, and to the commentary on article 60 in the Commission's Report for the year 1966 : and to my own observations thereon in paragraphs 16 (page 87), 56 (page 188) and 66 (page 218) of my *Rapport Provisoire* and paragraph 10 (page 386) of my *Rapport Définitif*, on *Terminaison des traités collectifs*, submitted at Nice (Annuaire 52, Tome I). I do not think that the revised version of article 63 or of article 73 or the new article 76, of the Vienna Convention on the Law of Treaties affects the matter we are to study.

Herewith the answers to your questionnaire :

1. No.

2. We should examine the matter that has been excluded by the International Law Commission.

3. The definition of « treaty » in the Vienna Convention, and followed in the 1974 draft articles on succession of States in respect of treaties, should certainly suffice. But consider also whether to expand the scope of the work to cover treaties as defined in article 2 of the draft articles on treaties concluded between States and international organizations or between international organizations, also adopted by the International Law Commission in a preliminary way in 1974.

4. It seems to me that the approach of the International Law Commission

and of the Vienna Conference towards the law of treaties was an extremely pragmatic one, eschewing theoretical considerations as much as possible. I suggest that we take a similar approach. At all events, I would reserve my position on theoretical aspects until later.

5. No further classification of treaties is required beyond that already adopted by the International Law Commission in its work on the law of treaties, both before and after 1966. See paragraphs 19-25 (pages 96-108) of my *Rapport Provisoire*.

6. As far as I can recall, the question has not really arisen for Israel, neither for the Courts nor for the Government. This is certainly a consequence of our position on the succession of Israel to the international treaties of Palestine, for that brought to an end from our point of view all possibility of the treaty relationships previously existing between Palestine and any of the Arab States with whom hostilities took place in 1948 and since, from becoming treaty relationships of Israel. See Yearbook of the International Law Commission, 1950, Vol. II, page 206 ; U.N. Legislative Series, *Materials on the Succession of States*, page 38 (1967) ; and my article « Israel and the international treaties of Palestine », *Journal du Droit international*, vol. 77 (1950), p. 1140. In 1958, the Knesseth (Parliament) passed the Obsolete Enactments (Repeal) Law, and included among enactments of the Mandatory Government thus repealed was the Palestine-Syria and Palestine-Lebanon Customs Agreement (Validation) Ordinance, 1940. In the Explanatory Memorandum accompanying the Bill, the Government simply states that the 1940 Ordinance was no longer applicable.

7. I believe so, but I may not have fully understood the question. Would not article 5 of the Vienna Convention have some relevance ? The International Court seems to have avoided this issue in the *I.C.A.O. Council* case (1972).

8. I do not fully understand the first part of this question. My answer to the second part is Yes.

9. Guiding principles, along the lines of the Wiesbaden resolution on the intertemporal law.

10. For me this question does not, therefore, arise.

In conclusion, wishing you all success in your difficult work as Rapporteur of the Fifth Commission, and with warmest personal regards, I am,

Yours sincerely,

Shabtai Rosenne

4. Observations of Professor Stephen Verosta

Vienna, 28 February 1977

1. No. The Règlement of the Institut de Droit International of 1912 (RIDI) on the effect of war on Treaties only said « outbreak and continuance of hostilities ». Article 73 of the Vienna Convention on the Law of Treaties of 1969

(VCLT) speaks of « outbreak of hostilities », which could cover armed conflicts, acts of aggression and war. The Fifth Committee should therefore proceed accordingly.

2. Yes.

3. The Fifth Committee should limit itself to formulating rules (or guiding principles) on the effect of armed conflict on « international agreements concluded between States in written form » as defined in Art. 2, para. 1, lit. a of the VCLT.

4. Any assessment of the effects of armed conflicts on treaties has to take into account the object and purpose (or nature or type) of the particular treaty and the intention of the parties (third « theory »). The RIDI of 1912 is much closer to such assessment than the theory of annulment of treaties, the consequences of which are absurd and have the effect of bestowing a legal advantage to the aggressor.

5. The main classification of multilateral as well as bilateral treaties should be « political » and « non-political » treaties. Art. 2 of the RIDI of 1912 tried to enumerate the political treaties, meekly ending up with the usual general clause — « and generally treaties of a political character ». We should not start an enumeration of the different types of political treaties again, but try to give a general definition of « political treaty ».

6. Not to my knowledge.

As stated by the great Powers in the Moscow Declaration of 31 October 1943, Austria was « the first free country to fall a victim to Hitlerite aggression ». The great Powers declared « the annexation imposed upon Austria — on March 13 1938 by force — null and void. They consider themselves in no way bound by any changes effected in Austria since that date ». During the German domination no Austrian Government was in operation and Austria was not at war with any country. Accordingly the treaties concluded by Austria since its foundation in 1918 were considered as suspended. « As a result of the Allied victory Austria was liberated from the domination of Hitlerite Germany », as is stated in the preamble (para. 4) of the Austrian State Treaty of 15 May 1955. After its liberation Austria resumed its diplomatic and consular relations, occupied again its seat in all international organizations which it had joined before its military occupation by Germany. Austria applied again all multilateral and bilateral treaties concluded since 1918; only relatively few bilateral treaties underwent readjustments (additional protocols etc.) by mutual consent to meet circumstances changed as a result of the Second World War.

Between its liberation in 1945 and the conclusion of the Austrian State Treaty in 1955 Austria has, in principle, during armed conflicts continued its treaty-relations with both sides of the armed conflict.

Having adopted on 26 October 1955 the international status of permanent neutrality, which subsequently was recognized by all States including the five permanent members of the Security Council, Austria has fulfilled and certainly will fulfil, should an armed conflict occur, its obligations under multilateral as well as under bilateral treaties in relation to its treaty-partners on both sides of the conflict, until supervening circumstances would make the performance

impossible (Art. 61, para. 1 VCLT). One could say that for Austria as a permanently neutral State the outbreak of hostilities as a rule had no effect on treaties. The Austrian courts, generally speaking, act in conformity with the legal standpoint of the government.

7. Yes. The extent of a possible suspension of such treaties will mainly depend on the size — regions affected, weapons used, etc. — of the armed conflict. An armed conflict between permanent members of the Security Council would certainly have an effect even on the Charter of the United Nations or its operation.

8. Yes. But through the subsequent practice of States some of the rules laid down in the RIDI of 1912 have become obsolete; they have been bypassed in a trend of « *favor contractus* ».

9. The Fifth Committee should start by formulating guiding principles based on recent practice and then try to present rules governing the effects of armed conflicts on treaties in a form similar to the RIDI of 1912.

10. Tentatively one could formulate:

In the case of an armed conflict.

(a) No treaty, multilateral or bilateral, political or non-political, is automatically annulled by the mere outbreak of hostilities.

(b) Multilateral treaties continue to be in force between the « parties » (in the sense of Art. 2, para. 1, lit. g of the VCLT) not involved in the armed conflict and in their relations with the « parties » involved in an armed conflict.

(c) Multilateral treaties may be suspended as between the parties to an armed conflict in the case of supervening impossibility of performance.

(d) Bilateral treaties between parties to an armed conflict and States not involved in that armed conflict remain in force.

(e) Political bilateral treaties between parties to an armed conflict are suspended. (But not annulled).

(f) Non-political bilateral treaties between parties to an armed conflict are presumed to be suspended unless the parties to an armed conflict decide — unilaterally or by special (tacit) agreement — to continue their operation.

A thorough analysis of Chapter V on the invalidity, termination and suspension of the operation of treaties of the VCLT would however make it possible to formulate more rules on the effects of armed conflicts on treaties.

Sincerely yours,

Stephen Verosta

5. Observations de M. Jaroslav Zourek

Genève, 28 juillet 1976

Observations préliminaires

Comme conséquence de l'interdiction de l'emploi de la force par les Etats dans leurs relations internationales, le mot de guerre a cessé d'être une notion juridique. Trois concepts ont pris sa place : *l'agression, la légitime défense* et *les sanctions internationales* (mesures de coercition selon la terminologie de la Charte des Nations Unies). Alors que dans le droit traditionnel la position des belligérants reposait sur le principe de l'égalité juridique, celle-ci est foncièrement différente en droit actuel selon qu'il s'agit de l'agresseur ou de sa victime ou qu'il s'agit d'Etats participant à une sanction militaire contre un agresseur. L'ancien « droit de la guerre » a subi un changement fondamental sur ce point sauf s'il s'agit du cas exceptionnel où dans une guerre civile de type habituel les insurgés ont été reconnus comme partie belligérante.

Il me semble important de tirer au clair le changement fondamental dont il vient d'être question. Autrement on risque fort de rester sous l'emprise des idées qui appartiennent au passé et de commettre des confusions regrettables lors de la formulation des règles que la 5e Commission est appelée à proposer à l'Institut.

En face du changement fondamental opéré en droit international par l'interdiction du recours à la force dans les rapports internationaux, il est indispensable de se poser la question de savoir si l'institution de l'état de guerre, élaborée à l'époque où le recours à la violence dans les relations internationales pour n'importe quel but était licite, et reposant sur le principe de l'égalité juridique des deux parties belligérantes, n'a pas été modifiée ou même rendue caduque par cette évolution spectaculaire du droit international. Il s'agit de dégager les règles juridiques impliquées dans l'interdiction du recours à la force entre Etats et d'examiner l'impact de cette interdiction sur le droit international traditionnel.

Dans le cas qui nous occupe, il y a lieu d'esquisser brièvement la caractéristique juridique des trois notions mentionnées qui ont remplacé la notion de guerre.

L'agression armée est devenue crime international et a été, après 50 ans d'efforts, définie en 1974 par une déclaration de l'Assemblée générale des Nations Unies (résolution 3314/XXIX en date du 14 décembre 1974). Il est universellement admis que les règles du droit international humanitaire s'appliquent dans ce cas sans aucune limitation. Mais il serait impensable que l'agresseur, en proclamant l'état de guerre, puisse créer d'autres droits quelconques à son profit que l'ancien droit de guerre reconnaissait aux belligérants, par exemple le droit de confisquer la propriété de l'Etat attaqué. Il serait également inadmissible que l'agresseur puisse par sa déclaration imposer aux autres Etats les obligations de neutralité. Une déclaration à cet effet faite par l'Etat agresseur devrait être considérée comme dépourvue de tout effet juridique.

Quant à la *victime de l'agression*, celle-ci n'aura aucun intérêt à invoquer

l'état de guerre et à donner ainsi à l'agresseur une possibilité inespérée d'améliorer considérablement sa situation juridique.

En ce qui concerne les mesures de coercition décidées contre l'agresseur ou un autre violateur de la loi internationale, elles ne peuvent en aucun cas être assimilées aux opérations de guerre, malgré la confusion regrettable causée par le libellé de l'article 16 du Pacte de la Société des Nations, rédaction explicable par la nouveauté de l'institution des sanctions internationales. Les mesures internationales de coercition (sanctions internationales) sont absolument différentes en droit de l'ancienne notion de guerre et il est donc inadmissible de parler de la guerre de sanction (voir mon intervention à la session de Bruxelles de l'Institut, *Annuaire de l'Institut*, 1963, vol. 50, t. II, p. 320).

Il résulte de ce qui précède qu'il existe de bonnes raisons à l'appui de la thèse selon laquelle la notion de l'état de guerre dans le sens du droit traditionnel est devenue caduque en raison de l'évolution du droit international, rappelée ci-dessus.

Il est profondément regrettable que l'Institut de Droit international n'ait pas terminé l'étude concernant la position des parties belligérantes dans un conflit armé international, à la suite de sa session de Bruxelles en 1963, où la question a été décidée seulement pour le cas où le Conseil de sécurité aurait déterminé l'agresseur. Cette situation peu satisfaisante impose à chaque commission de l'Institut, lorsqu'elle se heurte à cette question capitale, le devoir de se faire une opinion elle-même.

Après ces observations préliminaires, mes réponses aux questions posées sont les suivantes :

1. Il me paraît indispensable de définir par des critères précis quels sont les conflits armés qui ont un effet sur les traités. Il découle de mes observations préliminaires que dans le cadre de cet examen l'on ne doit pas s'occuper particulièrement de la guerre ni de l'état de guerre. Parmi les critères à retenir, c'est d'abord qu'il doit s'agir d'un conflit armé entre Etats et de plus qu'il doit s'agir d'un conflit armé d'une certaine magnitude pour exclure les simples incidents de frontière. Par contre, j'hésite à y inclure un élément de durée, parce qu'un Etat très puissamment armé est capable de liquider en quelques heures les forces armées de son faible voisin sans que celui-ci puisse même songer à lui opposer une résistance autre que symbolique.

2. Une délimitation des conflits armés conformément à ma réponse à la première question rend inutile d'envisager deux régimes différents pour les guerres et les autres conflits armés. De plus, cette distinction serait à mon avis contraire à l'état actuel du droit international (voir mes observations préliminaires).

3. J'estime que la définition du traité contenue dans la Convention de Vienne sur le Droit des traités pourrait suffire pour les besoins de la Cinquième Commission.

4. Il ne me semble pas possible d'envisager la même théorie pour toutes les catégories de traités. En principe, trois solutions sont possibles :

a) Le conflit armé n'a pas d'effet sur les traités.

b) Les traités sont suspendus pendant la durée du conflit armé.

c) Les traités sont abrogés par le déclenchement du conflit armé. (*Cf. Lord McNair*, RCADI, vol. 59 (1937-I), p. 331).

La Commission devrait passer en revue les différentes catégories de traités et examiner à propos de chacune d'elles quel est l'effet admis par le droit contemporain.

5. Pour déterminer les effets des conflits armés sur les traités, deux grandes catégories de traités devraient retenir particulièrement l'attention de la Commission. Tout d'abord, la distinction entre les traités-lois (law-making treaties) et traités-contrats. Cette distinction cadre dans la grande majorité des cas avec celle des traités multipartites et des traités bilatéraux, mais pas dans tous les cas. Une attention particulière devrait être consacrée au type de traités bilatéraux où une des parties se trouve constituée par plusieurs Etats. En outre, il faut faire une distinction nette entre les traités ou clauses déjà exécutés et les traités ou clauses exécutoires.

Pour l'organisation pratique des travaux de la Commission, il est suggéré d'examiner les catégories suivantes de traités :

1) Traités stipulant qu'ils ne prennent pas fin en cas de conflit armé ;

2) Traités qui, de par leur nature, doivent être appliqués en cas d'hostilités ;

3) Traités politiques ;

4) Traités de commerce ;

5) Traités créant un statut ou un régime international ;

6) Traités créant une organisation ou une agence internationale ;

7) Traités de droit international privé ;

8) Traités auxquels des Etats tiers sont partie en dehors des belligérants.

6. Pour des raisons exposées dans mes observations préliminaires ci-dessus, j'estime que la pratique des Etats, antérieure à l'interdiction du recours à la force en droit international, ne saurait être prise en considération. Même en ce qui concerne la pratique la plus récente, il faut l'examiner avec beaucoup de prudence. Cette pratique, en effet, peut être conforme ou contraire au droit international. Voir la réponse à la question 9.

7. La validité des traités établissant des organismes internationaux n'est pas affectée en droit par le déclenchement d'un conflit armé. Par contre, des traités peuvent être suspendus à l'égard de l'Etat agresseur par la décision du Conseil de sécurité en application de l'article 41 de la Charte des Nations Unies.

8. La résolution de l'Institut, adoptée en 1912 sous l'empire d'un droit international basé sur des principes très différents en ce qui concerne le recours à la force, ne peut pas être considérée à mon avis comme annonçant ou décelant les présentes tendances du droit international. Toutefois, la ligne générale que la Cinquième Commission devrait suivre, c'est de limiter autant que possible les effets des conflits armés sur les traités.

9. La forme de l'énoncé de principes directeurs en la matière me paraît de beaucoup préférable. La formulation de principes directeurs est aussi plus facile à réaliser qu'un code. Mais ces principes ne peuvent pas être basés uniquement sur la pratique des Etats. La Commission, tout en analysant la pratique récente (depuis l'interdiction de l'emploi de la force dans les rapports internationaux), sera appelée à faire état dans une large mesure du développement progressif du droit international.

En ce qui concerne l'importance à reconnaître à la pratique des Etats dans le processus de création de règles de droit international, il y a lieu de souligner que le rôle de la pratique a diminué depuis l'interdiction de la menace et de l'emploi de la force par les Etats à des fins de leur politique individuelle dans leurs rapports internationaux. Cette interdiction constituant sans aucun doute une norme de caractère impératif, il est indispensable de distinguer la pratique qui est conforme au droit international et celle qui en constitue une violation.

Jaroslav Zourek

The effects of armed conflicts on treaties

(Fifth Commission)

Addendum to the Provisional Report and Proposed Draft Resolution

Bengt Broms

The provisional report and proposed draft resolution of the Fifth Commission were discussed in Oslo on 30 August 1977 at a meeting at which the following members were present: *Briggs, von der Heydte, McDougal, Rosenne, Sir Humphrey Waldock, Zourek* and *Broms*. The meeting felt that the vacancies in the Commission should be filled with interested new members. The Bureau of the Institute announced on 25 January 1978 that the following new members of the Commission were appointed: *Erik Castrén, Constantin Eustathiades, Dietrich Schindler* and *Georges Ténékidès*. The new members were subsequently asked to make their observations on the preliminary and provisional reports and proposed draft resolution.

Of the new members *Schindler* sent a written reply on 10 April 1978, while *Castrén* submitted oral comments on 21 September 1978. In addition *Rosenne* also submitted oral comments on 9 November 1978. The reply of Schindler has been annexed. In addition to this reply *Schindler* enclosed his article on 'Der « Kriegszustand » im Völkerrecht der Gegenwart', from « Um Recht und Freiheit », Festschrift für Friedrich-August Freiherr von der Heydte zur Vollendung des 70. Lebensjahres, Berlin 1977, pp. 555-574. This article includes an examination of international practice since 1945 on the « Kriegszustand » as well as a section on the legal effects of the state of war. The article substantiates the opinion which was expressed by *Schindler* in his observations that recent practice can hardly bring « any substantial change to the draft resolution ».

As to the proposed draft resolution *Schindler* suggests eliminating the words « in written form » from the third preambular paragraph for reasons with which I am in full agreement. I have also taken

note of the proposals put forward by *Schindler* with regard to paragraphs 5 and 8 (now 7 (b)). Similarly I have tried to cover carefully the oral comments submitted by *Castrén* and *Rosenne*. In taking into account also the opinions presented by members of the Commission in Oslo, I have revised the draft resolution which now appears in the annexed form.

Although it was envisaged in Oslo that due to the limited number of replies to the preliminary questionnaire, a new short questionnaire should be sent out it seems that with the addition of new members to the Commission and taking into account the recent additional replies and discussions this may no longer be necessary. Therefore I do hope that the matter could be discussed by the Institute already in Athens.

I would, however, be grateful for additional written comments should any of the members care to send them in advance of the forthcoming session. Such comments and additional oral comments could be discussed at a meeting to be arranged at the beginning of the session before the matter comes for discussion in the Institute.

Helsinki, 4 February 1979

Revised draft resolution

The Institute of International Law

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties ;

Having regard for the need to take into account that the use of force in international relations contrary to the Charter of the United Nations has been forbidden and bearing in mind the provisions of the Charter of the United Nations and the Vienna Convention on the Law of Treaties ;

Considering also that it is now correct to speak of the problem of the effects of armed conflicts on treaties and that an « armed conflict » in this context covers cases, regardless of a formal declaration of war, which include the use of armed force contrary to the Charter of the United Nations by one State against another in their international relations including the fact that the acts concerned or their consequences are of sufficient gravity to have any effects on treaties and that for the purposes of the present resolution « treaty » means an international agreement concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ;

Noting that the practice of States in so far as the effects of armed conflicts on treaties are concerned varies and that the rules of international law cannot as yet be regarded as having been fomulated to a satisfactory extent ;

Considering, however, that there is an urgent need to indicate some guiding principles to cover cases where an armed conflict occurs ;

Adopts the following Resolution :

I

1. The occurrence of an armed conflict does not *ipso facto* lead to the termination or suspension of the operation of any of the treaties in force between the parties to the armed conflict.

2. The parties are not prevented by the mere fact of the outbreak or the existence of armed hostilities from concluding new agreements among themselves.

3. A treaty which expressly provides that it is to be performed in time of war or during an armed conflict or which by reason of its nature or purpose was intended by the parties to be operative during an armed conflict is not terminated or its operation suspended by the outbreak or existence of an armed conflict between any of its parties.

4. A treaty which has been concluded between one of the parties to an armed conflict and a third State remains in force despite the outbreak or existence of an armed conflict, but its operation may be affected and consequently temporarily suspended during such conflict.

II

5. The parties to an armed conflict may regard as terminated or suspended treaties with States with which they are in armed conflict if these treaties are considered to be incompatible with the state of an armed conflict. Such a decision should be made known to the other parties to the particular treaty. The parties may decide either unilaterally or by special agreement that the operation of a particular treaty will continue despite the occurrence of the armed conflict.

6. At the end of the armed conflict the parties should indicate their intentions as to the application of all those treaties which may either by means of a unilateral decision, a special agreement or otherwise have been affected by the armed conflict. There is a presumption that where the parties do not specifically indicate their intentions in this respect the treaties which existed between the

parties before the outbreak of an armed conflict continue to be in force unless there is a supervening impossibility of performance or such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

III

7. In cases where the effects of an armed conflict on a particular treaty have not been adequately regulated by the parties either before, during or after the armed conflict the following rules of interpretation are to be recommended to cover disputed cases:

(a) As to the bilateral treaties between the parties to an armed conflict only such treaties may be regarded as suspended in their effects during the armed conflict in respect of which there is a supervening impossibility of performance or such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. Transitory treaties continue to be in force despite the outbreak of an armed conflict if they have been executed before the outbreak of the armed conflict. Treaties concerning, *inter alia* commerce, technical and social matters as well as matters of private international law are to be judged in the light of the relevant circumstances, the presumption being that their operation is suspended during an armed conflict unless the parties otherwise agree. Special attention should be paid to the impact of the process of coercion upon possibilities of performance of the treaty in accordance with the contents and purpose of the treaty, taking also into account the original and continuing expectations of the parties.

(b) As to the multilateral treaties between parties to an armed conflict and third States, such treaties remain in force between the parties not involved in the armed conflict in their mutual relations as well as in their relations with the parties involved in the armed conflict. Between the parties to an armed conflict multilateral treaties may be suspended if there is a supervening impossibility of perfor-

mance or such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties. At the conclusion of an armed conflict the multilateral treaties cannot be altered by the mutual arrangements of the parties to an armed conflict to the disadvantage of the third States without their consent.

(c) The occurrence of an armed conflict between parties to a multilateral treaty establishing an international organization or agency does not affect the operation of such a treaty unless there is a supervening impossibility of performance or such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

(d) If the ground for terminating or suspending the operation of a treaty relates solely to particular clauses, it may be invoked only with respect to those clauses where the said clauses are separable from the remainder of the treaty, or where it 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 where continued performance of the remainder of the treaty would not be unjust.

Annex

Observations of Professor Dietrich Schindler on the Provisional Report and Proposed Draft Resolution

Zollikon, April 10, 1978

My dear Colleague,

Having recently been appointed member of the Fifth Commission, I have the pleasure to send you my observations concerning your provisional report and proposed draft resolution. I can say in advance that I find myself in agreement with all essential points of your report and of the proposed draft resolution. I will first make some general remarks on State practice concerning the effects of armed conflicts on treaties since 1945 and then give you a few comments on the draft resolution.

I somewhat regret that it has not been possible to investigate recent State practice on the effects of war on treaties in a more extensive way, as Professor Briggs suggested. However, I do not believe that a more extensive research would have brought any substantial change to the draft resolution.

As far as I can see, practice of national courts since 1945 has almost exclusively been concerned with the effects of World War II on treaties. It is very difficult to find any decisions dealing with the effects of more recent armed conflicts on treaties. If I see correctly, none have been cited in your reports. This lack of decisions is not surprising. Among the armed conflicts which have broken out since 1945, only few were of an inter-state character and in hardly any of them the question of the effects on treaties could arise. It may be appropriate to pass them shortly in review.

In the *Arab-Israeli conflict* obviously no treaties existed which had been concluded between Israel and the Arab States. The question of the effects of the war on treaties could therefore become relevant only in regard of former treaties of Palestine which were in force when the State of Israel was founded. Shabtai Rosenne informs us, however, that Israel has taken a negative attitude with regard to the succession to such treaties. As to the Arab States, which have not recognized Israel, we can assume that they did not rely on such treaties in their relations with Israel, either. With regard to the *Suez Incident* of 1956 between Britain, France and Egypt, it has been reported that « as a result of that incident a law was passed in Egypt (Law no. 1 of 1957) stating that the British aggression had put an end to the Anglo-Egyptian Agreement of 1954 » (*McNair/Watts*, The Legal Effects of War, 4th edition, 1966, p. 20, n. 1 ; the agreement referred to must have been the Agreement regarding the Suez Canal Base). Apart from this agreement there was probably no effect on treaties. As to the armed conflict between *China and India* in 1962, I have no information concerning its effects on treaties. However, since diplomatic relations between

the two countries were not broken off there was probably no rupture of treaty relations either.

In the war between *Pakistan and India* in 1965, there was no effect on treaties in spite of Pakistan's claim that she was « at war » with India. Our confrère *Pierre Lalive*, as arbitrator in an arbitration of the International Chamber of Commerce, gave an award on the question whether a state of war had come into existence between Pakistan and India. He arrived at a negative conclusion. The award contains the following remarks which seem important to me for the question under discussion :

« (48) The second factor, which remains to be examined, is the continued existence of treaties between the two countries.

While the question of the effect of war on treaties 'remains as yet unsettled', according to Oppenheim-Lauterpacht (II, § 99, p. 303), it is generally agreed that at least certain categories of bilateral treaties previously concluded by the belligerents are *ipso facto* annulled through war, some writers maintaining the traditional doctrine that the outbreak of war cancels all treaties previously concluded between the parties.

(49) It is, therefore, interesting to note that none of the treaties concluded by India and Pakistan before September 1965 seems to have been considered, on either side, as cancelled ; at least no contention and no evidence to that effect has been forthcoming from the Defendant. On the contrary, evidence may be found to show that both countries have viewed their treaties as still in force. On the Claimant's side, reference was made to the fact that India continued to effect payments to Pakistan under the Indus River Treaty. It is common knowledge also that the Treaty concluded on June 30, 1965, in order to arbitrate the question of the Rann of Kutch, was finally implemented by both parties (if not actually during the hostilities, of course, but shortly after the Tashkent Declaration of January 10, 1966, *i.e.*, on February 15, 1966). McNair writes on this point (p. 458) : 'Both States apparently regarded the existing Kutch Arbitration Agreement between them as continuing in force, taking action under it in connection with the appointment of arbitrators.'

Moreover, this view finds a confirmation in Article VI of the Tashkent Declaration, whereby the Prime Minister of India and the President of Pakistan agreed 'to take measures to implement the existing agreements between India and Pakistan' — and not, for instance, to 'revive' former agreements cancelled by a 'war'.

(50) While it is generally recognised that war entails, and must be analysed as, a complete rupture of international relations — of which treaties are the most perfect legal expression — the continued existence of treaties as well as of diplomatic relations between the parties cannot be reconciled with a 'state of war'. It proves or confirms, by the conduct of both Parties, that the hostilities of September 1965 were a 'conflict not amounting to war'. »

(Award of 18 December 1967, reproduced in S.P. Sharma, The Indo-Pakistan Maritime Conflict, 1965, Academic Books Limited, Bombay/New Delhi 1970, pp. 107-123, at pp. 117-118).

According to the last paragraph quoted, the termination or suspension of treaty relations is to be considered not so much as a consequence of the outbreak of hostilities but rather a criterion of the existence of a state of war. As long as treaty relations are maintained — and their complete rupture may often be hardly possible in the present-day world — no state of war in its traditional sense can be presumed.

As to the armed conflict between India and Pakistan over the secession of *Bangla Desh* in 1971, I did not find any indications as to its effects on treaties. Different from the 1965 conflict, diplomatic relations were broken off in this conflict between the two countries. I have, furthermore, no relevant information with regard to the armed conflicts between *Turkey and Cyprus* in 1974 and between *Ethiopia and Somalia* at present.

As to the wars in *Korea* (1950-1953) and in *Vietnam* (ending in 1973), we can assume that there were hardly any treaty relations, particularly no bilateral treaties, between the Northern and the Southern parts of those countries which could have been affected by the hostilities. As to the States which sent military forces to either one of those countries, the question whether those wars had any effects on their treaties needs a closer examination. One cannot assume, however, that there were any important effects.

This short and incomplete survey of inter-state conflicts may serve as a confirmation that there is hardly any State practice concerning the effects of armed conflicts broken out since 1945 on treaties. The factual and legal situation has been considerably different from the one in World War II. The survey, furthermore, shows that the question of the legality of the resort to force has never had since 1945 any relevancy to the question of the effects of armed conflicts on treaties. The U.N. Charter is important, however, inasmuch as a decision of the Security Council on measures not involving the use of armed force (Art. 41) will normally lead to the suspension or termination of treaties concerning economic and financial matters or communication.

As to the proposed *draft resolution*, I have only few remarks. I agree with the definition of « armed conflict » in the *preamble* but believe that in the definition of the term « treaty » it would be appropriate to eliminate the words « in written form », since — different from the Vienna Convention on the Law of Treaties — the proposed resolution contains no provision whose application would be restricted to treaties in written form.

Paragraph 5 of the draft resolution, when read without any comment, might give rise to the erroneous opinion that the parties to an armed conflict have a sweeping right to regard as terminated or suspended treaties with States with which they are in armed conflict. It could be appropriate, therefore, to make clear that this right may be exercised only within the limits of the principles set forth in paragraphs 8-10. I would recommend to bring paragraph 5 into a closer relation with paragraphs 8-10.

In *paragraph 8* the term « dispositive treaties » is perhaps not sufficiently clear, while the terms « technical and social matters » are rather too vague.

I have also some doubts whether it is correct to presume that the operation of treaties concerning matters of private international law is suspended during an armed conflict.

Sincerely yours,

Dietrich Schindler

The effects of armed conflicts on treaties

(*Fifth Commission*)

Final Report and Revised Draft Resolution

Bengt Broms

The provisional report and proposed draft resolution of the Fifth Commission were discussed in Athens on 6 September 1979 at a meeting at which the following members were present: *Briggs, Castrén, von der Heydte, McDougal, Schindler, Ténékidès, Verosta, Sir Humphrey Waldock* and *Broms*.

In view of the fact that the final report of the Fifth Commission would be discussed at the next session of the Institute of International Law it was decided that members could still submit their comments on the proposed draft resolution by the early part of 1980.

Accordingly *Briggs* sent a written reply on 15 November 1979, *McDougal* on 3 January 1980 and *Schindler* on 19 January 1980. These replies have been annexed. In addition to this, *Rosenne* submitted oral comments on 13 March 1981 and *Castrén* on 10 April 1981.

In preparing the new version of the proposed draft resolution I have taken note of the proposals put forward at the meeting in Athens as well as in the replies and oral comments. The revised draft resolution appears in the annexed form. The revised text is based mainly on the following considerations.

In so far as the preamble is concerned *Schindler* points out that the third preambular paragraph is too long and heavy. Following a proposal by *Rosenne* I have shortened this paragraph by removing a part of the text to become a new Article 1. According to a suggestion by *Castrén* the word « however » was deleted from the last preambular paragraph.

Article 1 includes now a provision as to the meaning of an « armed conflict » and a « treaty » for the purposes of this resolution.

The comments submitted by *Briggs*, *McDougal* and *Schindler* have been generally taken into account in revising Article 2. However, I have added the old « but » clause to the proposals by *Briggs*.

My comments as to the proposal by *Schindler* to add some supplementary provisions to this part of the new draft resolution are as follows.

In the first place our draft deals solely with the effects of armed conflicts on treaties. It seems to me, therefore, that provisions concerning the effects of the decisions of the Security Council acting under Article 41 of the Charter of the United Nations need not be included.

Schindler has also proposed that a reference should be made to the laws of armed conflicts concerning enemy aliens (and especially the Fourth Geneva Convention of 1949). These laws are, however, based on the provisions of treaties which are intended to be operative during an armed conflict and such treaties are mentioned in Article 2, paragraph 3. As a result of this a supplementary provision is not necessary.

In so far as the proposal to include a reference to the law of neutrality as prevailing over conflicting treaty obligations is concerned, it seems as if this fact does not result directly from the armed conflict. A reference to the laws of neutrality could, however, be added to the end of the second preambular paragraph as follows : « as well as the rules of the laws of neutrality ». I am presenting this as an alternative solution.

In his fourth proposal *Schindler* himself points out already that reprisals are to be distinguished from the suspension of treaties as a consequence of their breach. For the same reason I have not included a supplementary provision on the effects of reprisals. Let it be mentioned that *Castrén* and *Rosenne* shared my views on these issues.

Article 3 is based generally on a proposal by *Briggs*. I did, however, change the phrase « evidence of the intent of the parties » as it was correctly pointed out by *Rosenne* that « evidence of the intent » is not the best possible criterion. In addition to this amendment I did retain the second sentence of Article 5 of the previous proposed draft resolution. *Castrén* agreed with this solution whereas

Schindler pointed out that a special agreement mentioned in this sentence would be rather exceptional.

In so far as Article 4 is concerned I have made use of the proposals by *Briggs* as they seem to be generally acceptable and non-controversial.

In accordance with a proposal by *Briggs* I have deleted from Article 5, paragraph 1, the expression « of interpretation » and a reference to « a supervening impossibility of performance ».

In so far as Article 5 (a) is concerned I have deleted the reference to treaties on private international law matters in accordance with a proposal by *Schindler*.

The phrase « compatibility with the existence of an armed conflict » has been inserted to Article 5 (b) in an effort to comply with a proposal by *Briggs*. Regardless of a proposal by *Schindler* to delete the last sentence of Article 5 (b) it has been retained as this was also the opinion of *Castrén*.

In so far as Article 5 (d) is concerned I have tried to comply with a proposal by *Briggs* while adding the word « reasonably » before « separable ».

The articles of the proposed draft resolution have been renumbered in a way which I hope to be acceptable.

In conclusion I would like to express my thanks to those members of the Fifth Commission who have so kindly submitted written and oral comments. The Fifth Commission is scheduled to meet in Dijon before the opening of the next session of the Institute. I would be grateful for additional written comments already in advance of the forthcoming session.

Helsinki, 12 April 1981

Draft Resolution

The Institute of International Law,

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties,

Having regard to the need to take into account that the use of force in international relations has since the Charter of the United Nations been forbidden and bearing in mind the provisions of the Charter of the United Nations and the Vienna Convention on the Law of Treaties,

Considering also that it is now correct to speak of the problem of the effects of armed conflicts on treaties and that the practice of States in so far as the effects of armed conflicts on treaties are concerned varies and that the rules of international law cannot as yet be regarded as having been formulated to a satisfactory extent,

Believing that there is an urgent need to indicate some guiding principles to cover cases where an armed conflict occurs,

Adopts the following Resolution :

Article 1

For the purposes of this Resolution :

1. « Armed conflict » means cases, regardless of a formal declaration of war, which include use of armed force contrary to the Charter of the United Nations by one State against another in their international relations including the fact that the acts concerned or their consequences are of sufficient gravity to have any effects on treaties.

2. « Treaty » means an international agreement concluded between States and governed by international law, whether embodied

in a single instrument or in two or more related instruments and whatever its particular designation.

Article 2

The occurrence of an armed conflict does not *ipso facto* terminate or suspend the operation of any of the treaties in force between the parties to an armed conflict.

The existence of an armed conflict does not prevent the parties thereto from concluding new treaties with each other.

A treaty which expressly provides that it is to be performed in time of war or during an armed conflict or which by reason of its nature or purpose is to be operative during an armed conflict is not terminated nor is its operation suspended by the existence of an armed conflict between any of its parties.

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of bilateral treaties between a party to that conflict and third States.

The existence of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict.

Article 3

Unless the contrary intention of the parties in concluding a treaty is established as to its continuance in operation in the event of an armed conflict between them, the operation of the treaty or of provisions thereof may be suspended between them if performance is incompatible with the existence of an armed conflict. The parties may decide jointly or severally that the operation of a particular treaty will continue despite the existence of an armed conflict.

Article 4

The termination of an armed conflict will normally lead to resumption of the operation of treaties which have been suspended.

It is desirable that the parties to an armed conflict, either unilaterally or jointly, give notification to that effect.

Performance under multilateral treaties establishing an international organization or agency is customarily resumed even prior to the conclusion of a treaty ending the armed conflict.

Article 5

Where the effects of an armed conflict on a particular treaty have not been adequately regulated by the parties either before, during or after the armed conflict the following rules are to be recommended to cover disputed cases :

(a). As to the bilateral treaties between the parties to an armed conflict only such treaties may be regarded as suspended in their effects during the armed conflict in regard to which there is such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

Treaties establishing a permanent régime continue to be in force in spite of the existence of an armed conflict if they have been executed before the outbreak of the armed conflict. Treaties concerning, *inter alia,* commerce and technical matters are to be treated in the light of the relevant circumstances and on the basis of their compatibility with the existence of the armed conflict.

(b). As to the multilateral treaties between States parties to an armed conflict and third States, such treaties remain in force between the parties not involved in the armed conflict in their mutual relations as well as in their relations with the parties involved in the armed conflict.

Between the States parties to an armed conflict multilateral treaties may be suspended if there is such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

At the conclusion of an armed conflict the multilateral treaties cannot be altered by the mutual arrangements of the States parties to an armed conflict to the disadvantage of the third States without their consent.

(c). The existence of an armed conflict between some of the parties to a multilateral treaty establishing an international organization or agency does not affect the operation of such a treaty unless there is such a fundamental change of circumstances that the performance of the treaty would be unduly hampered in the light of the relevant provisions of the Vienna Convention on the Law of Treaties.

(d). If the ground for terminating or suspending the operation of a treaty relates solely to particular clauses, it may be invoked only with respect to those clauses which on the basis of their compatibility are reasonably separable from the remainder of the treaty, or where it 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 where continued performance of the remainder of the treaty would not be unjust.

Annex

Observations of the members of the Fifth Commission on the proposed draft resolution annexed to the « Addendum to the Provisional Report »

1. Observations of Professor Herbert W. Briggs

Ithaca, New York 14850, 15 November 1979

My dear Colleague,

I have given careful attention to the Draft Resolution on The Effects of Armed Conflicts on Treaties handed to us in Athens in September and submit the observations and suggestions which follow.

Leaving aside the Preamble until we have agreed on the substantive articles, I consider the content of the latter.

Article 1 is basic and has my agreement. I would suggest a drafting change : omit the words « lead to » as less proximate and rephrase as follows :

> 1. The occurrence of an armed conflict does not *ipso facto* terminate or suspend the operation of any of the treaties in force between the parties to the armed conflict.

Article 2. Reference to « the outbreak » is not necessary here : it is « the existence » of armed conflict to which reference should be made. I accept the principle and would redraft as follows :

> 2. The existence of an armed conflict does not prevent the parties thereto from concluding new treaties with each other.

Article 3. Acceptable as drafted, with a minor change : in line 5 delete « or » and substitute « nor is » (its operation suspended, etc.).

Article 4 raises two questions. The first proposition — i.e., that the existence of armed conflict does not terminate or suspend the operation of treaties with third States — is correct and the only question is whether such a truism requires restatement in our draft. Your second proposition is doubtful. It is not clear whether you regard the existence of an armed conflict as possibly *ipso facto* « temporarily » suspending the operation of a treaty or whether you regard it as

conferring a right of suspension on a party to the armed conflict (also on the third State ?). I do not believe that either alternative has any basis in international law, and I would therefore omit the « but » clause.

It might be desirable to divide Article 4 into two parts — one dealing with bilateral treaties and the second part incorporating the proposition found in the first sentence of your paragraph 7 (b), on multilateral treaties. This would also have as a precedent Articles 10 and 9 of the Christiania *Règlement* of the *Institut* in 1912. Article 4 could be drafted thus :

> 4 (a). The existence of an armed conflict does not terminate or suspend the operation of bilateral treaties between a party to that conflict and third States.
>
> (b). The existence of an armed conflict between parties to a multilateral treaty does not terminate or suspend the operation of that treaty as between other contracting States or between them and the States parties to the armed conflict.

Article 5. The practice of States appears to have clearly established that States at war have a legal right under international law to terminate or to suspend treaties with enemy States, or provisions thereof which, in their opinion, are incompatible with a state of hostilities. On the other hand, no evidence has been produced that armed conflict short of war in the legal sense gives rise to such a right. It is nevertheless true that the practice of States since the UN Charter, and the opinions of jurists, have tended to blur the distinction between war as a legal status and the existence in fact of armed conflict. The policy choice before us is therefore whether to set forth parallel articles on the legal effects of war on treaties, and of armed conflicts on treaties, or to assimilate armed conflict to war, with its legal consequences. On a realistic view, it is not likely that States engaged in actual hostilities will regard all treaties between them as fully operative. As a minimum, therefore, the parties to an armed conflict should be regarded as having a right to suspend the operation of treaties between them or of provisions thereof which are incompatible with the existence of hostilities. Whether a right of *termination* should also be recognized might be left open in our draft, as depending upon the developing practice of States.

Suggestions that the decision as to incompatibility should be limited to « supervening impossibility of performance » or « fundamental change of circumstances » are not likely to provide precise or workable standards for the decision which a party to an armed conflict must make. They import extraneous considerations which are not helpful in the circumstances. I therefore suggest the deletion of these suggested criteria you have listed in Article 7. I would also delete the last two sentences of your Article 5.

More useful might be an approach that in the absence of evidence of the intent of the parties in concluding the treaty as to its continuance in operation in the event of an armed conflict between them, a right of suspension of provisions incompatible with the existence of armed conflict may be exercised. Since the decision as to incompatibility and the determination of intent will

inevitably rest on a party engaged in armed conflict, they will serve more as desirable guides than as a legal condition precedent to exercising the right of suspension. On this view, a possible draft of Article 5 might be :

> 5. In the absence of evidence of the intent of the parties in concluding a treaty as to its continuance in operation in the event of an armed conflict between them, the operation of the treaty or of provisions thereof may be suspended between them if performance is considered (by a party) to be incompatible with the existence of armed conflict.

(By referring to « the existence » rather than to « the state of » an armed conflict, the possible implication that a « state of armed conflict » is a legal status like a « state of war » is avoided.)

Article 6. While our first articles may be considered as expressive of existing international law, it may be more difficult to formulate as rules of law the effect on treaties of the termination of an armed conflict. However, there appears to be sufficient State practice for us to indicate the usual behavior of States and to indicate what we consider desirable. Since the incompatibility test ceases to operate with the cessation of armed conflict, we need no reference to it in this Article ; and the tests of « impossibility of performance » and « fundamental change of circumstances » involve *additional* consideration involving more than the effect of armed conflict or its cessation.

For your consideration, I suggest that Article 6 might read as follows :

> 6 (a). The termination of an armed conflict will normally lead to resumption of the operation of treaties which have been suspended.
>
> (b). It is desirable that the parties to the armed conflict, either unilaterally or jointly, give notification to that effect.
>
> (c). Performance under multilateral treaties establishing an international organization or agency is customarily resumed even prior to the conclusion of a treaty ending the armed conflict.

With my best personal wishes,

Sincerely yours,

Herbert W. Briggs

2. Observations of Professor Myres S. McDougal

January 3, 1980

Dear Professor Broms,

As promised in Athens, I have taken another look at your proposed resolution. The comments I wrote as I read are attached.

My first thought was that the content of the resolution was right and that all it needed was somewhat tighter draftsmanship. Since Sir Humphrey Waldock

is a member of our commission, I knew that the draftsmanship could be easily remedied.

As I reflected, however, I became somewhat less sure of some of the content. I am not certain that this is a problem requiring presumptions. The fundamental policy, I suppose, is to maintain all agreement that is reasonably compatible with one or more of the parties being subjected to armed conflict. A disciplined examination of all features of the context to determine what is compatible and reasonable might be preferable to a structure of presumptions.

I confess I have not worked with these materials for some time and raise these questions with diffidence.

Cordially yours,

Myres S. McDougal

Comments on the Draft Resolution

I (4) This draft may be too restrictive. The subjection of a party to an agreement to armed attack may importantly affect its capabilities for performing the agreement with the third State. The problem would appear to call for a careful contextual examination of all relevant factors.

II (5) « Are considered to be incompatible » should be made to read « Are incompatible ».

Strike « with the state of » before « an armed conflict ».

Would « reciprocal acquiescence » be better than « unilaterally » ?

II (6) Might strike « a supervening impossibility of performance » as redundant.

III (7) Might strike « of interpretation » in first paragraph.

III (7) (a) Strike « a supervening impossibility of performance ».

Might find a better word than « transitory ».

I am not sure about the presumption that all these types of treaties should be suspended. The « type of treaty » might simply be included among the relevant factors requiring examination.

III (7) (b) I am inclined to think a careful contextual examination might be better than a presumption here. The inquiry should be for compatibility and reasonableness. It might impose unnecessary hardship to require that the treaties remain in force.

III (7) (b and c) I continue to think that « fundamental change of circumstances » is enough.

III (7) (d) Some definition of « separable » is required. I would suggest again that compatibility and reasonableness, as determined by careful contextual examination, be made the tests.

Myres S. McDougal

3. *New Observations of Professor Dietrich Schindler*

8702 Zollikon, January 19, 1980

My dear Colleague,

As agreed upon in Athens I am sending you some suggestions concerning the draft resolution on the effects of armed conflicts on treaties.

First, I believe that the division of the resolution in three parts headed by roman ciphers is not yet entirely convincing as the criteria lying at the basis of this division are not clearly recognizable. It might be helpful to add titles to the roman ciphers in order to achieve greater clarity.

I would not exclude an alteration of the resolution's structure, for instance on the lines of the 1912 resolution which is based on the division between treaties among belligerents and treaties between belligerents and third States.

As to the *preamble*, the third paragraph beginning with « Considering » seems to me too long and too heavy. Furthermore, the initial sentence « it is now correct to speak of the problem of the effects of armed conflicts on treaties » might be rendered more substantial by calling attention to the causes of the changes which have occurred since 1912 : the state of war is no more recognized ; the States have become much more interdependent ; armed conflicts do not generally lead to a complete rupture of treaty relations any more.

Section I/3. I believe that you overemphasize the *intention* of the parties to a treaty by saying that a treaty is to be performed only if it is « intended by the parties to be operative during an armed conflict ». I would delete the words « intended by the parties » so that the sentence reads : « which by reason of its nature or purpose is to be operative during an armed conflict ».

Among the treaties which are to remain in force during armed conflicts mentioned in I/3 one could furthermore list treaties which create a permanent regime, *e.g.* the cession of territory and the determination of frontiers. You mention them in Section III/7/a under the unfortunate expression « transitory treaties ». I would rather mention them in Section I. As far as I can see, the doctrine is unanimous in this regard (*e.g. Castrén*, The Present Law of War and Neutrality, 106 ; *Guggenheim*, Traité (2nd ed. 1967), I 241/2 ; *Rousseau*, Droit international public, I (1970), 223 ; *Wengler*, Völkerrecht, 378).

Section I/4. The treaties between parties to an armed conflict and third States are mentioned in I/4 as well as in III/7/b. This leads to an unnecessary duplication.

Section I : supplementary provisions. I would like to point to the following situations in which the operation of treaties will be suspended in case of armed conflicts :

— *Decisions of the Security Council* based on Article 41 of the Charter will normally lead to the suspension or termination of treaties concerning commercial and financial matters and communication which are in force with the States against which the measures are taken.

— The rules of the *laws of armed conflicts concerning enemy aliens* (especially of the 4th Geneva Convention of 1949) will set aside conflicting rules concerning the treatment of nationals of the enemy State applicable in peace time.

— If a State is bound to apply the *law of neutrality*, the rules of this law will prevail over conflicting treaty obligations, *e.g.* provisions on exportation or transit of war materials.

— The operation of treaties may be suspended by means of *reprisals* against an illegal act of another State, *e.g.* as a reprisal against an armed attack. Such reprisals are to be distinguished from the suspension of treaties as a consequence of their breach.

It might be useful to mention these cases in the resolution.

Section II/5. It seems to me that the following questions ought to be clarified in the text of this paragraph :

— Does this paragraph apply to *bilateral* and *multilateral* treaties ?

— Is a party to an armed conflict free to regard a treaty either as *terminated* or as *suspended* according to its discretion, as the wording seems to suggest ? Can a multilateral treaty be regarded as terminated ?

— Is a declaration by *one* of the parties to an armed conflict sufficient to bring about the termination or suspension ?

In the first sentence of paragraph 5 I would delete the words « considered to be » which are too vague in my opinion, and say instead « are incompatible with the state of an armed conflict ». A large measure of appreciation will be left to the parties in any case. In the second sentence I do not understand why a « special agreement » between the parties to an armed conflict on the continuation of the operation of a treaty must be particularly mentioned. Such an agreement seems to be something rather exceptional.

Section II/6. The second sentence (« There is a presumption... ») should rather be transferred to Section III in view of the fact that Section II deals with declarations to be made by parties to an armed conflict whereas Section III covers the cases where the parties have not made adequate declarations.

Furthermore : If one refers to the provisions of the Vienna Convention on the Law of Treaties on supervening impossibility of performance and fundamental change of circumstances, one should make clear whether the procedure provided for in Articles 65-68 of the Vienna Convention must be followed or not.

Section III/7/a. I refer to what I have already said concerning « transitory treaties ».

I still have some doubts whether there is a presumption that treaties on private international law are suspended during an armed conflict.

I think that the last sentence of (a) is not sufficiently clear and precise.

Section III/7/b. I refer to what I mentioned above concerning the procedure according to the Vienna Convention on the Law of Treaties.

I believe that the last sentence of (b) is unnecessary. Why speak of *alterations* of treaties at the end of an armed conflict when during the armed conflict the treaties may only be *suspended*? Furthermore, the sentence seems to be self-evident.

I hope that some of my remarks will be useful to you.

With kindest regards,

Sincerely,

Dietrich Schindler

The problem of choice of time in private international law

(Twenty-fourth Commission)

Supplementary Report

Ronald Graveson

1. The present Report is intended to supplement that presented on 13 September 1979 at the fourteenth plenary meeting of the Session of Athens and reported in the Annuaire, Vol. 58, Part II, at pages 179 to 190. It takes account both of the observations made by Confrères at that meeting and of subsequent written comments which three members of the 24th Commission, Professors Cansacchi and Gannagé and Judge Sorensen, very kindly sent to the Reporter. Their letters are annexed to this Report. The Reporter wishes to record his warm appreciation to all Confrères who have commented orally or in writing on the draft Resolution. In particular he would pay tribute to the valuable participation of Mr. M. van Hoogstraten during the Athens Session and express our deep sorrow at the loss of such a distinguished member of the 24th Commission so soon after his election to the Institute.

2. The draft Resolution presented at Athens has been amended in the light of the observations referred to and further consideration by the Reporter and is annexed to this Report. Most of the changes are in arrangement rather than substance, though one important change of principle has been made. They are as follows :

Preamble, para. 3. The reference to « private international law » is broadened to « systems of private international law generally » to take account of the comparative factor mentioned in the discussions and reflected in the scope of the recommendations.

Para. 4. The words « the essential task of the judge » replace « an important consideration », adopting the amendment of Professor

Cansacchi. This paragraph acquires increased importance as a general principle for solution of the problems of choice of time in view of the proposed exclusion of the principle of *tempus regit actum* in Article I (a) of the earlier draft.

Section I - Article 1 (a). This clause, embodying the basic principle of *tempus regit actum*, to which many of the following provisions were specific exceptions, has been omitted in view of the doubts and fears expressed by some of my Confrères both at the Athens Session and in correspondence. The Reporter does not share those doubts, but is nevertheless content to regard the amended Paragraph 4 of the Preamble as a general principle, of which the specific provisions in the Resolution are not exceptions (as in the case of the deleted Article 1 (a)), but examples and manifestations. Apart from the logical attraction of this relationship between the general principle and its subsidiary rules, the amendment in the Preamble exemplifies the philosophical basis of private international law, namely justice, which the Reporter has sought to expound since 1948 and which is now well established in judicial decisions.

Article 6 (old). — Following the suggestion of Judge Sorensen the substance of this Article has now been embodied in the new Article 3, line 1. The old Article 6 accordingly disappears.

The remaining Articles are unchanged but again, chiefly on the suggestions of Judge Sorensen and other Confrères, renumbered in a more logical order as follows :

Former Article 1 (a) is deleted.
Former Article 3 becomes Article 1.
Former Article 2 remains Article 2.
Former Article 4 becomes Article 3.
Former Article 7 becomes Article 4.
Former Article 8 becomes Article 5.
Former Article 1 (b) becomes Article 6.
Former Article 5 becomes Article 7.

Section II. — The Recommendation is unchanged.

London, 1 January 1981

Revised draft resolution

The Institute of International Law,

Recalling, the Resolution on The Intertemporal Problem in Public International Law adopted at its Wiesbaden Session;

Noting that certain problems of time in private international law differ from those in public international law;

Considering it desirable accordingly to propose appropriate solutions to the problem of time in systems of private international law generally;

Considering that in the application of the following Resolution the essential task of the Judge should be the achievement of a just and equitable solution,

I.

Adopts this Resolution:

1. The temporal effect of change in a rule of private international law shall be determined by the legal system to which that rule belongs.

2. The temporal effect of change in the applicable law shall be determined by the *lex causae.*

3. The temporal effect of change in the connecting factor, whether resulting from the action of a law-making authority or than of an individual, shall be determined as follows:

(a) in the case of changes in the facts constituting the basis of jurisdiction during the course of proceedings, such changes shall not deprive a court of its existing jurisdiction or affect the recognition or enforcement of its judgments in other States;

(b) in the case of changes of the facts constituting the connecting factor, by applying the internal law of the country having the closest links with the situation.

4. The legal relevance of facts occurring before or after the legally decisive event and not relevant to the ascertainment of the connecting factor shall be determined by the *lex causae*.

5. The effect of retrospective legal provisions, whether legislative, executive or judicial, should normally be determined by reference to the legal system in which they originate.

6. In so far as concerns continuous legal situations of personal status, property or obligation, it should be recognised that personal status established and rights acquired before the happening of a relevant change of law should be protected so far as may be possible.

7. In any case in which, on the occasion of regulating the conflict in time, the effects of a legal situation may be subjected to a law different from that applicable to its conditions of formation, the solution adopted should take into consideration the need to ensure a sufficient continuity and cohesion of the total régime of the situation under review.

II.

Recommends that :

In order to avoid any cause of uncertainty or dispute, it is desirable that every convention or statute relating to matters of private international law should include express provisions indicating the solution that ought to be given to such problems of applicable time as might arise in the course of its application.

Annex

Observations of Members of the Twenty-fourth Commission on the Draft Resolution of Professor Graveson[1]

1. Observations de M. Giorgio Cansacchi

Turin, 15 mai 1980

Mon cher Confrère,

J'ai reçu la lettre circulaire de notre éminent Secrétaire général et aussi la copie du procès-verbal de la séance consacrée, le 13 septembre dernier, à Athènes, à votre rapport.

Je partage votre avis sur les difficultés de proposer des directives générales aux juges sur le problème du « temps » en droit international privé, vu la mentalité juridique différente des juristes de droit civil et de *common law*. Je pense toutefois que votre dernier projet de résolution, tel qu'il a été présenté à Athènes, est entièrement acceptable et dûment justifié dans ses considérants.

Pour ma part, je proposerais, dans le quatrième alinéa du préambule, de modifier le texte en ce sens :

« Considérant que dans l'application de la présente résolution, la recherche d'une solution juste et équitable doit être la tâche essentielle du juge ».

Dans le texte de la résolution, je pense qu'il est essentiel d'affirmer clairement le principe *tempus regit actum* avec les éclaircissements et les exceptions particulières que vous avez exposés. Je suis d'accord avec vous que, en présence d'un changement dans le temps des faits constituant le facteur de rattachement, il est raisonnable de choisir la loi étrangère « qui présente le lien le plus étroit avec la situation » (art. 4, lettre b).

Je suis aussi d'accord sur le maintien de la proposition avancée par M. Gannagé (5), même si elle envisage un cas très particulier. Je n'ai pas d'objections à soulever sur les articles 6 et 7. Sur l'article 8, je serais d'avis d'ajouter les propositions que vous avez faites dans votre premier projet de résolution (lettre e : i et ii) ; c'est-à-dire que, lorsqu'il y a un changement

[1] See *Annuaire*, Vol. 58, Athens Session, Part II, p. 182.

temporel de deux règles contradictoires rétroactives, on doit préférer la règle la plus favorable à la validité de l'acte (ou au maintien d'un droit).

Je ne vois pas la nécessité de mentionner spécifiquement la limite de l'ordre public, celle-ci étant un principe général reconnu dans tous les ordres juridiques.

Je reste à votre disposition, et avec mes meilleurs souhaits pour votre travail, je vous prie de croire, mon cher Confrère, à l'expression de ma haute considération.

Giorgio Cansacchi

2. Observations de M. Pierre Gannagé

Beyrouth, le 20 août 1980

Mon cher Confrère,

Faisant suite à la discussion qu'a provoquée votre excellent rapport à la session d'Athènes, je me permets de vous adresser encore quelques brèves observations.

Elles sont inspirées par l'adage « *tempus regit actum* » dont l'adoption comme principe général du règlement du conflit dans le temps en droit international privé a suscité des hésitations chez certains de nos confrères.

Cet adage paraît énoncer une vérité élémentaire, savoir qu'une situation juridique doit être normalement soumise à la loi contemporaine de sa naissance. L'affirmation est sans doute exacte pour les actes et faits créateurs des situations juridiques. Ainsi l'acte de constitution d'un mariage ou d'un lien d'adoption est nécessairement régi par la loi en vigueur au moment où il se forme. Il en est autrement des effets des situations juridiques où le conflit dans le temps en droit interne n'est pas toujours réglé de la même manière. Certes, souvent ces effets pourront être détachés de l'acte dont ils découlent pour être soumis à la loi en vigueur au moment où ils se produisent, et la maxime « *tempus regit actum* » se trouvera ainsi respectée.

Mais dans d'autres cas, ce détachement ne sera pas possible et la solidarité des divers éléments d'une situation juridique devra être préservée par l'application d'une réglementation unique. Il en est généralement ainsi en matière contractuelle où la loi en vigueur au moment de la formation du contrat continue à en régir les effets, au mépris de la maxime « *tempus regit actum* ». Celle-ci revêt ainsi un caractère relatif, son application en droit interne variant avec les matières examinées.

En droit international privé, les données du problème sont différentes. Les règles de conflit de lois sont en effet spécifiques et s'écartent par leur nature des règles substantielles. Le fait qu'elles ne visent pas directement le comportement des particuliers les rend moins sensibles au souci de préserver les droits acquis et justifie qu'elles puissent s'appliquer à des situations antérieures à leur mise en vigueur.

Aussi une doctrine importante[1] n'a-t-elle pas hésité à rejeter complètement la règle « *tempus regit actum* » pour le règlement du conflit transitoire né de la modification des règles de conflit du for. Elle a ainsi soutenu qu'une nouvelle règle de conflit du for devait s'appliquer pleinement dans le temps indépendamment de la date de survenance des faits ou situations qu'elle était appelée à régir. Bien qu'elle ne soit pas unanimement partagée, cette doctrine représente un courant non négligeable qui fait écho au caractère spécifique des règles de conflit, et qui ne peut être ignoré.

Des remarques d'un autre ordre peuvent être faites à propos de ce qu'il est convenu d'appeler le conflit mobile qui trouve son origine dans un changement de la circonstance de rattachement et dont l'élément temporel ne saurait effacer le caractère spatial. Le conflit dans le temps me paraît ici dépendre étroitement du conflit dans l'espace.

C'est l'interprétation de la règle de conflit dans l'espace qui permet de le résoudre au mieux des objectifs qu'elle doit satisfaire. Et cette interprétation pourra conduire à appliquer tantôt la loi ancienne, tantôt la loi nouvelle.

On s'expliquera dès lors là aussi que le règlement de ce conflit puisse être difficilement tributaire d'un principe préétabli comme celui de la maxime « *tempus regit actum* » qui sera écartée par l'autorité judiciaire dans beaucoup de circonstances.

En définitive, il me paraît souhaitable sinon de supprimer dans la résolution toute référence à la maxime « *tempus regit actum* », du moins d'en atténuer considérablement la portée. Cette maxime me paraît constituer non un principe de solutions, mais un élément parmi d'autres susceptible d'être pris en considération par le juge pour le règlement du conflit dans le temps en droit international privé.

Pierre Gannagé

3. *Observations of Judge Max Sorensen*

Risskov, 14 June 1980

My dear Confrère

To my great regret I was unable to attend the Athens Session of the Institut de Droit International. I was therefore deprived of the privilege of taking part in the discussion of your masterly report on the Problem of applicable time in Private International Law. As the subject was not disposed of at Athens, the Secretary General has informed that you may wish to look at the draft resolution once more before the next session, and he has asked members

[1] Voir pour cette doctrine *Battifol et Lagarde*, Traité, I, n° 315.

of the 24th Commission and certain other colleagues to send you their additional observations.

I doubt whether I can offer any useful contribution to the debate which has already covered such a vast ground. So please take the following remarks as a token of my good intentions and general wish to see your important work carried to a fruitful conclusion.

Having read once again your reports and the comments of our colleagues, as well as the procès-verbal of the meeting where you submitted the revised version of your draft resolution, I cannot help feeling that a wide measure of agreement has been attained concerning the fundamental issues, and that most of the outstanding points of controversy relate primarily to questions of presentation and terminology.

In particular, I think it is generally agreed that the so-called intertemporal problem in private international law arises in three different circumstances, namely (1) when there is a change in a rule of private international law; (2) when there is a change in the applicable law; and (3) when there is a change in the connecting factor.

I wonder whether it might not be conducive to a satisfactory result if the main body of the resolution, after the preamble, started with the propositions relating to these three points, that is to say paragraphs 2, 3, and 4 (and possibly 7) of your draft, only reversing the order of your paragraphs 2 and 3.

These paragraphs, which essentially answer the question, to which law recourse shall be had for determining the effects of change, might be followed by those paragraphs which indicate criteria for determining what these effects shall be, namely 1, 5, and 8. The substance of paragraph 6 might, for the sake of brevity, be incorporated into the first line of par. 4 (« change in the connecting factor, *whether resulting from... or...* »).

The problem remains, of course, as pointed out by Mr. von Overbeck at Athens (*Annuaire*, Part II, p. 185) whether the principle *tempus regit actum* should be of general application in those situations where there is a change in the rule of private international law only. If a new choice-of-law rule is introduced, whether by statute or by judicial precedent, is there not a strong presumption in favour of applying that new rule in all cases, whether or not the material facts have occurred before or after the introduction of that new rule? (Subject to maintaining the substance of paragraph 1 (b) of your draft resolution).

One further point concerns the case of a change in the applicable law. The solution of the intertemporal problem which then arises must — so it seems to me — be the same whether or not any particular case involves a private international law element. This leads me to the query whether we can, for the sole reason that we are approaching that situation from our particular point of departure, give directives for the solution of general intertemporal problems in an exclusively national legal context.

So we are left with the equally difficult and important problem of changes in the connecting factor, and I am inclined to believe that it might

be advisable to direct the main body of the resolution (after paragraphs 2 and 3) to the various aspects of that problem.

I realize that weighty objections can be raised against these suggestions and that they are unlikely to facilitate your unenviable task. So please ignore them and forgive me for meddling.

With kind personal regards and best wishes,

Yours sincerely,

Max Sorensen

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