Di 1913

Institut de Droit international
Annuaire, Vol. 65, Tome I
Session of Milan 1993
Travaux préparatoires

Institute of International Law
Yearbook, Vol. 65, Part I
Session of Milan 1993
Preparatory work

Institute of International Law

Yearbook

Vol. 65, Part I

Session of Milan 1993

Preparatory work

Justitia et Pace

Editions A. PEDONE - 13, rue Soufflot - Paris

Institut de Droit International

Annuaire

Vol. 65, Tome I

Session de Milan 1993

Travaux préparatoires

Justitia et Pace

Editions A. PEDONE - 13, rue Soufflot - Paris

Adresses de l'Institut de Droit International

Secrétariat :

M. Christian Dominicé
Secrétaire général
10, ch. des Limites
CH-1293 Bellevue-Genève (Suisse)
Tél. (41-22) 774.18.43

M^me^ Hans Wehberg
Conseiller
1, av. de Frontenex
CH-1207 Genève (Suisse)
Tél. (41-22) 736.26.20

M^me^ Isabelle Gerardi
Institut universitaire de
hautes études internationales
(IUHEI)
132, rue de Lausanne
Boîte postale 36
CH-1211 Genève 21 (Suisse)
Tél. (41-22) 731.17.30
Fax (41-22) 738.43.06

Trésorerie :

M. Frank Vischer
Trésorier
22, Bäumleingasse
CH-4001 Bâle (Suisse)
Tél. (41-61) 272.30.60

M^me^ René Lachenal
12, rue du Vieux-Moulin
CH-1213 Onex-Genève (Suisse)
Tél. (41-22) 792.41.09

Alls rights reserved
No part of this publication may be translated into other languages, reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, microcopying, or by any information storage and retrieval system, without permission in writing from the publisher.

© Copyright by Editions Pedone
Printed in France by Bosc Frères, Oullins
ISBN 2-233-00245-8

Table des matières

The Extraterritorial jurisdiction of States

La Compétence extraterritoriale des Etats

(Nineteenth Commission)

Rapporteur : Maarten Bos

Obligations of a company belonging to an international group and their effect on other companies of that group

Les effets des obligations d'une société membre d'un groupe transnational sur les autres membres du groupe

(Fifteenth Commission)

Rapporteur : Andreas F. Lowenfeld

The Activities of national judges and the international relations of their State

L'activité du juge interne et les relations internationales de l'Etat

(Ninth Commission)

Rapporteur : Benedetto Conforti

The Extraterritorial jurisdiction of States

La Compétence extraterritoriale des Etats

(Nineteenth Commission) *

Rapporteur : *Maarten Bos*

* The Commission was composed of Messrs Bos, *Rapporteur*, Dinstein, Doehring, Dominicé, Henkin, Manner, Oda, von Overbeck, Pescatore, Philip, Reese, Rudolf, Salmon, Seyersted, Skubiszewski, Wortley, Zemanek.

Preliminary Report

Introduction

During the Cambridge Session of the *Institut* which took place from 24 August to 1 September 1983, the *Commission des Travaux* decided to recommend the setting up of a new Commission dedicated to the study of the extraterritorial jurisdiction of States. Its recommendation was approved on 31 August 1983 in the course of an administrative meeting. In February 1984, following this decision, the *Bureau* of the *Institut* proceeded to elect members of the new Commission which was to be known as the Nineteenth. The present writer found himself designated as its Rapporteur. He was invited to prepare a preliminary report with a view to the Helsinki Session planned for the period of 20 to 29 August 1985. The report was to be discussed in a Commission meeting.

Before making a start with his *exposé*, the Rapporteur should like to make a few observations on its plan and underlying materials. The subject-matter of the Commission is as wide-ranging as anybody might wish in order to guarantee a discussion of great intellectual and practical interest on a most variegated series of individual topics. If time had permitted him to do so, the Rapporteur might have written a true handbook covering every aspect and detail of the extraterritorial jurisdiction of States. He would, then, have exhausted a vast literature and a considerable mass of case-law.

However, members of the Commission might have been confused, in that case, rather than assisted in their search for the essence of the overall problem and for those facets of it with regard to which the *Institut* may have a task to fulfill. It may be fortunate, therefore, that pressure of work forestalled this approach and that the Rapporteur had to limit himself to essentials. The approach thus taken should enable members of the Commission more easily to concentrate on an analysis of the concept of extraterritoriality. Extraterritoriality is an elusive notion, and it is on the basis of a *prise de conscience* of its ramifications only that a determined choice may be made as to where lie possible solutions of the many conflicts which in recent times have arisen on the scope of a State's jurisdiction in territorial terms. Having unravelled the concept of extraterritoriality as such, one may then endeavour to determine the impact its different varieties have on the relations between States. One variety, indeed, may be acceptable, whereas another may lead to bitter controversy. Where is the psychological limit of forbearance a State should avoid to cross ?

Three more questions should have the Commission's attention. First, there are the arguments offered in favour of extraterritoriality. Before entering upon any proposals for solution of conflicts, one should be informed of the forces behind claims to extraterritoriality (the internationalization of commerce, protection of the investment climate, political motives, etc.). A second aspect of the matter is in the character of jurisdiction as a category of legal thought. Much may depend on whether jurisdiction should be looked upon as a positive law concept or as a concept directly shaped by a meta-positive image of world structure. And in the third place, some thought should be given to the question of the different means of peaceful settlement available.

It is suggested that the Commission should make up its mind on the direction to take in continuing its work after the present preliminary phase of it. To the Rapporteur's mind, it is self-evident that the Institute cannot nourish the hope of laying down — or rather proposing — detailed rules covering the entire field of extraterritoriality. In a second phase, a more thorough study of a limited portion of it may possibly be in place. But whatever the

outcome of the Commission's deliberations, it was considered useful at the end of Chapter 2 of this report to insert a number of suggestions — some specific, some general — regarding the entire subject of extraterritoriality.

As to the underlying materials, for the reasons indicated the Rapporteur was unable to indulge in elaborate personal research. He was happy, therefore, to find a copious source of materials in a printed report presented in 1984 to the Netherlands branch of the International Law Association by an eminent Dutch expert in the field, Mr Paul Peters [1]. The author had access to, and made use of, the most recent data available. Much of the information in the present report has its origin in Mr Peters' excellent study, and the Rapporteur owes him a debt of gratitude which is gladly acknowledged. It should be emphasized, however, that the arrangement and doctrinal presentation of materials is entirely the Rapporteur's.

Chapter 1. — Forms and degrees of extraterritoriality

1.1. — The basis of State jurisdiction is territorial power. It is due to its territorial power that a State has jurisdiction over persons, movables and immovables, events, and activities within its territory. Its jurisdiction, consequently, is fundamentally territorial itself. Under the rules of international law concerning extraterritoriality, however, a number of exceptions to a State's territorial jurisdiction exist which need not to be spelled out here. Individuals acting as tourists, or in transit, to some extent are equally held to escape from the territorial State's jurisdiction.

But if there are exceptions to territorial jurisdiction, on the one hand, a State's territorial jurisdiction, on the other hand, also tends to spill over the bounds of a State's territory, *i.e.*, to become extraterritorial. The problem of extraterritoriality is whether international law should, or does in fact, tolerate this spilling over, and if so, to what extent.

[1] Paul PETERS, « Volkenrechtelijke aspekten van extraterritoriale wetgeving » (International Law Aspects of Extraterritorial Legislation), *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, No. 89 (May, 1984), pp. 3-109.

It is no secret that most divergent opinions are held on this score. They flourish, in addition, on top of a State practice which is extremely diversified. It is submitted that, in order to be able to appreciate the body of opinions on the subject, it may be useful first to bring some system into State practice. As will be shown hereafter, it is possible to distinguish quite some "forms" of extraterritoriality of jurisdiction. It is proposed to list them, here, as a sequence running from the weakest to the strongest form. Every form, furthermore, will be seen to correspond to a certain "degree" of extraterritoriality, one form being more incisive than another, although not every form necessarily will prove to be characterized by its own degree of incisiveness.

1.2. — The mildest form of extraterritoriality is what this writer would like to call "constructive territoriality". Jurisdiction is territorial in scope inasmuch as the rule framed by any organ of the State — be it a legislative, judicial, or executive organ — aims but at persons, movables or immovables, events, or activities located "within that State's own territory". But as soon as the latter expression is construed extensively, territoriality to some extent starts to fade and extraterritoriality takes its place. Presence "within" a State's territory may, thus, become a fiction, indeed.

In the United States, for instance, a foreign company may be summoned to appear in court when "found" or "transacting business" in the court's district. Both criteria are liberally construed to the effect, *e.g.*, that a foreign company is "found" in New York when it may be reached from there, and that, occasionaly, business is considered to be "transacted" in the United States whenever the foreign company's representatives in the past have repeatedly been on a business trip to the United States[2].

With regard to movables, one may think of incorporeal movables such as the rights of shareholders and the opinion according to

[2] H. ZWARENSTEYN, *Some Aspects of the Extraterritorial Reach of the American Antitrust Laws* (Deventer, 1970), p. 132, and PETERS, *op. cit.*, p. 73.

which they are subject to the laws of the State of incorporation and may be nationalized there, irrespective of the place in which the bearer shares may be located.

Events and activities, furthermore, through the doctrine of "effect" may be deemed to have taken place within a State's territory as long as their effect has been felt there. The case of *The S.S. Lotus*, judged upon by the Permanent Court of International Justice on 7 September 1927 [3], is there to remind us of the claims of States to criminal jurisdiction over foreign merchant marine officers in case of collision between two vessels on the high seas causing injury to persons or property on board of the vessel flying their flag. Though these claims have now been largely put at rest in modern international law, the same train of thought is still very much alive, and above all in antitrust questions. It should be noticed, meanwhile, that not every possible effect within a State's territory is indiscriminately considered as a justification of that State's jurisdiction. Should there be criminal jurisdiction only in case the effect felt is a "constituent element" of a criminal offense, for example? Should there be jurisdiction only for the State within whose boundaries the principal effect was to be noted? Should the effect have been intended or foreseeable by the person who provoked it? Everyone among these questions reflects an opinion actually held. Especially important is the further problem as to whether from one field of law to another the same doctrine of effect should be applied, or whether in matters of antitrust law, *e.g.*, a wider measure of jurisdiction should be justifiable than with regard to so many other branches of the law. A wide measure of jurisdiction in antitrust cases is often claimed on the ground of the remarkable degree of internationalization nowadays of commerce and industry [4]. In the United States, the Federal Republic of Germany, and the European Economic Community, the idea of jurisdiction based upon effect has firmly taken root. In the Netherlands, England, and France, on the contrary, it failed to gain acceptance [5].

[3] *Series A*, No. 10.
[4] PETERS, *op. cit.*, pp. 30-31.
[5] PETERS, *op. cit.*, pp. 31-32.

1.3. — One step away from extraterritoriality under the guise of territoriality is the second form of extraterritoriality to be proposed, here, and which appears in an order directly or indirectly given by a State organ — again : either legislative, or judicial, or executive — to a person residing within the territory of the State to perform one or more legally relevant isolated acts, limited in time, in the territory of another State. It is felt that extra-territoriality is more markedly present in this case than in that of what was called constructive territoriality. The person who is subject to the order may be a national of the territorial State as well as an alien settled there

Orders as envisaged may be issued in many fields of law. They have been conspicuous in particular in the law of evidence and in company law. In the law of transport, one occasionally may spot a further example.

As to the law of evidence, one should think of the so-called orders of "discovery". A litigant in State A may be ordered to take action in State B with a view to obtaining evidence which should be of some, or even crucial, importance in a lawsuit pending in State A. But in State B, the evidence sought may be classified as secret under the law relating, *e.g.*, to bank-secrecy. A suit in State B may ensue in which the person subject to an order of discovery will make an effort to let the law of State A prevail over that of State B in so far as secrecy is concerned. If successful, the law of evidence of State A would have extraterritorial effect in State B. Many examples may be given to illustrate the point. Those cases are particularly interesting in which courts issuing orders of discovery make detailed assessments of the interests involved on either side (see *U.S.* v. *First National City Bank*), 396 F. 2d. 897 (2d. Cir. 1968) ; *Timberlane Lumber Co.* v. *Bank of America,* 549 F. 2d. 597 (9th Cir. 1976) ; *Mannington Mills Inc.* v. *Congoleum Corp.*, 595 F. 2d. 1287 (3rd. Cir. 1979)). Most recently, *i.e.*, on 20 February 1985, according to newspaper reports, a case was decided by the Swiss Federal Court in the matter of the *Santa Fe International Corporation* and in which the Court ordered three Swiss banks to hand over documents wanted by the American Securities and Exchange Commission (S.E.C.) in the context of

purportedly fraudulent stock manipulations. The Federal Court of Switzerland agreed to their discovery since no vital Swiss interests were at stake.

As to company law, State A may try to influence a resident company's market policy in State B through measures, either compatible or incompatible with the latter State's law. In both cases, there is a form of extraterritoriality be it to varying degrees of interference, but it should be noted at once that the opinion is not generally held. Peters, for one, sees no extraterritoriality before a non-resident subsidiary (" daughter ") of a resident parent company is ordered to operate abroad in a specific manner[6]. The view does not seem to be correct, however. " Consent decrees " under United States antitrust law given by American courts in case of a merger between an American and a foreign corporation, for instance, are liable to lay down rules for the future conduct of the parties. In the present writer's submission, such rules are clearly meant to have an extraterritorial effect, also in so far as the American corporation is concerned. Another example of this form of extraterritoriality is in legislation prescribing resident parent companies to oblige their foreign subsidiaries to transfer part of profits made, or dividends paid, by these daughters to the State of the legislator. Foreign exchange problems were at the root of such rules in the United States (the Foreign Direct Investment Regulations 1968) and the United Kingdom in the sixties of this century. More often than not, they collided with the local law abroad.

As an example taken from the law of transport, the Rapporteur would like to quote the " cargo preference " practice of some States subjecting import and/or export of goods to a condition of transport by vessels flying their own flag. In so far as import is concerned by residents of the flag State, the practice may amount to an informal order indirectly given by this State to conclude a contract of affreightment abroad with the owner of a ship flying its own flag. With regard to import by non-residents, the practice

[6] PETERS, *op. cit.*, p. 8, opposing J.J.A. Ellis, " The Extraterritorial Effect of National Criminal Law : Antitrust, Trading with the Enemy, Navigation " (in Dutch), *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, Nr. 51 (1964), pp. 30-31.

would come under the form of extraterritoriality to be dealt with in paragraph 1.5. below.

1.4. — A further step on the road of extraterritoriality is implied in the same sort of direct or indirect order as discussed in paragraph 1.3., though with a slightly differing object, *viz.*, the performance no more of one or more isolated acts, but the observance of a particular conduct for the duration of a resident's presence in another State's territory.

To find an example, one may turn again to company law and the question or influencing market policy abroad. Reference is made to the practical instance mentioned in paragraph 1.3. of a resident parent company ordered to oblige a foreign subsidiary to perform some specific act. Through the doctrine of the "unity" of enterprise, the parent company may constructively be considered to be present in the country of incorporation of the subsidiary and to exert there an activity of some duration. The feeling of extraterritoriality can only be heightened in case the State of the parent company's incorporation prescribes the latter's conduct abroad in the shape of its subsidiary's activities.

1.5. — From persons present in the regulating State's own territory, it is proposed to direct one's attention now to persons actually — and not merely constructively — present in another State's territory. Once more, extraterritoriality is intensified. The situation envisaged may be defined as one in which State A indirectly orders a person domiciled in State B to act according to a rule promulgated by State A.

First, there is the case of cargo preference mentioned at the end of paragraph 1.3. *supra.* No further comment on it appears to be required.

Furthermore, orders of discovery, market policy, and transfer of profits or dividends, equally discussed in paragraph 1.3., may work as indirect orders to persons domiciled in foreign parts.

The same applies to the imposition of parent or subsidiary companies under the so-called "unitary tax" principle of taxation in virtue of which profits are assessed in such a way as to take into account profits made by subsidiary and parent companies

domiciled in other countries. According to the Reporters' Notes to paragraph 412 of the Draft Restatement (1982) of the Foreign Relations Law of the United States by the American Law Institute, the United States has jurisdiction to tax American parent companies for the reserved profits of foreign subsidiaries.

1.6. — The next degree of extraterritoriality is reached in a direct order to a person domiciled abroad, and in an order directly affecting the legal status of movable property situated in a foreign country. Both kinds are to be dealt with separately.

1.6.1. — A person domiciled abroad may have a more or less narrow bond with the State from which the order emanates. Such a bond may also be totally absent. In the latter case, extraterritoriality will needs be more incisive than in the former. The degree of extraterritoriality is likewise to be influenced by the object of the order: one or more isolated acts, or conduct of a certain duration (see paragraphs 1.3. and 1.4.).

When it comes to illustrating the foregoing with some examples from State practice, there appears to be a variety of choice. First and foremost, cases abound in which States extend legislation to natural persons abroad who are their nationals. Many fields of national law are thus given an extraterritorial dimension. With regard to some, however, no consensus exists concerning their admissibility in law. Dr. F.A. Mann voiced serious doubts with respect to the correctness in international law of the extension by the United States of its fiscal law to United States citizens residing abroad. He, furthermore, criticized the House of Lords' decision in *Boissevain* v. *Weil* (1950 A.C. 327), according to which certain prohibitions under the British foreign exchange law dating back to 1939 were binding on all British subjects around the globe. A loan concluded in 1944 between a British subject residing in Monaco and a Dutchman was, therefore, deemed to be null and void. In Dr. Mann's opinion, this probably was a serious breach of international law[7]. In the field of labour law, on the contrary, the National Labor Relations Board of the United States in 1973

[7] F.A. MANN, "The Doctrine of Jurisdiction in International Law", *Recueil des Cours de l'Académie de Droit International*, 1964-I, pp. 116 and 124.

refrained from applying the National Labor Relations Act to American personnel of Distant Early Warning stations in Greenland [8].

States also extend legislation to natural persons abroad who are foreigners, but have some other sort of connexion than nationality to show with the regulating State. The same National Labor Regulations Board in 1963 applied the National Labor Relations Act to the Honduran crew of a Honduran ship owned by a Honduran subsidiary of United Fruit, an American company. The bond seen by the Board clearly was that of being employed by a subsidiary of an American company, but the United States Supreme Court considered that the Act was not intended to have any application to foreign-registered vessels employing alien seamen (*McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). In the field of procedural law, discovery — already mentioned in different contexts (see paragraphs 1.3. and 1.5.) — is another case in point. In the United States view as interpreted in the Draft Restatement, section 420, a court "may order a person before the court to produce documents or other information", "even if the information or the person in possession of the information is located outside the United States". Since persons before the court may be natural persons domiciled abroad, the implication is that this category of persons, too, are covered by section 420 and may be subject to an order of discovery. Dr. Mann agrees only partially [9]. The bond with the United States seen here must be that of being a litigant before an American court.

As to foreign juristic persons abroad, connected one way or another with the regulating State, it is in the field of antitrust law, *inter alia*, that the effects of the present form of extraterritoriality are being felt.

One may think, here, of a direct order by a court to a foreign subsidiary of a parent company in the State of the forum, as in the *Alcoa* case (*U.S.* v. *Aluminum Co. of America*, 148 F. 2d. 416

[8] G.Z. NOTHSTEIN and J.P. AYRES, "The Multinational Corporations and the Extraterritorial Application of the Labor Management Relations Act", 10 *Cornell International Law Journal* (1976), p. 22.

[9] MANN, *op. cit.*, p. 157.

(2d. Cir. 1945) relating to a quota system in the production and sale of aluminum). Apart from antitrust motives, a host of other reasons is behind direct orders to juristic persons abroad more or less connected with the regulating State. One is reminded, here too, of taxation of foreign subsidiaries the majority of whose shares are owned by citizens of the State imposing the tax (see the "withholding taxes" claimed by the American tax authorities from such subsidiaries on certain transactions carried out abroad). Discovery once more is a case in point : foreign companies doing business in the United States are supposed to comply with U.S. requests for discovery (Reporters' Notes at section 420 of the Draft Restatement). Freezing orders and export controls are further examples of U.S. practice. By Presidential Executive Order of 14 November 1979, Iranian assets in the power of "persons subject to the jurisdiction of the U.S." were declared to be blocked, five days afterwards limited to dollar balances in so far as assets in foreign countries were concerned. Foreign subsidiaries and branches of American banks were subsequently held to be included among the "persons subject to" American jurisdiction in the matter. In London and Paris, the Bank Markazi Iran, instituting court proceedings, opposed all extraterritorial effect of the Executive Order, but before the courts could pronounce, the Algiers Agreements of 19 January 1981 brought these proceedings to an end. Export controls were repeatedly in the limelight. The *Fruehauf France* case wase concerned with a contract for the export of tractors to China. Fruehauf France was a subsidiary of the Fruehauf Corporation of the United States which had a majority share in it and, consequently, in the words of the Trading with the Enemy Act, "owned or controlled" Fruehauf France. Under the Act, both subsidiary and parent were punishable, as well as the American members of the former's board of directors. As a result, the American members had the contract cancelled, but their French counterparts on the board challenged that decision. The Paris Court of first instance, acting on the theory of abuse of right, replaced the American members with a French administrator who revoked the cancellation. On appeal, the Court's judgment was upheld (see 5 *International Legal Materials* (1966), p. 476). Another case in the same vein is reflected in the decision handed down

by the President of the Hague District Court on 17 September 1982 (*Cie Européenne des Pétroles* v. *Sensor Nederland B.V.*, Rechtspraak van de Week, 1982, no. 167). The case related to the delivery by the Dutch subsidiary of an American company of strings of geophones to a French firm which intended to export them to the Soviet Union for use in the Siberian pipeline. Under an enforcement provision (June 1982) of the U.S. Export Administration Regulations, foreign subsidiaries of American companies were prohibited from exporting without special permit any goods and technology to the U.S.S.R., whether or not of American origin (under the same provision, other companies abroad having no link with the U.S. were not allowed to export to the Soviet Union goods of American origin only, or of foreign origin if manufactured with the benefit of American technology). The Dutch subsidiary, having no such permit, refused to live up to its contract with the French firm. The President of the Hague District Court, however, denied the enforcement provisions any extraterritorial effect and gave judgment against the Dutch subsidiary. In his view, the relevant provision was contrary to international law.

The European Economic Community has also ventured in extraterritorial orders to companies domiciled outside its own borders. Parent companies outside the E.E.C. have, indeed, been held responsible for the acts of their E.E.C.-subsidiaries. In its judgment of 13 July 1972 (nr. 18/1972), the European Court of Justice upheld the Commission who in the *Dyestuff* case had fined a number of chemical companies for violation of E.E.C.-law, including British and Swiss parent companies, who determined their subsidiaries' market policy within the Community. A similar decision was handed down in the Court's judgment of 21 February 1973 (Jur. 1973, p. 215) in the *Continental Can* case. A Directive of 8 July 1983 was, furthermore, submitted to the E.E.C. Council of Ministers (the so-called "Vredeling Directive") on procedures for informing and consulting employees. Foreign parent companies of subsidiaries in the E.E.C. may under this Directive, when entered into force, be obliged, *e.g.*, to postpone certain decisions on matters outside the Community, or their execution, until completion of consultations with employees of their E.E.C.-subsidiaries (Article 4,

paragraph 5). Peters expressed doubts as to the feasibility of such provisions in international law [10].

Extraterritorial effect *vis-à-vis* foreign juristic persons was also envisaged in the Dutch Act on Financial Relations with Foreign Countries of 1980 (*Staatsblad* no. 321). "Residents" subject to the provisions of the Act in the terminology of this Act include juristic persons not domiciled in the Netherlands, but which receive instructions from Netherlands territory, provided the Central Bank of the Netherlands does so determine (Article 1). Purpose of the provision is to forestall possible efforts at frustration of the Act through the device of a dummy company abroad. Dutch criminal law is, furthermore, declared applicable to offenses against the Act committed abroad (Article 20). As a result, a foreign company may be prosecuted in the Netherlands on account of an offense perpetrated outside Dutch territory.

Coming now to natural and juristic persons domiciled abroad and having no bond with the regulating State, one will see that for different other reasons they nevertheless are at times subjected to its jurisdiction. One of these reasons may be damage inflicted upon nationals of the State claiming jurisdiction, and the State will then invoke the so-called "passive nationality principle". This principle may be considered as an offshoot of a more general principle, namely, that of the protection of the State's interests at large. It is of some interest to distinguish the specific from the more general principle because of their differing psychological weight in the question of the admissibility of individual extensions of jurisdiction. For whereas the protection of a State's nationals does appear to furnish a more easily acceptable reason for such extension — albeit that no exaggerated claims thereto should be laid [11] — it is readily understood that the protection of a State's interests generally as an excuse of virtually unlimited extension of jurisdiction may occasionally lead to a denial of sovereignty vested in other States, a result which no international lawyer would like to condone.

[10] PETERS, *op. cit.*, p. 75.

[11] See PETERS, *op. cit.*, p. 28, on diverging doctrinal opinions.

The principle of protection of nationals was one of Turkey's arguments in favour of its extension of criminal jurisdiction in the *Lotus* case already mentioned above. The Permanent Court of International Justice, however, failed to make a clear pronouncement on it. Criminal and civil jurisdiction alike based on no other ground than this passive nationality principle are debated in doctrine [12]. Some States of the United States of America claim civil jurisdiction in case of torts committed by foreigners abroad against their citizens, *e.g.*, in airplane accidents [13]. The passive nationality principle extended to residents of the United States of America is to be found in section 416 of the Draft Restatement relating to transactions in securities not on a securities market in the United States. According to the rule proposed there the United States has jurisdiction to prescribe whenever reasonable " where *(a)* securities of the same issuer are traded on a securities market in the United States ; or *(b)* representations are made or negotiations are conducted in the United States in regard to the transactions ; or *(c)* the party subject to the regulation is a United States national or resident, or the persons sought to be protected are residents of the United States ". Peters rightly notes that this proposed rule opens the door to American regulation with respect to foreign securities not listed in the United States [14]. And he recalls the separate opinion of our Honorary Member Judge Philip C. Jessup appended to the International Court's judgment of 5 February 1970 (*Case Concerning the Barcelona Traction, Light and Power Company Limited* - New Application : 1962), and in which the learned judge quoted some of the actual problems around jurisdiction. One of them — jurisdiction with respect to securities transactions — reminded him of the opinion voiced by the Committee on International Law of the Association of the Bar of the City of New York, namely, that " the extension of the regulatory and penal provisions of the Securities Exchange Act of 1934... to foreign corporations which have neither listed securities in the United States nor publicly offered securities within the United States is a violation of international law " [15].

[12] See MANN, *op. cit.*, pp. 39, 79, and 80.
[13] PETERS, *op. cit.*, p. 28.
[14] PETERS, *op. cit.*, p. 62.
[15] *I.C.J. Reports*, 1970, p. 167.

The wider principle of the protection of national interests *tout court* is apparent in a number of further claims to jurisdiction. It was probably never put as clearly and bluntly as by Judge Hand in *Alcoa* (see *supra*) : " any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends ". In the antitrust sphere, there is section 8 of the Sherman Act (1890) declaring the word " person " in section 1 (" every person who shall make any contract hereby declared to be illegal shall be deemed guilty of a misdemeanour ") " to include corporations existing under the laws of any foreign country ". In *U.S.* v. *Imperial Chemical Industries*, 105 F. Supp. 215 (S.D.N.Y. 1952), and in *U.S.* v. *Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955) (the latter followed by a number of related decisions), United States courts went to great lengths in their antitrust philosophy. In the first case, I.C.I., a British company in the United Kingdom, was ordered to transfer certain patents to its American competitor duPont and not to grant certain licences outside the United States. In the second one, the Swiss Watchmakers Federation was ordered to terminate or modify a number of contracts, to modify its own articles of association, and to prohibit its members from acting in contravention of this particular decree. It took many years of diplomatic negotatiations to have the latter decree reversed (1962, 1964). In a third decision, *U.S.* v. *General Electric Co.* (115 F. Supp. 835 (D.N.J. 1953)), the court ruled that an international electric bulb trust was in existence comprising, *inter alia*, the Dutch company of Philips. Diplomatic intervention by the Netherlands resulted in a clause in the court's judgment exempting Philips from it inasmuch as the company might otherwise come into conflict with the law of the Netherlands. Also in an antitrust context, American courts ruled against foreign companies in matters of sea and air transport, especially regarding tariffs. The *Bundeskartellamt* of the German Federal Republic in a number of cases pronounced against mergers between foreign companies which were supposed unfavourably to affect the German market. But, as Peters has it, this office as well as German courts showed some measure of reticence in recognizing extraterritorial effect of German legislation [16].

[16] PETERS, *op. cit.*, p. 42, with reference to D.J. Gerber, " The Extraterritorial Application of the German Antitrust Laws ", 77 *American Journal of International Law* (1983), pp. 756 *et seq.*, for German case-law.

The protection of national interests as a platform for extra-territoriality could also be noticed in other than antitrust cases. In the field of navigation, for instance, the American Tank Vessel Act 1978 assumed jurisdiction for United States authorities to lay down rules for the design, construction, operation, equipment, and manning of tankers calling at United States ports, irrespective of whether they fly the United States or a foreign flag. Exactly the opposite was the consensus at the Third United Nations Conference on the Law of the Sea : see Article 211 of the Convention of Montego Bay. As a deviation of Article 66, paragraphs 2 and 3a, of that same Convention (which, by the way, did not yet enter into force), the Presidium of the Supreme Soviet of the U.S.S.R. by a decree of 28 February 1984 (*Official Gazette of the U.S.S.R.*, 1984, no. 9, item 137, pp. 174-180), Article 3, ruled that the relevant Soviet authorities had power to determine catch quota for anadromous species outside the Soviet Economic Zone. Fishermen of other nations were prohibited from fishing otherwise than in conformity with agreements to be concluded with their home States. And in the field of taxation, mention may be made of section 412 of the American Draft Restatement according to which the United States " has jurisdiction to tax transactions which... have a substantial relation to the state, without regard to the nationality, domicile, residence or presence of the parties to such transactions ".

One principle is there on the strength of which traditionally States may extend their criminal jurisdiction to anybody wherever he may commit an act of a certain gravity, *viz.*, the principle of universality. The catalogue of these acts appears to be growing. Sea piracy is the most classic example, whereas piracy in the air has been added in recent years. Other acts on which virtual unanimity exists are war-crimes, genocide, and counterfeiting. A number of further acts have been proposed for inclusion, among which terrorism, marine and air pollution, and torture. At the start of the present sub-paragraph (1.6.1.), it was observed that the extension of a State's jurisdiction to persons having no bond with that State made for a higher degree of incisiveness in extraterritoriality. It should be clear that adding a threat of punishment provides extraterritoriality with a further edge, and one may even wonder whether a separate " form " of extraterritoriality is not also

implied. If so, this would equally apply to the extension of criminal jurisdiction on the basis not of the principle of universality, but on that of passive nationality.

1.6.2. — It is proposed to be very brief on orders directly affecting — or purporting to affect — the legal status of movable property situated in a foreign country. Expropriation (nationalization) and confiscation are measures intended to affect property rights belonging to natural or juristic persons in the territory of the expropriating or confiscating State. Other measures, such as a declaration of bankruptcy, are in the same bracket. In the present context, the question is whether movable property abroad shares the fate of property inside the territory of the expropriating or confiscating State, or in other words, whether the act of expropriation or confiscation is provided with an extraterritorial dimension. The question is of practical importance whenever the owner whose property was taken reclaims parts of it situated outside the boundaries of the country which took a decision of expropriation or confiscation. Two positions are then to be imagined : (1) The property reclaimed was inside those boundaries when the relevant measure was proclaimed, (2) it was already abroad at the moment of taking. In the first position, no question of extraterritoriality strictly speaking is involved, and if a dispossessed person reclaiming property is unsuccessful, the reason of it may be elsewhere than in an extraterritorial effect of the measure taken as, *e.g.*, in the doctrine of Act of State or of sovereign immunity. In the second position, on the contrary, the question of extraterritoriality is there in all its purity, and supposing the doctrines of Act of State or sovereign immunity not to spoil the game, a foreign court may have to decide on whether an extraterritorial effect should be recognized as to property within its jurisdiction at the crucial moment. Another Honorary Member of the *Institut*, Professor Verzijl, was very explicit on this score. In the event of a nationalization law clearly intending " to produce effects with regard to assets outside the national boundaries... the law must be held to have been in so far enacted *ultra vires* and to lack legal efficacy or validity as against other States and as against assets situated there. The general law of nations does not empower a State to appropriate, by means of

nationalization, confiscation or otherwise, goods which are physically present either in foreign countries, or on the high seas in vessels which fly a foreign flag, or in foreign aircraft outside its frontiers " [17].

In the Netherlands, courts have not recognized extraterritorial effects of foreign *acta jure imperii* on property rights [18]. The French *Cour de cassation* in its judgment of 20 February 1979 (*Société Méditerranéenne de Combustibles* v. *Sonatrach, Revue critique de droit international privé*, 1979, p. 803) proved to be of the same opinion. An American Federal Court denied extraterritorial effect for reasons of *ordre public* (*Maltina Corporation* v. *Cawy*, 462 F. 2nd. 1021 (5th. Cir. 1972)).

In several countries, the legal position of subsidiaries of parent companies nationalized abroad was discussed in court. Lately, problems arose after the French Nationalization Act of 11 February 1982, and court proceedings relating thereto were started in Belgium and Switzerland [19]. According to Professor Lipstein, the position of subsidiaries in the United Kingdom is uncertain for lack of precedents [20].

1.7. — One more step forward on the path of extraterritoriality is the indirect enforcement by State A of its own rules in the territory of State B *vis-à-vis* nationals of State A itself or foreign persons. In the Rapporteur's opinion, such indirect enforcement may be called an independent form of extraterritoriality, although it is realized that others may see but a form of heavy pressure coupled to one of the previously discussed forms.

Two main devices are practised for indirect enforcement, *viz.*, the imposition of a penalty, and sanctions.

[17] J.H.W. VERZIJL, *International Law in Historical Perspective*, Vol. V (Leyden, 1972), p. 475.

[18] See the present writer's contribution on " The Protection of Foreign Investments in Dutch Court and Treaty Practice " in *International Law in the Netherlands* (Editors H.F. van Panhuys *et al.*), Vol. III (Alphen aan den Rijn, 1980), p. 229.

[19] PETERS, *op. cit.*, pp. 49-50.

[20] K. Lipstein, paper on English nationalization law for a symposium of the Institute of International Business Law and Practice (February, 1982) quoted by Peters, *op. cit.*, p. 50.

Penalties are provided for in the United States Trading with the Enemy Act and in the Dutch Law on Financial Relations with Foreign Countries. In both the *Fruehauf France* and *Sensor* cases (see paragraph 1.6.1. *supra*), subsidiary and parent were guilty of acts punishable under American criminal law. Article 20 of the Dutch law, of similar purport, has already been broached above (paragraph 1.6.1.). Fines, including subpoena's, and so-called " treble damages " are specific kinds of penalty. Under section 814 of the United States Shipping Act, every shipping line company to the United States is supposed to submit its tariff agreements to the Federal Maritime Commission for approval. A fine is threatened in the event of a rejected agreement being executed. Heavy subpoena orders were issued by a Federal Grand Jury in the United States in a discovery case against an American subsidiary of a Swiss concern, *Marc Rich A.G.* Both subsidiary and parent were ordered to pay substantial amounts of money in case of non-compliance [21]. With regard to E.E.C. practice, reference may be made to the *Dyestuff* case (paragraph 1.6.1. *supra*). " Treble damages " appear to be a specifically American phenomenon. Called a " horse cure " by Peters [22], the remedy is intended in the hands of interested persons claiming prejudice to act as a means toward the realization of American antitrust policy. The remedy was not adopted by the E.E.C. [23].

Sanctions, including import restrictions, inflicted by the United States mainly rest on the Trading with the Enemy Act (1917), the International Emergency Economic Powers Act (1977), and the Export Administration Act (1979), all of them unreservedly forging American business into an instrument of United States foreign policy [24]. Under the latter act, extraterritorial export controls may be imposed (see paragraph 1.6.1. in the context of the *Sensor* case). Non-compliance may be punished by import restrictions aimed at particular firms (" temporary denial orders ").

Indirect enforcement thus exemplified is the last but one step in extraterritoriality. The very last stage of it is direct enforcement.

[21] PETERS, *op. cit.*, pp. 78-79.
[22] *Ibid.*, p. 38.
[23] *Ibid.*, p. 41.
[24] *Ibid.*, p. 55.

Direct enforcement by State A of one or more of its rules by means of its own agents in the territory of State B, unless agreed upon between the two States, is a violation of one of the most elementary rules of international law. Saying so, the Rapporteur should specify that his statement is intended to apply to conditions of peace. But even in peace-time, and quite apart from any agreement, this last and most incisive form of extraterritoriality does occasionally become a reality.

Chapter 2. — Conflicts, unilateral remedies, bilateral settlement, and the question of lex ferenda.

2.1. — It should be no cause for wonder that some of the claims of jurisdiction discussed in Chapter 1 led to conflicts between the States concerned, or between a State and the E.E.C. State A, going too far in claiming extraterritorial effect for one of its rules, inevitably hurts the feelings of national sovereignty and pride of State B. The latter State's criticism may in turn provoke State A's irritation. As stated in Chapter 1, diplomacy may at times bring a solution in an individual case, but there is no guarantee that further conflicts can be avoided, whether in the same field or in another.

Doctrine seized itself of the problem of extraterritoriality. A past President of the *Institut*, Sir Robert Y. Jennings, in an early study on American court practice in antitrust cases, voiced the opinion of many when speaking of "an attempt to export into other countries and to make operate there what are after all peculiarly American political notions "[25]. Under the impression of the downright political object of some United States laws (comp. Chap. 1, paragraph 1.7), probably, others used far less mild language to characterize practices evolved in virtue of them. The political motive behind these, and maybe other, American laws may furnish the explanation of what otherwise might be too apocryphal to be taken seriously, *viz.*, a lack of understanding of reciprocity in treatment. Mr Monroe Leigh spoke of "the most elementary prin-

[25] Sir Robert Y. JENNINGS, "Extraterritorial Jurisdiction and the U.S. Antitrust Laws", *The British Yearbook of International Law*, 1957, p. 175, as quoted by Peters, *op. cit.*, p. 41.

ciple of international relations, namely reciprocity "[26]. Yet, as Peters has it, United States legislature and courts fail to recognize other States' jurisdiction with regard to American subsidiaries of non-American parent companies, while claiming the reverse for themselves[27]. The British Protection of Trading Interests Act (1980) even met with violent criticism in the United States[28].

The latter act was one in a long series of unilateral reactions against United States claims to extraterritoriality. In reply to American court orders to aliens, contradicting orders were often sought and obtained in the courts of the aliens' countries. In *U.S. v. Imperial Chemical Industries* (see Chapter 1, paragraph 1.6.1.), for instance, in which an American court ordered I.C.I. to transfer certain patents to duPont, a licensee of I.C.I. in the United Kingdom, British Nylon Spinners, sought and obtained an injunction from a British court prohibiting I.C.I. from complying with the American court order (*British Nylon Spinners, Ltd.* v. *I.C.I.*, 1 Ch. 19 (1953)). In one extraordinary case (*British Air* et al. v. *Laker*), British defendants, brought to court in the United States by a British claimant, were at least temporarily successful in asking a British court for a writ forbidding their opponent to continue his case against them[29]. They, apparently, preferred not to take chances. Unilateral responses to exaggerated claims of jurisdiction, meanwhile, are not limited to the courtroom. Legislators, too, reacted, and they did so in the shape of " blocking statutes ", *i.e.*, legislative measures aimed directly at the prevention of such claims from being effective. Many countries, indeed, enacted legislation to this effect[30], and for present purposes, it does not seem to be necessary to go into any details of them. For the moment, it may be more

[26] Monroe LEIGH, " The Long Arm of Uncle Sam ", report to the I.L.A. Conference (1983) on Extraterritorial Application of Laws and the Responses Thereto.

[27] PETERS, *op. cit.*, p. 72.

[28] *Ibid.*, p. 81, quoting Serge April on " Blocking Statutes " at the above-mentioned I.L.A. Conference.

[29] PETERS, *op. cit.*, p. 40, quoting T.R. MURPHY, « Laker in the U.S. and U.K. Courts ", *International Financial Law Review*, July 1983, p. 8.

[30] PETERS, *op. cit.*, pp. 81-84. *Ibid.*, p. 81 : certain States applied " secondary boycotts " against other States not complying with their primary boycotts.

interesting to see what kinds of bilateral means there are to iron out divergences as to the forms and degrees of extraterritoriality which may be mutually acceptable.

Apart from the usual devices of arbitration and conciliation, which do not seem to be much practised in the context of extraterritoriality, there is hardly more to be mentioned than the O.E.C.D. decision (1976, revised 1979) concerning intergovernmental consultative procedures with a view to the establishment of guidelines for multinational enterprises. Under this decision, Member States may request that in the O.E.C.D. Committee on International Investment and Multinational Enterprises consultations be held on problems caused by conflicting requirements imposed upon multinationals by different States. The respective Governments undertake to co-operate in good faith in order to solve these problems, whether in the Committee or outside. The decision is binding on the twenty-four Member States (see O.E.C.D. Convention, Article 5), but sofar no consultations seem to have taken place [31]. Guidelines were, in fact, established but are not legally binding. They contain a similar clause on consultations, as does an O.E.C.D. Council recommendation (1979) concerning co-operation between Member States on restrictive business practices affecting international trade. On the whole, and in spite of the limited field to which it applies, the O.E.C.D. system did not much contribute to a solution. It is suggested that the political factor to which allusion was made above is responsible for it: for is it not characteristic of the field covered by the O.E.C.D. that much of it is politically sensitive? And if this is right, one cannot fail to see that proposals *de lege ferenda* should take this into account.

The best means to settle, and even to avoid, differences of opinion as regards extraterritoriality is, of course, to conclude an agreement. In the antitrust context, the United States entered into a few bilateral treaties, *viz.*, with Canada (1959), the Federal Republic of Germany (1977), and Australia (1982) [32]. The bilateral character

[31] PETERS, *op. cit.*, p. 15.

[32] *Ibid.*, p. 16. Peters also calls attention to a U.S.U.K. agreement prescribing informal consultations before starting criminal prosecution in antitrust cases.

of these treaties may be proof that the political voltage of the problem of extraterritoriality in antitrust cases may vary from one set of countries to another, to the effect that the subject matter by its very nature is not susceptible of multilateral regulation.

The *technique* of an agreement is conspicuous in Articles V and VI of the *Institut*'s resolution of 7 September 1977 on *Multinational Enterprises* reading as follows :

V

States in which the parent company and the subsidiaries or dependent places of business of multinational enterprises are located should co-operate in exercising their legislative, executive and judicial jurisdiction to control such enterprises and, to this end, envisage in particular the conclusion of international agreements.

VI

1. Jurisdiction to regulate, control and penalize restrictive competition practices of multinational enterprises, which shall be based in all cases on the place where such practices are performed, should, in addition, be made dependent on the effects of the latter, but only if these effects are deliberate — or at least predictable —, substantial, direct and immediate within the territory of the State concerned.

2. It would be desirable that international agreements be concluded for the allocation of jurisdiction in this field in order to prevent any gap or overlap between applicable rules.

3..... [33].

2.2. — Coming now to the question of *lex ferenda*, the Rapporteur proposes first to inquire into the present state of *lex lata*. In his opinion, one should even go beyond the *lex lata* — if any — and probe into the proper nature of the concept of jurisdiction. The question was already asked in the Introduction : should jurisdiction be looked upon as a positive law concept or as a concept directly shaped by a metapositive image of world structure ?

Questions of this kind have been asked on other occasions in the *Institut*. In 1950 at the Bath Session, Professor Donnedieu de

[33] *Institut de Droit international, Annuaire 1977*, tome II (Bâle, 1978), p. 343.

Vabres was Rapporteur on « la portée extraterritoriale des sentences répressives étrangères ». Professor Verzijl in his *International Law in Historical Perspective*, Vol. I, pp. 196-197, harks back at the discussion which then took place in the course of his own discussion of possible extraterritorial effects of nationalization :

> " The *rapporteur* tried to make a distinction between rules in his draft which he designated as « droit positif », « droit existant » or « principes de droit commun incontestables », and others which could only be recommended to governments as « droit désirable » for future adoption as « une solution progressive ». One of the other participants to that session was not sure what exactly the *rapporteur* meant by « droit commun existant » in this context and expressed his doubts on the point by asking him whether perhaps he intended to convey by that term that in case a State or a court should deviate from the rules qualified as such, they would incur liability for the breach of an international engagement ? The *rapporteur*, visibly surprised by the question put in this way, answered without hesitation that that of course was not his intention and that he had only meant to say that some of the rules were so widely accepted in municipal legislations or by municipal courts that they could be labeled as « droit commun positif » (footnote : Comp. *Annuaire de l'Institut de droit international*, session de Bath, 1950, Vol. 43-II, p. 288 (where the word " international ", ninth line from top, is a printing error for " intellectual ")). But at the bottom of this construction of the term « droit positif » there lays, to my mind, a certain confusion between, on the one hand, the recognition of certain rules as positive law, binding upon specified subjects of law, with all the consequences thereof in the field of international responsibility for tort in case of violation or non-observance of such rules and, on the other hand, the detached statement of a certain uniformity or identity of rules as the result of a purely intellectual operation, that is, of comparison of municipal laws, judgments of municipal courts and legal doctrine, justifying the conclusion that specified practices and theories are prevailing or even quasi-universal.
>
> From the viewpoint of the *lex ferenda*, the weight of the contradictory arguments in answering the question whether a lawful foreign nationalization should or should not be attributed extraterritorial effect proper by a third State in respect of assets belonging to a purely national enterprise of the nationalizing State but being outside the latter's grasp at the critical moment, would seem to be so finely balanced that it is hard to say which solution must be held preferable. "

Professor Verzijl's conclusion, then, is the following :

> " ...in any case, no binding rule of public international law governs the case, nor does there exist any obligatory universal principle of private international law ".

" Specified practices and theories ", but no positive law, " no binding rule of public international law " : such is the author's final word in the matter.

A kindred finding was Judge Sörensen's in his *rapport provisoire* of 29 April 1972 to the *Institut* on what then still was called « Le problème dit du droit intertemporel dans l'ordre international ». Professor Paul Reuter had suggested that the intertemporal problem was one of method rather than of law, « une méthode inspirée par les finalités de tout ordre juridique, méthode enracinée dans les éléments communs à toute formation juridique au-dessus des différences nationales et sociales. Les uns diront qu'il y a là des éléments de droit naturel, les autres s'en rapporteront tout simplement à cette base de conceptions communes et universelles sans laquelle le droit international serait inexistant ». Judge Sörensen declared himself in agreement with this view. In 1975, during the *Institut*'s Wiesbaden Session, the title of the subject was changed accordingly to read « Le problème intertemporel en droit international public » [34].

It is the present Rapporteur's opinion that the jurisdiction of a State at bottom is no positive law concept at all. In the extensive quotations from his work offered above Professor Verzijl essentially said the same, though limiting himself to one aspect of jurisdiction only. And the link between the present writer's view as just expressed and that of Professor Reuter and Judge Sörensen is that jurisdiction, too, originally at least, belongs to method instead of law, be it not to method *stricto sensu* as is the case of the intertemporal problem [35], but to method *lato sensu*. Method *lato sensu*, it is submitted, encompasses general principles of conduct, principles of structure, and method *stricto sensu*. Instead of being " binding ",

[34] See *Institut de Droit international, Annuaire 1973* (Bâle, 1973), p. 20, and *Annuaire 1975* (Bâle, 1975), p. 341. And comp. this writer's *Methodology of International Law* (Amsterdam - New York - Oxford, 1984), pp. 287-288.

[35] *Methodology*, p. 288.

as does the law in force, they all have "authority" to various degrees and are, so to say, anterior to the law in force. They certainly may crystallize into law and, thus, become binding, but the fact of it cannot detract from their origin and initial character. One of the principles of structure in the international legal order is sovereignty. And if jurisdiction is not simply another word for sovereignty, jurisdiction at any rate should be considered as a sequel of it[36].

How much, now, of this fundamental and elementary concept of jurisdiction *did* crystallize into international law in force, how much of it is *lex lata?* It is submitted that it almost is a bare minimum which reached that stage: on studying doctrine, one cannot escape the impression, and doctrinal writers *inter se* are divided on practically everything. The subject of jurisdiction clearly did not lend itself to spontaneous development into positive international law. A spirit of free appreciation of the authority of the concept pervades the atmosphere, and it is this spirit which must be responsible for the continuing popularity of the judgment rendered on 7 September 1927 by the Permanent Court of International Justice in *The Case of the S.S. "Lotus"* (*Series A*, No. 10).

The prospect for codification does not appear to be too bright, therefore, and the less so since one of the chief participants in the debate on extraterritoriality, the United States of America, would prefer to leave things mostly as they are, and to rely on the *Lotus* principle — correct in intself — that all is permissible unless prohibited, and on comity *(comitas)* as a leading device for accommodation.

The American point of view was unequivocally set forth by Mr Davis R. Robinson, the Legal Adviser of the State Department, in a speech made on 2 November 1984 before the American branch of the International Law Association and to be published in time in its Proceedings. Its title is "Reflections on the Current State of "Extraterritoriality" or Conflicts of Jurisdiction" and the key-passages of it may be paraphrased here.

[36] See *ibid.*, pp. 10-14, for much of what is said here.

Mr Robinson refers to the present-day international system in which enterprises are constantly crossing many borders, establishing branches or subsidiaries in foreign parts. Home States are naturally interested in the foreign activities of these branches or subsidiaries, and for the United States he claims "legitimate concerns in various overseas conduct". The resulting conflicts of jurisdiction "are a fact of life that needs to be managed but cannot be completely avoided". Management of it is highly desirable because conflicts of jurisdiction — as also stated by the O.E.C.D. after the 1984 ministerial meeting — tend to have increasing effects on the investment climate and — in the words of Secretary of State Shultz — "to harm the fabric of the global economic system". Simple solutions, however, are ruled out, and in particular is the answer not to be found in strict rules of international jurisdictional law, whether embodied in an exhaustive list of permissible modes of jurisdiction, or in some general principle or rule for the identification of the latter. The answer, actually, is in problem-solving, and the following three elements should be observed to this end: (1) the policy differences underlying many conflicts of jurisdiction should be resolved, (2) comity and self-restraint should be resorted to in the exercise of jurisdiction, and (3) bilateral and multilateral mechanisms should be improved in seeking to achieve the first two goals.

It is also interesting to see Mr Robinson's reaction to sections 402 and 403 of the tentative draft No. 2 of the revised *Restatement of the Foreign Relations Law of the United States* (see Annex 2 to the present report), both dealing with jurisdiction. Section 402, to his eyes, is too categorical in treating the traditional bases of jurisdiction, at least in the commentary thereto. "We have also vigorously opposed the draft's "winner take all" proposal in Section 403 that would replace the comity concept of Section 40 of the *Restatement Second* with a legal rule of reasonableness which would supposedly determine the existence of a single lawful jurisdiction in conflict situations". Section 40 as mentioned is to be found in Annex 1 below.

It is believed that Mr Robinson's speech is an admirable summing-up of the problems under discussion. The question

remains whether the Nineteenth Commission, and later the *Institut*, should follow his approach, or rather should aim at a result of a more substantial character, leaving intact, if so agreed, his valuable proposals as to procedure. Asking this question, one is back at the problem of *lex ferenda*.

2.3. — In order to prepare an answer, the Rapporteur proposes to recapitulate the various forms and degrees of extraterritoriality set forth in Chapter 1. The following seven forms have been distinguished :

a) constructive territoriality, being the mildest form of extraterritoriality (Chap. 1, paragraph 1.2.) ;

b) an order directly or indirectly given by an organ of the State to a person within that State's territory to perform one or more isolated acts, limited in time, in another State's territory (*ibid.*, paragraph 1.3.) ;

c) an order as envisaged in (b), but intended to bring about a particular conduct for the duration of a resident's presence in another State (*ibid.*, paragraph 1.4.) ;

d) an order indirectly given by an organ of the State to a person domiciled in the territory of another State to act according to a rule promulgated in the first-named State (*ibid.*, paragraph 1.5.) ;

e) an order as in (d), but given directly, or an order directly affecting (or purporting to affect) the legal status of movable property situated abroad (*ibid.*, paragraph 1.6.) ;

f) indirect enforcement (through the imposition of penalties or sanctions) by one State of one or more of its own rules in the territory of another State *vis-à-vis* nationals of the former or foreign persons (*ibid.*, paragraph 1.7.) ;

g) enforcement as in (f), but direct, *i.e.*, by means of agents of the State operating in the territory of another State (*ibid.*, paragraph 1.7.).

In the Rapporteur's opinion, each form closeley corresponds to a degree of incisiveness, but as already suggested above (Chap. 1, paragraph 1.1.), a more advanced form of extraterritoriality may shock the legal conscience less than a milder form of it. The imposition of a penalty on a national abroad as in (f), *e.g.*, though being a form of enforcement, may not be felt as an inroad on territorial sovereignty as serious and painful as an order envisaged in (b) and being at variance with the *lex loci*. Peters has an example of the latter (already mentioned in Chap. 1, paragraph 1.3.) in the United States Foreign Direct Investment Regulations of 3 January 1968 repealed on 13 June 1968 (7 *International Legal Materials*, 1968, pp. 55 and 858). Under these Regulations, a parent company in the United States as a shareholder in a foreign subsidiary was supposed to intervene in the latter's management in such a way as to violate in many cases the local company law, the rules laid down by the host country, the provisions of the investment agreement concluded between the parent company and that country, and the rights of possible minority shareholders in the subsidiary. Peters claims that the Regulations inasmuch as applied to investments already in existence were in excess of jurisdiction permissible under international law [37]. With regard to cargo preference, on the other hand (Chap. 1, paragraph 1.3.), the situation may be less clear [38]. Foreign States may also be more sensitive to orders as in (b) contradicting their own law than to orders coming under (e) which, though representing an increased form of extraterritoriality, may not conflict with the local law — and yet, our *confrère* Mann was seen to have serious doubts concerning the extension of one State's fiscal law to its nationals residing in another State's territory (Chap. 1, paragraph 1.6.1.), whilst in *Boissevain* v. *Weil* the House of Lords' judgment to his eyes probably was "a serious breach of international law".

These examples of progressive "forms", and not always evenly progressive "degrees", of extraterritoriality may suffice to show the complexity of the problem, coming on top of its occasional

[37] PETERS, *op. cit.*, p. 61.

[38] *Ibid.*, p. 45, quoting Professor P.J. Slot's report (in Dutch) to the Netherlands branch of the I.L.A. on "National Measures for the Regulation of Maritime Transport, With a View also to International Law" (1979), p. 28.

political implications (this Chap., paragraph 1) and the fundamental character of jurisdiction as an aspect of world structure (*ibid.*, paragraph 2). And to complicate matters still more, it should be realized that within each form, degrees may vary according to the subject-matter involved.

All this adds up to the dim prospect for codification already noted (paragraph 2 *supra*), *i.e.*, for codification in a comprehensive sense. One may, of course, think of a partial codification only, which could be one of two kinds, *viz.*, a codification of broad principles, on the one hand, or a codification in detail of jurisdiction regarding one or more specific subjects, on the other hand. Broad principles, however, are of doubtful practical value, whereas a codification limited to specific subjects possibly would have to restrict itself to subjects of minor importance. Furthermore, the question arises whether extraterritoriality of jurisdiction is a universal problem in which each State is equally interested, or rather is of importance only between a limited number of members of the world-community. If Peters is right, the scene is practically limited to O.E.C.D. members, the protagonists being principally the United States on the one side, with the remaining members on the other[39]. Important developments in this limited circle over the last years are the growing number of codes of conduct and the increasing tendency with United States courts to balance the different interests of the States involved.

Members of the Nineteenth Commission will now have to decide on which direction to take. It is proposed to have a Commission meeting in the course of the *Institut*'s Helsinki Session and then to determine how further to proceed with its work.

In the circumstances, it appears to be pointless to add a *questionnaire* to the present report, which above all is of an exploratory character.

If, nevertheless, the Rapporteur may be allowed to make a few suggestions, they would be as follows :

— constructive territoriality as the mildest form of extraterritoriality is always permissible, unless prohibited by a rule of

[39] PETERS, *op. cit.*, p. 87.

positive international law (comp. the *Lotus* case and the ensuing Brussels International Convention of 10 May 1952, followed by the 1958 Geneva Convention on the High Seas) or extravagant (comp. Chap. 1, para 1.2.: "found" or "transacting business");

— at the other extreme, direct enforcement is always prohibited, unless permitted by a rule of positive international law;

— with regard to all other forms of extraterritoriality — (b) to (f) inclusive — all relevant interests of the States concerned must be taken into account in a balancing process the leading principles of which should be restraint and reasonableness;

— bilateral or multilateral procedures to this end should be reinforced or established.

It does not seem to be altogether improbable that in time sufficient practice will have been built up to justify the laying down of further rules. Once more, reference may be made, here, to Article VI of the *Institut*'s resolution on *Multinational Enterprises* (see paragraph 1 *supra*).

The Rapporteur, meanwhile, acknowledges that these provisional thoughts of his came to his mind without the benefit of his colleagues' advice. Yet, as starters of a fruitful discussion it is hoped that they may be of some use at least.

13 April 1985

Annex I

Annex. 1. — Restatement of the law (second), Foreign relations law of the United States, as adopted and promulgated by the American Law Institute at Washington, D.C., May 26, 1962.

§ 40. *Limitations on Exercise of Enforcement Jurisdiction*

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Annex II

Annex 2. — Restatement of the law, Foreign relations law of the United States (Revised), Tentative Draft No. 2.

§ 402. *Bases of Jurisdiction to Prescribe*

Subject to § 403, a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to

(1) *(a)* conduct a substantial part of which takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory which has or is intended to have substantial effect within its territory;

(2) the conduct, status, interests or relations of its nationals outside its territory; or

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

§ 403. *Limitations on Jurisdiction to Prescribe*

(1) Although one of the bases for jurisdiction under § 402 is present, a state may not apply [its] law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including :

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state ;

(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect ;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted ;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question ;

(e) the importance of regulation to the international political, legal or economic system ;

(f) the extent to which such regulation is consistent with the traditions of the international system ;

(g) the extent to which another state may have an interest in regulating the activity ;

(h) the likelihood of conflict with regulation by other states.

(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).

(4) Under the law of the United States :

(a) a statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under

§ 402 and this section, unless such construction is not fairly possible ; but

(b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

Questionnaire

1. *a)* La Commission doit-elle, à votre avis, envisager son travail comme impliquant une recherche des principes généraux de la matière ?

b) Doit-elle, si la Commission répond d'une manière affirmative à la question *a)*, limiter son champ d'investigation d'une manière ou d'une autre ? Par exemple en excluant certains domaines tels que le droit pénal ou le droit antitrust ou en évitant les questions présentant des aspects politiques ?

2. Estimez-vous nécessaire que l'on clarifie tout d'abord le sens des concepts utilisés dans le titre de la Commission ou impliqués par celui-ci, à savoir :

a) le concept de territorialité (voir question n° 3) ;

b) le concept d'extraterritorialité ;

c) le concept de "*jurisdiction*" (en français « compétence ») (voir question n° 4) ?

3. Si la Commission répond de manière affirmative à la question 2 *a)*, êtes-vous d'accord pour que l'on étudie certaines constructions juridiques tendant à étendre la notion de territorialité *(constructive territoriality)* telles que celle de l'effet *(effect doctrine)*, du lien significatif de rattachement *(significant link)* et certaines fictions de territorialité (îles artificielles, engins, etc.) ?

4. Si la Commission répond de manière affirmative à la question 2 *c)*, estimez-vous que la Commission doit se prononcer sur la nature et le fondement du concept de "*jurisdiction*" (en français « compétence ») (voir chapitre 2, sous 2, du rapport préliminaire) ? Ou faut-il éviter d'aborder cette question théorique ? Peut-on se passer de se prononcer à cet égard ?

5. Etes-vous d'accord pour que l'on divise fondamentalement l'examen de la matière en deux parties :

a) la compétence législative (*" jurisdiction to prescribe "*) ;

b) la compétence exécutive (*" jurisdiction to enforce "*) ?

Faut-il traiter de manière distincte la compétence juridictionnelle (*" jurisdiction to adjudicate "*) comme le fait le nouveau *Restatement* aux Etats-Unis ?

Faut-il faire un sort particulier, comme le fait le nouveau *Restatement* aux Etats-Unis, à l'exécution par des moyens non-judiciaires (par exemple *blacklisting*) ?

A. *Compétence législative*

6. Etes-vous d'accord pour que l'on analyse les différents chefs de compétence extraterritoriale, soit :

— compétence personnelle active (voir question n° 7) ;
— compétence personnelle passive ;
— compétence de protection (dite parfois compétence réelle) ;
— compétence universelle ?

Pour mémoire : les constructions juridiques relatives à la notion de territorialité (*" constructive territoriality "*) mentionnées sous la question 3.

Quelles questions particulières faut-il se poser à leur égard ? Existe-il d'autres chefs de compétence ?

7. Quelle est, à votre avis, l'extension du concept de compétence personnelle (*" personal jurisdiction "*) ?

A qui s'étend ce concept :

a) personnes physiques et morales ; question des sociétés mères (*" parents "*), succursales (*" branches "*) et filiales (*" subsidiaries "*) ; problème de l'unité de l'entreprise ?

b) nationaux, résidents permanents ?

c) les ordres peuvent-ils porter seulement sur les comportements (actes ou omissions) ou aussi sur les biens ?

8. Le droit international limite-t-il l'utilisation de (ou impose-t-il des principes d'interprétation à) l'ensemble des différents chefs par des principes généraux tels que :

— non-intervention ?
— " *reasonableness* " (voir *Restatement n° 2 draft*) ?
— abus de droit ?
— droit du voisinage ?
— coopération ?
— droit des étrangers ?
— droits de l'homme ?
— autres ?

9. Le droit international limite-t-il l'utilisation de certains de ces chefs en particulier (par exemple le principe de la compétence personnelle passive) ?

10. Le droit international établit-il des règles de priorité quant à l'exercice par plusieurs Etats concernés de la compétence législative, en particulier lorsque deux ordres juridiques distincts donnent au même destinataire des ordres inconciliables ?

11. Etes-vous d'accord pour que la Commission propose aux Etats de prendre des mesures de coopération pour éviter ou régler les conflits de compétence ?

Quelles méthodes suggérez-vous :

a) mesures unilatérales d'auto-restriction inconditionnelles ou sur base de réciprocité, notifications de politiques économiques, etc. ?

b) mesures bilatérales : négociations ou arrangements informels, accords internationaux, autres ?

12. La Commission doit-elle proposer aux Etats en application du droit international ou au-delà de celui-ci de tenir compte de certains critères pour déterminer le caractère approprié ou les priorités dans l'exercice des compétences :

— la réciprocité ;
— l'importance des intérêts respectifs (voir la notion de " *reasonableness* " à la question 8) ;

— la violation du droit interne d'un autre Etat, etc. ?

B. *Compétence judiciaire*

13. Si la Commission estime qu'il convient de traiter séparément la compétence judiciaire, vos réponses aux questions mentionnées sous A seraient-elles différentes pour la compétence judiciaire ?

C. *Compétence exécutive*

14. Estimez-vous que le principe d'interdiction d'accomplir des actes d'exécution sur le territoire d'un Etat étranger sans son accord s'applique :

1° aux actes coercitifs ?

2° aux actes suivants effectués par voie postale qui, sans être par eux-mêmes coercitifs, participent à l'acte d'autorité :

a) convocations à des procédures ;

b) demandes de renseignements ;

c) significations et notifications de décisions administratives ou judiciaires ou d'autres types d'injonction ?

3° *idem* que 2° par voie consulaire pour les ressortissants ?

4° *idem* que 2° par voie consulaire pour des non-ressortissants ?

5° *idem* que 3° et 4° par la voie d'autres agents de l'Etat que ses fonctionnaires consulaires ?

15. Si vous répondez de manière positive à la question 14 (2° à 5°) :

a) Estimez-vous que le droit pour un Etat d'accomplir des actes d'exécution sur son propre territoire ne peut néanmoins être exercé lorsque les significations préparatoires nécessaires à l'étranger n'ont pas été effectuées de manière licite au regard du droit international ?

b) Faut-il faire une exception si le contenu de l'acte transmis par la voie postale, consulaire ou autre, a simplement pour but de permettre à l'individu qui le reçoit d'exercer un droit ?

16. Est-ce que vous estimez que le fait pour un Etat de placer une personne sur une liste noire, constitue un acte d'exécution illicite bien qu'il ait été exclusivement accompli sur le territoire de l'Etat qui prend la décision ?

17. Envisagez-vous d'autres limites en vertu du droit international à l'exercice de la compétence exécutive ?

18. Estimez-vous que la coopération entre Etats devrait être exercée par voie conventionnelle en vue de permettre les actes mentionnés à la question 14, 2° *a), b), c)* :

— par voie postale ?
— par voie consulaire ?
— par d'autres agents de l'Etat requérant ?
— par des agents de l'Etat requis ?

19. Envisagez-vous d'autres modes de coopération ?

11 novembre 1985

Observations of the Members of the Nineteenth Commission in reply to the Preliminary Report and the Questionnaire.

1. *Observations of Mr K. Skubiszewski on the Preliminary Report*

24th July 1985

(1) I am in favour of a full-fledged examination of extraterritorial jurisdiction of States by the Nineteenth Commission.

The scope of the inquiry should be broad. A selective approch, in particular the concentration on only some categories of extraterritorial jurisdiction (" forms ", as they are called in Chapter I of the Report), might result in gaps that would distort the picture. The whole gamut of extraterritorial application of law and the conformity of such application with international law is to be taken into account. The Commission should try to establish the test or tests whereby such conformity can be measured and judged. This will involve the discussion of the various bases for extraterritorial jurisdiction (nationality, protection of fundamental interests, universality) and the interplay of certain rules of international law (equality of States, non-intervention).

If, on the other hand, the Commission decides not to deal with the whole spectrum, an autonomous subject within our topic should be taken up such as, for instance, the resolution of jurisdictional conflicts.

(2) The Commission should define and explain the concept of jurisdiction. The concept should primarily be discussed in terms of positive law : when does international law endow the State with capacity to exercise its jurisdiction extraterritorially ? The Commission should explore the interconnections between jurisdiction and sovereignty, independence and territory. Further, it should clarify the notions of territorial and personal jurisdictions and those of jurisdiction to prescribe and jurisdiction to enforce.

However, we should approach the subject from all angles, not limiting ourselves to positive law. Consequently, the Commission should not avoid a discussion of extraterritorial jurisdiction (in the Rapporteur's words) " as a concept directly shaped by a metapositive image of world structure ".

(3) The Report points out that there are States which do not recognize the extraterritorial jurisdiction of other States, though they claim such jurisdiction for themselves. This raises the problem of reciprocity, in particular its role as a factor which might introduce some balance into various demands put forward by individual States and perhaps reduce extraterritorial jurisdiction to generally acceptable and manageable proportions. Otherwise States face a situation in which there is a series of orders and counterorders of different national origin resulting in mutually opposed requirements being imposed on the same person.

The Commission should inquire into various techniques that neutralize conflicting claims of jurisdiction or at least bring them into equilibrium.

2. *Observations de M. J. Salmon sur le Rapport préliminaire*

Le 26 août 1985

Mon cher Confrère,

Laissez-moi tout d'abord vous féliciter pour votre bel exposé préliminaire, qui présente une synthèse à la fois brève, intéressante et originale d'une matière passablement complexe.

A ce stade de nos discussions, il s'agit sans doute moins d'entrer dans les détails que d'envisager la manière dont l'Institut peut traiter de ce vaste et important problème.

Le premier intérêt de votre exposé préliminaire consiste certainement à avoir montré que le problème intéresse la matière du droit pénal, le droit anti-trust, le droit des preuves, le droit des transports, le droit des sociétés, le droit fiscal, le droit social, les contrôles d'exportation, les nationalisations, etc... On pourrait continuer la liste par tous les domaines où les Etats tentent de gérer la conduite de leurs nationaux à l'étranger (service militaire, attitude de non-intervention, etc...) ou d'étrangers à l'étranger (pour la protection des intérêts de l'Etat légiférant ou de ses nationaux).

Je souhaiterais vivement que la Commission persiste dans cette voie. La grande tentation de ceux qui examinent en général cette question est de se laisser éblouir par certaines excroissances de la matière, comme le droit anti-trust, ou le droit des nationalisations, sans rendre compte de tous les autres aspects de la matière. L'Institut devrait éviter ce travers.

Le second intérêt de votre exposé consiste à avoir montré que l'extra-territorialité pouvait prendre diverses formes et était susceptible de degrés.

Pour ce qui concerne ce que vous appelez la "*constructive territoriality*", je me demande si cet aspect ne peut pas être assez rapidement écarté. Il s'agit en somme de l'utilisation du procédé de la fiction pour considérer comme accompli sur le territoire de l'Etat légiférant ce qui s'est passé sur des engins ou structures (navires, aéronefs, engins spatiaux, îles artificielles, Antarctique) hors de son territoire mais qui, en principe, ne se trouvent pas non plus sur le territoire d'un autre Etat. Il y a extraterritorialité sans doute mais sans qu'il y ait conflit — du moins en général — avec la compétence d'un autre Etat.

Les problèmes surgissent essentiellement lorsqu'il y a conflit de compétences.

A ce propos, on peut se demander s'il ne serait pas utile de diviser la matière en deux champs d'étude : d'une part la compétence législative extra-territoriale, et d'autre part la compétence exécutive extraterritoriale. La première est souvent appelée par les anglo-saxons "*jurisdiction to prescribe*", la seconde "*jurisdiction to enforce*". On peut accepter que la seconde comprend *lato sensu* la question de la sanction ou « *coertion* ».

Les problèmes ne se posent pas dans les mêmes termes selon que l'on est dans la première ou dans la deuxième hypothèse.

Si l'on admet l'utilisation de cette *summa divisio*, notre Commission pourrait examiner pour chaque hypothèse distincte quelques points importants.

A. *Compétence législative extraterritoriale (ou " jurisdiction to prescribe ")*

1. Il conviendrait tout d'abord de prendre position sur le point de savoir si le droit international permet aux Etats de régir les actes, comportements, faits ou biens sur un territoire étranger. Deux positions théoriques peuvent être adoptées : existence d'un principe de liberté avec des exceptions ou existence d'autorisations spécifiques.

Sur un plan pratique, il semble en général admis que l'Etat peut exercer sa compétence extraterritoriale législative dans un certain nombre de cas.

Le droit pénal a identifié longtemps certains chefs de compétence. Vous y faites allusion à plusieurs endroits de votre exposé préliminaire. Ainsi :

— la compétence personnelle active (lorsque le national est l'auteur de l'infraction) ;

— la compétence personnelle passive (lorsque le national est la victime de l'infraction) ;

— la compétence réelle ou de protection *(protective principle)* ;

— la compétence universelle ;

— il convient aussi de mentionner la compétence fondée sur l'effet.

Toutefois, ces chefs de compétence ne sont pas nécessairement limités au droit pénal. Dans une série de domaines particulièrement sensibles, l'Etat légiférant peut requérir de son national, voire de son résident permanent une conduite déterminée alors même qu'il se trouve sur le territoire d'un Etat étranger. Il n'y a certainement pas unité de vue entre les Etats à ce propos. Les intérêts peuvent varier d'Etat à Etat ou selon l'objet de la conduite. Le régime économique social, la mesure dans laquelle les Etats s'estiment en droit de réglementer les comportements des particuliers varient de manière importante.

2. Après avoir identifié les divers chefs de compétence, il faudrait déterminer s'il y a des règles prohibitives qui limitent la liberté (ou la compétence) des Etats.

Il faudrait certainement rappeler ici certains principes importants dont la violation dans plusieurs affaires récentes a suscité des difficultés dans le domaine de la politique économique ou celui des contre-mesures : respect du principe de non intervention dans un monde divisé du point de vue économique et social.

Faute de mieux, les principes de l'abus de droit, de bon voisinage, de coopération entre les Etats peuvent jouer un rôle.

3. Ces points étant établis, il faudrait examiner s'il est possible de donner

des directives en cas de conflit entre la juridiction de l'Etat légiférant et la compétence de l'Etat territorial.

En effet, si l'exercice de la juridiction de l'Etat légiférant peut parfois laisser tout à fait indifférent l'Etat étranger sur le territoire duquel il opère, cet exercice peut aussi lui être parfaitement intolérable.

Le problème n'est pas simple.

Très souvent, la concurrence de juridiction n'a rien d'illégal dans le chef des deux Etats intéressés. Elle est seulement très onéreuse pour le particulier qui en est l'objet.

Prenons par exemple un cas de double imposition ou de double obligation de service militaire.

Ailleurs la concurrence débouche sur une illégalité. C'est le cas des concurrences de législations incompatibles, qu'elles soient involontaires ou volontaires (*blocking statutes* dans certains domaines).

Le respect de la souveraineté de l'Etat étranger paraît devoir former un principe à retenir sauf si l'exercice de cette souveraineté est lui-même contraire au droit international.

On peut par exemple penser aux directives internationales ou européennes interdisant à des filiales de sociétés d'appliquer en Afrique du Sud la législation relative à l'apartheid dans les entreprises. Le respect des droits de l'homme, les droits syndicaux, etc... pourraient ainsi devoir primer en principe l'ordre local qui leur serait contraire.

La solution la plus adéquate en cas de situations concurrentes passe par des attitudes unilatérales d'abstention ou par des négociations ou accords en vue d'établir des priorités de compétence ou les modalités de leur exercice.

Notre Commission pourrait faire un inventaire de ces types de solutions avec l'idée féconde que des solutions imaginées dans un secteur peuvent souvent, par identité de motifs, être exportées dans un autre.

4. La recherche de critères raisonnables d'appréciation pourrait aussi retenir notre attention.

Vous insistez à juste titre sur l'idée de réciprocité. L'Etat territorial n'exige habituellement pas d'un touriste étranger ce qu'il exige de ses résidents permanents. Par exemple, la France imposera évidemment aux voitures anglaises de rouler à droite et de respecter les règles françaises de circulation, mais pas nécessairement les règles relatives à la construction ou l'aménagement des véhicules (ceintures de sécurité, volant à gauche, phares jaunes, etc...).

Les différents facteurs mentionnés dans le *Restatement of the law (second)* 1962 pourraient être examinés en détail. Cette liste est un utile point de départ, mais elle est sans doute incomplète et amendable en divers points.

B. *Compétenc exécutive extraterritoriale (ou "jurisdiction to enforce")*

1. Problème de la légalité de l'usage de la compétence exécutive.

A première vue les choses sont ici plus simples.

1) Un Etat ne peut pas accomplir des actes d'exécution sur le territoire d'un Etat étranger sans son accord.

2) En revanche, il peut les accomplir sur son territoire, même s'ils concernent la sanction d'une compétence législative extraterritoriale.

2. A l'examen les choses ne sont cependant pas aussi simples.

Que faut-il entendre exactement par acte d'exécution ?

A partir de quand un acte d'exécution porte-t-il atteinte à la souveraineté de l'Etat étranger ? Il n'y a sans doute aucune difficulté pour les actes d'exécution utilisant la contrainte matérielle (" *acts of coertion* ").

Mais que faut-il penser d'une série d'actes d'autorité qui sont préparatoires à l'exécution coercitive proprement dite.

Exemples :

— convocation au service militaire,

— demande de renseignements,

— envoi d'une feuille de déclaration fiscale,

— notification d'un mandement à verser l'impôt,

— notification d'une décision administrative,

— notification d'une assignation judiciaire,

— notification d'une amende avec ordre d'en payer le montant, etc...

Ces divers actes sont indéniablement des actes d'autorité. Ils contiennent habituellement un ordre et s'insèrent dans une procédure mettant en jeu l'*imperium* sans que cet ordre soit lui-même accompagné d'une contrainte.

Dans la législation courante de certains Etats, il est prévu que de tels actes peuvent valablement — aux yeux de l'Etat qui prend la mesure — être adressés à l'étranger par voie postale.

Pour d'autres Etats, la notification de décisions administratives ou judiciaires en matière civile, pénale ou fiscale à des destinataires à l'étranger porte atteinte à la souveraineté territoriale de l'Etat concerné même si la notification est faite par la voie postale. Telle est notamment la position de la Hongrie, de la République fédérale d'Allemagne et de la Suisse (pour ce dernier pays, voyez Caflisch, « La pratique suisse en matière de droit international public », 1983, *ASDI* 1984, p. 174-176).

Il me semble que la Commission devrait prendre position à cet égard et motiver une proposition à faire à l'Institut.

3. Si un acte d'exécution est exercé sur le territoire de l'Etat qui ordonne la mesure, cet acte doit-il néanmoins être considéré comme illicite aux yeux du droit international, si les actes préparatoires à l'acte d'exécution et qui

fondent sa légalité interne (demande de renseignements, enquêtes, notifications d'actes d'instruction, notifications de décisions, etc...) ont été accomplis en violation de la souveraineté d'un Etat tiers ?

4. Coopération internationale.

L'objet de la coopération est ici très différent de celui relatif à la compétence législative.

Il s'agira :

1° d'autoriser certains actes d'instruction ou préparatoires, ou interlocutoires ou des notifications de décisions prises par l'Etat qui exerce sa compétence législative (ou judiciaire) :

a) au moyen de la voie postale ;

b) par la voie consulaire (à l'égard de ses ressortissants ou à l'égard de non ressortissants) ;

c) par la voie d'autres agents que les consuls ;

2° de prêter à l'Etat qui exerce sa compétence législative (ou judiciaire) les services des organes de l'Etat pour des actes d'exécution ou préparatoires à l'exécution :

Exemples :

— un agent de police belge — agissant pour le compte des Pays-Bas — recouvre une amende en Belgique auprès d'une personne résidant en Belgique qui a commis une infraction au Code de la route sur le territoire des Pays-Bas ;

— les conventions sur la double imposition prévoient la transmission de renseignements entre administrations fiscales ;

— diverses conventions organisent des commissions rogatoires en matière civile et pénale ;

— d'autres services sont prévus par des conventions sur la transmission d'actes publics.

En espérant que ces quelques réflexions préliminaires seront de nature à vous aider dans votre tâche et en demeurant à votre disposition pour toute aide complémentaire, je vous prie d'agréer, mon cher confrère, l'assurance de mes sentiments les plus cordiaux et les meilleurs.

3. *Observations of Mr Y. Dinstein*

10 December 1985

1. *(a)* I am not sure what the question implies. Clearly, the Commission must base its work on scholarly research. No research is going to be productive unless it covers "general principles" as well as specific rules.

The general principles underlie the specific rules and explain their *ratio legis*. At the same time, the Commission should only examine those general principles which are directly germane to its work. If it gets into a plethora of other general principles (see below, 8), the report will have to cover the entire gamut of international law.

(b) I do not believe that the Commission should limit its sphere of activities *a priori*. Subjects such as international criminal law or anti-trust raise challenging questions, which must be addressed (for instance, how can one come to grip with the issue of universal jurisdiction without wrestling with the topic of international offences ?). It is possible, on the other hand, that, as the work of the Commission expands, it will be felt *a posteriori* that the Commission ought not to go into too much detail as regards this or that aspect of its overall mandate.

2. It is always usefull to commence every attempt at codification with a series of definitions. The latter need not be regarded as having binding — or even general — application. They must simply be viewed as governing the text prepared by the Commission.

3. I believe that the "effect doctrine" is of paramount importance in the context of extraterritorial jurisdiction. Perhaps the greatest challenge to the Commission will be to demarcate the legitimate bounds of that doctrine. As for "fictions of territoriality", they should be mentioned, but I doubt that this will prove to be a major segment of the Commission's report.

4. I do not really see how the Commission can possibly avoid a working definition of the term "jurisdiction". In fact, even if the Commission were to avoid an explicit definition, some definition will inevitably be implicit in the text as it evolves.

5. In my opinion (as expressed in Helsinki), the two-pronged division between "jurisdiction to prescribe" and "jurisdiction to enforce" is entirely misleading. There are at least three categories, including "jurisdiction to adjudicate". As for the possibility of adding other categories (or, perhaps, sub-categories), it would be useful for the Rapporteur to study the matter in depth. As this stage, I have no firm views one way or the other.

6. I accept the traditional catalogue of five jurisdictional links based on the (i) territoriality principle; (ii) active personality principle; (iii) passive personality principle; (iv) protective principle, and (v) universality principle. The task of the Commission, as I see it, is to lay down the scope of application of each of these five principles. Four of the principles (ii through v) represent *ex hypothesi* extra-territorial jurisdiction. The fifth (i) must be properly confined within reasonable bounds, inasmuch as an unlimited extension of "constructive territoriality" is likely to reach the same extra-territorial end through different means. In other words, if principle (i) were unrestricted in its constructive application, there would scarcely have been any need for principles (ii) through (v).

7. In my judgment, the active personality principle sets up the jurisdiction of the State over all its nationals in all cases. This is also true in some exceptional instances as regards non-nationals (serving in the State's armed forces, its diplomatic service and the like). I do not believe that domicile is relevant (in my opinion there has been some confusion in this field owing to the inappropriate application of notions bclonging to "private" — as distinct from "public" — international law). Insofai as corporate entities are concerned, the *Barcelona Traction* ruling should be followed. As for property, when it is situated within the boundaries of the State, the territorial principle applies (thus, the State can enforce a judgment against a national who remains abroad through confiscation of his local property). If both the national and his property are abroad, the State lacks jurisdiction to enforce (*vis-à-vis* the property), though it has jurisdiction to prescribe as well as to adjudicate (*vis-à-vis* the national).

8. Obviously, there is an interaction between the various branches of international law. However, in my opinion it will be counter-productive for the Commission to get into the various subjects listed. They (as well as others) impinge occasionally upon the topic of extra-territorial jurisdiction (and vice versa). But they are not essential to the understanding of the Commission's theme, and broadening the purview of the study in every which way is likely to adversely affect its focus.

9. All five jurisdictional principles must be limited. The territoriality principle must be curtailed in terms of the effect doctrine ("reasonableness" can play an important role in this context). The active personality principle is confined basically to nationals (see above, 7). The passive personality principle should, in my view, be rigidly circumscribed to exceptional circumstances (*e.g.* when a national of the State claiming jurisdiction becomes a victim precisely because he is the national of that State). The protective principle is limited by definition to the vital interests of the State acquiring jurisdiction. The universality principle is restricted to international offences (and even there does not apply automatically; cf., *e.g.*, the 1948 Genocide Convention).

10. I believe that where there is a conflict between the legislations of two countries, priority should be given to the territorial State.

11. There ought to be a multilateral convention governing the subject of jurisdiction in its entirety. One of the clauses of the convention should deal with jurisdictional conflicts. In the absence of such a convention, States should settle disputes amicably in conformity with the general rules of international law.

12. I like the "reasonableness" principle in the context of the effect doctrine (see above, 9). In other instances, I believe that it would be more productive to demarcate precise frameworks for the application of each jurisdictional principle. As for the issue of reciprocity, I think that it comes

into play only when extradition is requested. As regards "violations" of the internal laws of other States, it is not quite clear to me what is meant.

13. No.

14. I think that the international legal limitations on jurisdiction to enforce within the territories of foreign States relate only to coercive acts. I see no objection to non-coercive measures (such as (I) use of the mail for transmittal of legal documents, or (ii) application of consular functions within the scope of the 1963 Vienna Convention).

15. .....

16. No.

17. No.

18. No.

19. .....

4. *Observations of Mr L. Henkin*

2 January 1986

1. The Commission should address its subject by exploring general principles. It ought not totally exclude any particular areas from its consideration, but should consider whether any particular areas (criminal law, tax law) might enjoy different treatment, and why. It can be decided later whether the different treatment for such particular areas should be explored in detail.

2-3. The Commission need not spend time defining territoriality or extra-territoriality. The issues that have arisen are not in respect of "definition" of those concepts but in their implications and applications.

It will be necessary to consider, *inter alia,* notions like "the effects doctrine"; which State or States have jurisdiction in respect of complex activities, some part of which takes place or has impact in each of several States; *e.g.,* a telephone conversation between persons in States Y and Z to further a conspiracy to smuggle drugs from State A to State B; whether international law imposes some limits on the exercise of jurisdiction even in respect of some activities admittedly within the State, for example by a requirement of reasonableness; when international law permits a State to exercise jurisdiction in respect of persons, things, activities or interests that are wholly extra-territorial.

4. It would not seem useful to explore in the abstract the very complicated conception of jurisdiction. It seems more useful to indicate what kinds of assertions of authority by States, however such assertions are denominated, have been a source of controversy under international law.

5. There is a clear and significant distinction between an exercise by a State of authority to prescribe law in situations that have significance for other States, and an assertion by a State of authority to subject foreign interests to adjudication in its courts. The Revised Restatement has also identified dimensions of non-judicial enforcement which have generated some controversy: attempts by one State to enforce its laws by actions inside another State, *e.g.*, by serving process, or by sending its police into that State's territory to arrest a person; or attempts to enforce its laws by administrative decisions applying to persons in another State, *e.g.*, by blacklisting them or denying them a license to trade. Jurisdiction to prescribe and jurisdiction to adjudicate remain the principal categories raising issues under international law, but non-judicial enforcement has acquired increased significance and deserves some attention.

6. This question, I assume, means to address exercises of jurisdiction to prescribe *extra*-territorially.

The categories listed are appropriate for that inquiry. But it might be useful to go behind them to clarify the perspective of international law in the matter of jurisdiction: (1) Is there a general principle barring the exercise of jurisdiction extra-territorially, to which the categories listed are exceptions? If so, are there other exceptions? Or (2) does international law begin rather with a presumption that, like any act of a State, the exercise of jurisdiction by a State is presumptively permissible; that the burden is on a State that objects to a particular exercise of jurisdiction to show that there has developed a principle of international law forbidding the exercise of jurisdiction on particular grounds or in particular categories of cases. If so, has international law developed a principle of limitation on the exercise of jurisdiction, designed to safeguard interests of other States or of private persons affected, where the State exercising jurisdiction has no significant links to the person or the activity involved? The categories listed in this question may indicate examples of links that have been accepted as not insignificant, but the list, presumably, is not exhaustive. This second perspective is suggested by language in the *Lotus Case* and though it is not the one commonly adopted, it needs to be addressed.

7. It has been generally accepted that a State may exercise jurisdiction to prescribe extra-territorially on the basis of certain links or relationships to the person acting, such as nationality, or domicile, or permanent residence. In the case of juridical persons, the issues are more complicated. In what circumstances can the State in which a company is incorporated, or in which it has its principal place of business, apply its law to the activities of branches or subsidiaries in another country? The answer may be, "in some circumstances but not in others." It may depend on whether the foreign entity is a branch or a subsidiary; whether the enterprise is or is not "unitary"; whether the State of the parent company pursues its purposes by addressing its mandate to the parent company (or to its officials) in its own territory, or seeks to

address the entity in a foreign country directly; whether the State of the parent company seeks to reach property rather than activities of the branch or subsidiary.

8. It seems clear that international law imposes some limitations on the exercise of jurisdiction to prescribe; that the various categories suggested to define whether the exercise of jurisdiction is permissible or forbidden are not self-defining; and that distinctions are to be made and lines are in fact drawn. Like the Revised Restatement I tend to support an overriding concept of "reasonableness" which would seem to subsume many if not all of the other concepts listed in this question.

The trend of the law, I believe, is towards acceptance of norms to regulate the exercise of jurisdiction; even when there is reference to "comity" or "cooperation", these considerations are given as the reasons for a norm, not merely to suggest practice reflecting etiquette or courtesy, or some other lesser obligation. Whether the limitation is couched in terms of "unreasonableness", or "exorbitance", or « *abus de droit* », what is acceptable and what is not may depend on the subject matter. For example, an exercise of jurisdiction may not be unreasonable or exorbitant where a State does so to protect human rights, whereas an analogous action to promote some parochial State interest may not be legally acceptable.

9. International law has resisted exercises of extra-territorial jurisdiction, in respect of actions of a person who is not a citizen or resident, because such exercise of jurisdiction affects interests of another State, as well as those of the person involved. Hence the very narrow view of what may be reached through "the protective principle": for example, international law resists efforts by a State to punish political acts by aliens abroad, such as "slander" of the State or of the chief of State. International law has also resisted legislation based on "passive personality", where the State seeks to exercise jurisdiction over an act of which the victim (*not* the actor) is a national, because it is not reasonable to expect persons everywhere to be charged with knowledge that a person they deal with is an alien, to subject persons everywhere to the laws of the country of nationality of any alien they may deal with, and to charge them with knowledge of what those foreign laws prescribe. But when a person attacks another of a foreign nationality because of his nationality, as is sometimes the case in "terrorist" activities, it may not be unreasonable to allow the State of that nationality to apply law to such offense.

There has also been some tendency to extend the scope of universal jurisdiction, as more matters are seen as reflecting universal values, for example, the need to eliminate genocide, or terrorism. Also, with an increase in the number of international obligations seen as "*erga omnes*", as, for example, the authority of all States to act to prevent pollution of the high seas, there is also a corresponding tendency to allow States to prescribe their laws to protect those rights.

10. International law does suggest priority between States, but the priority is not governed by fixed and precise principles. Balancing of interests should be required and considerations of reasonableness should govern. When two States issue contradictory orders putting a private person in an impossible situation, there is a compelling necd to have one State defer to the other, and the determination of preference or priority is imperative. Sometimes, fixed principles are called for and may be comparatively easy to apply, such as a preference, ordinarily, for the territorial State over a State of nationality. In complex situations, however, that choice may not be obvious and one might do better with a requirement of balancing the competing interests and a general principle of reasonableness.

11. To the extent that rules and principles have developed or are developing, the Commission ought to give them expression. Where it cannot be said that such rules and principles are already part of the law, it may be desirable to promote multilateral agreements or a network of bilateral agreements, and the Commission might well offer guidelines as to what such agreements should provide. Self-restraint ought to be encouraged but continued reliance on self-restraint ought to be a last resort.

12. While a condition of reciprocity is often *prima facie* reasonable, it ought not always be determinative : for example, where a person's human rights are at stake, a State should act properly even if the State of the person's nationality does not do so in reciprocal circumstances. The replies to the previous questions indicate my view that the Commission should support a principle of reasonableness and a balancing of interests. General acceptance of such principles would eliminate any need for reciprocity *ad hoc*.

13. While the considerations relevant to jurisdiction to adjudicate are generally similar to those that apply to legislative jurisdiction, differences between the two kinds of jurisdiction and between their consequences are sufficient to warrant detailed examination and possible differentiation. After the Commission has explored jurisdiction to prescribe it will be easier to consider analogous issues in respect of jurisdiction to adjudicate and determine how much special treatment they deserve.

14. It is commonly agreed that a State may not perform official acts in the territory of another State without the latter's consent, express or implied. There is much uncertainty, however, as to which activities States may have implicitly agreed to, for example by participating in an international postal system, or authorizing the opening of a foreign consulate. Consent to the establishment of a consulate implies consent to the ordinary consular functions ; it may be argued that it implies lack of consent to similar activities by other means, but that is not a necessary implication ; for example, ordinarily there is no reason to infer an objection to doing something similar by international mail. The Commission will also have to consider the implications of accession, or of non-accession, or of accession with reservations, to the Hague Convention

on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

In general one ought to distinguish acts or communications that are addressed to nationals or domiciliaries from those addressed to persons without such links ; those which impose some burden on the recipient from those which largely benefit him. For some purposes one might distinguish information or notice from judicial or administrative injunctions or orders.

15. *a)* Whether a State should give effect in its domestic law and procedure to actions abroad that violate international law is generally a domestic question. But in some cases, the most effective deterrent to violation by a State of its international obligation is to require that State to forego the fruits of the violation. For example, if agents of one State have entered upon the territory of another State to seize a person and bring him back for trial, it may be necessary to require the offending State to return him in order to deter such actions. (Argentina did not ask for the return of Eichmann, but that case was *sui generis*.)

b) Ordinarily, it may be assumed that the territorial State would not object to an official act by another State designed to confer a benefit on a person, especially when other means are not readily available for doing so.

16-17. It is not feasible or desirable to insist that a State may not take such measures as blacklisting against a person outside its territory. In fact, the act is not really done "in the territory of another State", even where the person who is the object of the measure resides or is present in that State.

The principal objection to such acts is not that they are done or have effect in another State, but that they are unfair to the person affected if not done with some due process of law. Just as with adjudication, an administrative determination that purports to apply legal standards (rather than unregulated discretion) requires notice, some opportunity to be heard, findings of fact, and a decision based on reasonable application of legal standards.

18-19. Where possible, it is best to have common standards and procedures by multinational agreement. Some such agreement has developed under the Hague Conventions. They ought to be extended to other subjects. Until they are, States should develop and apply policies of cooperation with a maximum of good will and a minimum of formalities and such practices may become customary law or be codified in international agreement.

5. *Observations of Mr W.L.M. Reese*

9 January 1986

Dear Professor Bos,

I find it difficult to reply to many of the questions posed in your excellent questionnaire. My answers, such as they are, appear below.

1. *a)* Yes. I think this would be most helpful. Also I think this should be possible to do in a relatively brief space.

b) In principle, my answer is "no". I feel quite strongly that the Commission should include anti-trust within the scope of its study. I feel less strongly about criminal law. I don't see how we can entirely avoid the political aspects of the field. After all, our subject is intensely political in nature and we should not shut our eyes to this fact.

2-3. I am not sure that we need spend much time in clarifying the concepts mentioned in Question 2. But I am sure that we must pay attention, and probably considerable attention, to the matters referred to in Question 3.

4. No.

5. Yes. I think the classification adopted by the new Restatement is a logical one.

6. Yes. This is most important.

7. I would think that the concept of jurisdiction extends to all the persons and entities mentioned. It can also extend to property. Whether jurisdiction exists in a particular case would, of course, depend upon other factors. It is essential that in each case the exercise of jurisdiction be fair and reasonable.

8. I think that the concept of reasonableness limits the exercise of extra-territorial jurisdiction. I am not so sure about the other concepts mentioned.

9. I doubt that international law forbids use of any of the concepts mentioned. However, the principle of reasonableness may restrict use of some of these concepts more than it does in the case of others.

10. I don't think so. But, of course, States should not, except in exceptional circumstances, subject a person to conflicting orders. This is, I think, an area where it would be eminently desirable to have clear rules of international law. But such rules would be difficult, if not impossible, to formulate. So much depends upon the facts of the particular case.

11. Yes. I would think that both method (a) and (b) should be tried.

12. Yes. Again I think that the concept of reasonableness is the most important. I realize that it is vague.

13. Generally "no". I am not sure that the concepts mentioned in Question 6 are of equal significance in the area of judicial jurisdiction.

14-15. No.

16. No.

17. No.

18. Yes, in all cases.

I do hope you will find these replies to be somewhat helpful.
With all best wishes.

6. *Observations of Mr B.A. Wortley*

10 January 1986

1. Recent differences between the U.S.A. and Libya indicate the urgency of this subject.

2. The extraterritorial jurisdiction of States may be validated by Treaty or Act of State carried out under public international law (ex. recaption or restitution after victory in a lawful war or after the lawful use of reprisals or retorsion) [1].

3. Claims to exercise jurisdiction to enforce national laws in respect of acts done outside national territory must always be considered in relation to the international protection of human rights [2], which are being more and more the subject of international treaties often of a multilateral character.

4. The whole question of the legal effect of economic blockade by States or by groups of economic interests, would certainly seem to merit continuing attention; but the parameters of such questions would need to be closely defined: ex. what are the internationally lawful limits of economic pressure by States, their subsidiaries or by legal or physical persons claimed to or under the jurisdiction of States ?

5. Chapters 6, 7 and 8 of Professor D.W. Greig's "International Law", London, Butterworths (1976) seem particularly valuable to me.

[1] See Wortley, Expropriation in International Law, Cambridge University Press (1959), Chapter 4.

[2] *Ibid.*, pp. 20 and 150.

7. *Observations of Mr K. Zemanek*

10 February 1986

1. *a)* Yes. We should aim at presenting a Report that suggests lines along which existing controversies can be settled. That aim cannot be reached as long as partisans shout from entrenched positions at each other without listening to each other. If we want to break the deadlock, recourse to an examination of the principles underlying the conflicting positions seems the most appropriate means.

1. *b)* It may be wise to exclude topics that have too many peculiar features of their own, like anti-trust law, from our detailed examination, although the principles which we shall try to elucidate will also apply to them. At a later stage therefore a test will have to be made to check the applicability. Moreover, we shall also have to clarify the relation of our subject to that of the newly created Commission on « La limitation par le droit international de la compétence judiciaire des Etats ».

2. Yes to (a) and (c). A separate study of (b) doesn't seem necessary since what of it is relevant to our examination will emerge through the study of (a) and (c).

3. "Effect doctrine" and "significant link" should be included. I am doubtful, though, on the advisability of including certain fictions of territoriality (like artificial islands) ; they certainly are interesting but they have no direct bearing on the subject as we have defined it in Helsinki.

4. If I would have needed something to convince me that a study of the concept of "jurisdiction" was inevitable, the description of the speech of Mr Robinson in the Preliminary Report would have done that. It is the absence of an independent inquiry into the concepts which allows the interested parties to maintain their conflicting positions. Without being unduely optimistic about the possible outcome of a theoretical debate, we could do worse by avoiding it.

5. "Jurisdiction to prescribe" and "jurisdiction to enforce" should be studied separately. Until the study has further progressed and until the relation to the topic of the newly created Commission has been determined, I reserve my judgement on a separate treatment of the "jurisdiction to adjudicate". Some national legal concepts consider adjudication to be a kind of enforcement, whereas others don't. It will have to be seen on the basis of more material whether international law requires the distinction to be made, but I can see no harm in adopting preliminary one or the other approach, as long as it is understood that the result will have to be reviewed at a later stage.

The same goes for the indirect means of enforcement, such as blacklisting. It may be that it can best be considered in the context of "jurisdiction to

enforce", but it may also turn out, through further research, that different rules or principles apply to it and require its separate treatment.

6. All four should be examined. The focus should be on the possible conflict with the exercise of jurisdiction by the territorial State (See Question 8).

7. *a)* It depends on whether the branch or subsidiary is vested with a proper legal personality in the State in which is resides. In that case no personal jurisdiction may be claimed ; financial control is not a sufficient link.

7. *b) Personal* jurisdiction does not extend to permanent residents who have another nationality.

7. *c) Personal* jurisdiction does not extend to property located in foreign territory.

8. Territorial sovereignty, sovereign equality, non-intervention and human rights seem to me the most important limitations on the exercise of extra-territorial jurisdiction.

"Reasonableness" might be a suitable principle of interpretation were it to be administered internationally. As long as it is administered nationally, other States, I am afraid, will have little confidence in the foreign judiciary's ability to strike a fair balance between the interests involved and, sometimes, even in its willingness to do so.

9. The differences of opinion existing in particular in respect of the last three points enumerated in Question 6 seem to originate in two conflicting concepts : whereas some seem to believe that the protection of self-defined interests allows unilateral action through the claim of jurisdiction even when that claim conflicts with a foreign territorial jurisdiction, and thereby turns the resolution of the conflicting claims into a test of power, others maintain that has to be solved through appropriate international procedures.

10. Territorial jurisdiction has precedence when an effect is produced in its realm.

11. *a)* What should be avoided is to make the outcome of the conflict depend on a test of power. Reciprocity might, therefore be a valid proposition if it were really respected (actually, the Courts of the US sometimes do not recognize as valid a foreign claim to jurisdiction in matters in which the United States authorities themselves claim such jurisdiction in respect of foreigners (f.i. in the case of embargoes).

11. *b)* In negotiations the power factor will still be prominent. Formal agreements, because of their publicity, may be the most appropriate procedure.

12. See answers to Questions 11 a, 8 and 10.

13. Not as far as I can see at this stage.

14. 1. Absolutely.

2.Yes. When the legal force of the legal act is subject to its being served on the person concerned, then serving is part of the authoritative act and may only be performed on foreign territory with the permission of the territorial State (cf. "Aktuelle österreichische Praxis zum Völkerrecht", *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht* 30, 362 - 365 (1979); 31, 328 - 329 (1980); 33, 361 - 367 (1982). Such permission may be expressed in a general way, through international custom or by treaty; it may also be given *ad hoc*.

3. Not when it remains within the limits of accepted consular functions, because permission is then implied in the establishment of consular relations.

4. The answer varies with the nature of the activity. When a request for information is f.i. the consequence of a visa application and is germane to the latter, then the request falls within legitimate consular functions and is therefore permissible. The criterion are the consular functions on which the States concerned have agreed.

5. Yes.

15. *a)* It may or may not be permissible under the national law of the State concerned. Under international law it violates, however, the State of nationality's right that its nationals be treated according to international law by other States. When the preparatory notification is illicit under international law, then ensuing proceedings have the aforementioned effect. (See also answer to Question 16).

15. *b)* Yes, because the information does not interfere with the territorial sovereignty of the State on whose territory it is received. The right which the individual concerned might thereupon exercise would have effects only in the legal sphere of the State which sent the information.

16. This question can only be answered under alternative hypotheses:

(a) If the reason for blacklisting is the non-compliance by the person concerned with rules or orders which under international law may not be legitimately addressed to it, it violates the State of nationality's right that its national be treated in accordance with international law by other States. Under these circumstances blacklisting is illicit.

(b) Under other circumstances it may be lawful, provided it does not amount to a discrimination forbidden by international law

17. See answer to Question 8.

18. Yes. The first-mentioned three procedures seem, however, ill-suited even for conventional regulation, because the territorial States could not control their legitimate exercise. The proper way is the fourth, and agreements on

mutual assistance in judicial and/or administrative matters are the appropriate instruments.

19. No.

8. *Observations of Mr E.J. Manner*

3 March 1986

1. *a)* A study of the general principles relating to the subject may be useful but in case a codification of its results does not appear practicable, it needs not to be extended too far into theoretical considerations.

b) The field of investigation of the Commission may be limited and systematized in conformity with its practical purpose, having in mind that the subject of the present study does not cover all aspects of extraterritorial jurisdiction.

2. Evidently there is need to clarify and specify these three basic concepts because they are often used in a wider sense than the present study would presuppose.

3. Taking account of the purpose of our study, the proposed extension of the notion of territoriality (*i.e.* including "constructive territoriality") appears to be adequate.

4. See the answer to question 2. Anyhow it may be necessary to specify the substance and define the limits of the concept of "jurisdiction" as such as it is applied in our study.

5. In order to deal with the problems systematically the proposed distinction between the terms "jurisdiction to prescribe", "to enforce" and "to adjudicate" may be useful. Because of the practical objectives of the study, also such "non-judicial" acts as "blacklisting" should be taken into consideration.

6. The distinction made here under the heading of "legislative jurisdiction" between the different categories of territorial jurisdiction is not unknown to modern legal theory. Nevertheless the proposed analysis might still be usefull if carried out within the limits of the purpose of this study.

7. The question of the extension of the concept of "personal jurisdiction" may appear also as a matter of definition. In these days many different forms of international commercial intercourse support an extensive interpretation of the concept. The Commission might not exclude from its consideration anything mentioned in this question.

8. The general principles of international law mentioned in this question may in some cases limit the application (or impose on the interpretation) of

the jurisdiction concerned, but it is hardly possible to specify these effects in general terms.

9. Some limitations may be embedded in the very substance of the concepts concerned.

10. The general international law does not limit the competence of States to establish and develop their own legal order without external interference. This competence, in other words, the jurisdiction to prescribe or legislative jurisdiction, is inherently based upon the principle of territoriality. Because of the exclusive nature of that principle it would not be possible to divide the legislative jurisdiction between two States on the basis of territorial jurisdiction. On the other hand, however, concurrent claims for legislative jurisdiction may in some cases follow from the distinction between territorial and personal jurisdiction. But it seems to be doubtful, whether international law and practice even yet may offer any clear-cut rules on priority concerning conflicts between the abovementioned claims for legislative competence.

11. Co-operation in good faith as well as bilateral measures and unilateral measures on the basis of ıeciprocity would be necessary in order to avoid and settle conflicts of competence.

12. All the three criteria mentioned in this question may be relevant in determining the nature and priority of claims for competence.

13. The above-mentioned answers apply, in the main, also to respective questions concerning "jurisdiction to adjudicate".

14. As regards "executive jurisdiction", the prohibition against acts carried out within the territory of another State without its permission seems to cover, as a rule, coercive acts, but may not, on the other hand, be applicable to such non-coercive acts that are executed by mail and without co-operation by the other State. Whether the said prohibition also applies to executive communications forwarded through consular representatives may depend on the personal status of the receiver. As to measures taken for the same purpose by other than consular agents, the answer in each particular case depends on prevailing circumstances.

15. States must, of course, observe the rules of international law and their legal obligations also in regard to executive measures taken within their own territories. The main question in this context may concern the legal consequences of executive measures carried out against the obligations concerned.

An exception made in order to permit a person to exercise his rights might, depending on circumstances, be deemed justifiable.

16. "Blacklisting" of foreign persons or companies within the own territory may involve discrimination and could be regarded as an illicit act of execution.

17. No comments.

18. It might be useful to organize the co-operation between the States concerned by agreement and thus determine bilaterally the proper way of permitting the executive acts in question. Existing means and representative organs might be given preference, if appropriate.

19. No suggestion.

9. *Observations de M. J. Salmon en réponse au Questionnaire*

Le 27 mars 1986

Mon cher confrère,

En vous demandant de bien vouloir excuser le retard que je mets à vous répondre, je vous prie de trouver ci-dessous les réponses à votre questionnaire. Je me réfère aussi à ma lettre du 26 août 1985 que je vous avais remise à Helsinki et dont je joins copie à toutes fins utiles, pour ne plus devoir revenir sur certains aspects que j'y avais traités.

1. *a)* La Commission devrait à mon avis s'attacher à identifier quels sont les principes de droit gouvernant l'exercice de compétences extra-territoriales : règles permissives ou limitatives, et celles qui gouvernent la solution des conflits de compétence ou de juridiction.

b) Il n'y a pas lieu de limiter le champ d'investigation par matière, car l'expérience dans un domaine peut illustrer des possibilités dans un autre. Tout le droit étant politique — même si les juristes soutiennent le contraire — je ne vois pas comment on pourrait exclure « les questions présentant des aspects politiques ».

2. Oui.

3. Oui mais brièvement et en ayant en vue que ce qui compte est de se prononcer sur le caractère juridiquement acceptable de ces rattachements.

4. A première vue, j'ai le sentiment qu'il vaut mieux éviter les discussions relatives aux fondements théoriques.

5. D'accord pour la division en deux parties.

Pour ce qui concerne la compétence juridictionnelle étant donné que l'Institut a créé une Commission spécifique (Troisième Commission. La limitation par le droit international de la compétence judiciaire des Etats, rapporteurs MM. Rudolf et Verhoeven), je pense qu'il vaut mieux que notre commission s'abstienne. M. Rudolf, étant rapporteur de la Troisième Commission et membre de la nôtre, pourrait assurer avec vous la coordination nécessaire.

Pour les moyens non judiciaires, on peut les inclure si vous n'êtes pas débordé, dans la typologie.

A. *Compétence législative*

6. Il y a une erreur dans le questionnaire. Il faut lire compétence extra-territoriale. Réponse affirmative.

Je vous signale que certains auteurs, le professeur Charles Rousseau notamment, citent à côté de la compétence territoriale et de la compétence personnelle une compétence dite « relative aux services publics » (*Droit international public*, tome III, Les compétences, Paris, Sirey, 1977, p. 142).

La réglementation des services publics même à l'étranger est évidemment une prérogative de l'Etat.

7. Je commencerais pas le *b)*.

Un Etat a certainement le droit — et parfois le devoir — de donner des ordres à ses ressortissants à l'étranger qu'il s'agisse de personnes physiques ou de personnes morales.

Il est plus rare que l'on donne des ordres aux étrangers à moins qu'ils ne soient des résidents permanents et soient de cette manière rattachés dans une mesure certaine à l'ordre juridique de l'Etat légiférant.

Quant aux étrangers non résidents, l'hypothèse doit être exceptionnelle (en cas de compétence de protection ou personnelle passive par exemple).

S'agissant des sociétés, il faut sans doute distinguer selon que leurs activités à l'étranger s'effectuent sans création d'une personnalité juridique distincte ou avec création d'une personnalité juridique distincte n'ayant plus la nationalité de la société mère. Dans ce dernier cas, l'Etat légiférant, sauf cas exceptionnel où un ordre peut être donné à un étranger non résident, devrait s'abstenir de s'adresser à elles. Si la société filiale est effectivement contrôlée depuis une société mère établie sur le territoire de l'Etat légiférant, l'ordre peut être très efficacement donné à la société mère.

c) Il ne me semble pas qu'il y ait des raisons de *principe* s'opposant à ce qu'un ordre soit donné à un national concernant ses biens à l'étranger. Certes, il existe notamment en matière de nationalisations ou de « spoliations » des positions contraires, mais on peut se demander si ces positions ne sont pas tout à fait excessives. L'Etat sur le territoire duquel l'ordre doit être exécuté peut estimer que l'exécution de cet ordre ne trouble en rien son ordre public ou sa politique économique.

Ainsi, les revenus à l'étranger d'un national peuvent être taxables dans l'Etat de ce national ; en cas de guerre, un Etat peut réquisitionner les navires des nationaux se trouvant à l'étranger, etc.

8. On s'accordera sans doute sur les limites que peuvent imposer les principes du droit international auxquels on ne peut déroger *(jus cogens)*

encore que le champ du *jus cogens* est lui-même l'objet de controverses. Ceci permettrait déjà de recouvrir plusieurs situations.

A supposer qu'ils ne soient pas de *jus cogens*, des principes tels que la non intervention dans les affaires intérieures des autres Etats (en particulier au point de vue *économique*) doivent être retenus comme limite. Le principe d'égalité des Etats (au moins sous l'aspect de la réciprocité) apparaît aussi comme une évidente limite.

On s'accordera sans doute aussi sur l'interférence dans la matière qui nous concerne des mesures décidées par le Conseil de Sécurité, voire par celles recommandées par l'Assemblée générale (recommandant aux Etats de réglementer l'activité de leurs nationaux à l'étranger).

Quoiques floues et imprécises, les notions d'abus de droit et de "*reasonableness*" me paraissent devoir être étudiées.

9. Je ne pense pas. Ce qui ne signifie pas qu'il soit déraisonnable d'envisager une priorité à la compétence territoriale sinon à la compétence personnelle active.

10. A première vue, je ne pense pas. La réglementation de ces priorités me semble varier considérablement de matière à matière et former l'objet rêvé de coopération interétatique conventionnelle (v. déjà les exemples en matière fiscale ou militaire).

11. Oui. Sous les deux formes mentionnées à la question.

12. Oui.

La réciprocité : oui.

L'importance des intérêts respectifs : oui.

Essayer d'obtenir l'effacement volontaire de l'un ou de l'autre en fonction de rattachements prioritaires.

La violation du droit interne d'un autre Etat : sans doute aussi mais sous la réserve du *jus cogens* et d'autres obligations de droit international (voir question 8).

B. *Compétence judiciaire*

13. Voyez *supra* réponse à la question 5.

C. *Compétence exécutive*

A mon sens, il convient de distinguer clairement deux types d'exercices de compétence exécutive.

1° Ceux qui impliquent l'exercice de la force matérielle (actes coercitifs *stricto sensu*).

2° Ceux qui tout en participant par leur nature à un acte d'autorité

peuvent être effectués dans un Etat étranger sans recourir à l'exercice de la force matérielle.

L'interdiction d'accomplir des actes de la première catégorie est totale sauf accord de l'Etat sur le territoire où l'exécution doit avoir lieu.

Pour les actes de la seconde catégorie, j'estime que l'usage de la voie postale ne viole pas la souveraineté de l'Etat territorialement intéressé.

L'existence de relations consulaires entre les deux Etats me paraît pouvoir être interprétée comme comportant l'autorisation implicite pour le Consul de transmettre de tels ordres à ses ressortissants.

Pour le 4e, je pencherais pour la nécessité d'un accord de l'Etat pour que de telles communications puissent être faites en principe ou pour que les communications soient faites par l'intermédiaire d'un organe de l'Etat territorial.

Pour le 5e, j'estime qu'aucun autre organe que les fonctionnaires consulaires ne peut procéder à ce type de communications sur le territoire d'un Etat étranger à moins qu'il n'y soit autorisé par l'un des deux modes indiqués immédiatement ci-dessus.

15. *a)* En bonne logique des actes d'instruction ou préparatoires accomplis d'une manière illicite en droit international devraient être considérés comme viciant toute la procédure. Il y a de nombreux cas où ce principe a été correctement suivi. Mais il existe des précédents dans le sens contraire par exemple l'affaire *Argoud*.

b) Non.

16. Non.

17. Lorsque l'exécution est permise dans les limites prévues ci-dessus sous la question 14, elle doit se faire en respectant le droit local. Elle ne peut être exercée si elle viole le droit local ou constitue une immixtion dans les affaires intérieures de l'Etat territorial. Ces limites qui s'appliquent pour les agents diplomatiques et les consuls doivent être considérées comme des applications d'un principe général. Elles peuvent être sensibles dans le domaine de la politique économique.

18. Oui. Il est sans doute difficile de faire dans ce domaine des recommandations précises. La coopération entre Etats par voie conventionnelle doit être encouragée.

Les compétences consulaires peuvent être précisées à cet égard notamment par la voie de conventions consulaires.

La volonté politique des Etats d'accepter de collaborer à l'exécution sur leur territoire d'ordres émanés d'une souveraineté étrangère varie considérablement selon le domaine envisagé : judiciaire, acte administratif, compétences fiscales, domaine du droit anti-trust, etc.

19. A première vue, non.

10. *Observations de M. K. Skubiszewski en réponse au Questionnaire*

Le 20 mai 1986

1. La Dix-neuvième Commission doit rechercher les principes généraux de la matière, mais sans se limiter à une exploration de ceux-ci. Il est souhaitable que la Commission accomplisse une étude exhaustive qui n'exclurait aucun domaine où existe l'éventualité de l'exercice de la compétence extraterritoriale. Je me réfère au paragraphe (1) des observations que je vous ai communiquées le 24 juillet 1985 en réponse à votre rapport préliminaire.

2. La clarification des concepts dont se sert la Commission est souhaitable s'il existe des doutes à propos de leur sens ou de leur signification.

3. Quant aux constructions juridiques ou doctrines telles que la territorialité constructive, la doctrine de l'effet, la doctrine du lien significatif de rattachement, et autres, la Commission devrait les clarifier afin d'arriver à une nette conclusion portant sur leur justesse et leur utilité.

4. Conformément à ce que j'ai dit sous 2, la Commission doit se prononcer sur la nature et le fondement du concept de compétence (en anglais : *jurisdiction*). Je me réfère au paragraphe (2) des observations que je vous ai communiquées le 24 juillet 1985 en réponse à votre rapport préliminaire.

5. La division de la matière en trois parties s'impose : *a)* la compétence législative (*jurisdiction to prescribe*), *b)* la compétence judiciaire (*jurisdiction to adjudicate*) et *c)* la compétence exécutive (*jurisdiction to enforce*). D'autre part, l'exécution par des moyens non-judiciaires — vous donnez l'exemple des listes noires — tombe sous le coup de la compétence exécutive, celle-ci comprenant des mesures diverses, et ne constitue pas une catégorie à part.

A. *Compétence législative*

6. Les chefs de compétence que vous énumérez se rapportent principalement au domaine du droit pénal (compétence personnelle active, compétence personnelle passive, compétence de protection, compétence universelle). On peut y ajouter la compétence concernant les crimes de droit international — on la distingue de la compétence universelle (crimes de guerre ; crimes contre l'humanité ; crimes contre la paix et la sécurité de l'humanité).

La question qui se pose est celle de l'application de certains ou de tous ces chefs de compétence au-delà du droit pénal, notamment dans le champ du droit privé (*civil jurisdiction*).

Il y a encore le problème de la compétence fondée sur l'effet. En droit antitrust l'exercice de cette compétence peut, en dernier ressort, mener aux sanctions pénales. Mais l'essentiel de la doctrine de l'effet se trouve ailleurs : il s'agit du contrôle de certaines activités des entreprises étrangères. J'ai des doutes à propos de la doctrine de l'effet comme fondement de la juridiction

extraterritoriale en droit antitrust ; je pense que la Dix-neuvième Commission doit se prononcer sur cette matière-là.

7. La compétence personnelle de l'Etat s'étend aux actes extraterritoriaux dont les auteurs sont les personnes suivantes :

I. Le premier groupe comporte les nationaux, auxquels on peut, dans certains cas, assimiler les étrangers qui sont des résidents permanents. La catégorie des nationaux comprend, bien sûr, des personnes morales nationales. D'autre part, la compétence personnelle ne s'étend pas aux anciens nationaux. Il est vrai qu'il y a des décisions judiciaires qui soutiennent le contraire, mais ce sont plutôt des cas qui concernent la double nationalité, tandis que la description « ancien » indique que l'Etat a reconnu le changement de la nationalité.

II. Le deuxième groupe auquel s'étend la compétence personnelle consiste en personnes morales étrangères dont le siège se trouve sur le territoire de l'Etat ou qui y font des affaires (*carry on business*). Ce sont, en particulier, les succursales et les filiales des sociétés mères étrangères. La compétence ne s'étend pas à la société mère si la succursale ou la filiale possède sa propre personnalité juridique, distincte par rapport à la société mère. Ainsi, l'idée de l'unité de l'entreprise ou des concepts analogues (par exemple, celui de *reciprocating partnership*) ne justifient aucun exercice de la compétence extraterritoriale envers la société mère, à moins que la succursale (ou la filiale) n'agisse en tant qu'agent de la société mère.

III. Vous vous demandez si les ordres basés sur la compétence personnelle peuvent porter aussi sur les biens, par contraste avec les comportements. Il s'agit, évidemment, des meubles, les immeubles étant soumis à la *lex situs*. Au paragraphe 1.6.2. du rapport préliminaire vous ne parlez que des meubles.

On pourrait formuler la règle suivante : les lois de l'Etat national du propriétaire régissent ses biens meubles se trouvant à l'étranger, mais l'Etat étranger peut refuser l'effet extraterritorial de ces lois si elles ne sont pas conformes à son ordre public ou si elles enfreignent le droit international.

Pourtant, il y a des pays, dont les Etats-Unis, qui dans cette matière-là se placent sur le plan non juridique : ils reconnaissent les effets des lois étrangères sur la propriété située sur leur territoire seulement en tant que devoir de courtoisie ou de convenance (*comitas, comity*), et non pas comme une obligation juridique.

Quant aux effets extraterritoriaux des nationalisations ou confiscations des biens appartenant aux étrangers, la matière déborde les limites de la compétence personnelle sauf pour les propriétaires étrangers dont le statut de résidents permanents permet de les assimiler aux nationaux

8. Les « principes généraux » que vous énumérez ont tous rapport à la limitation des différents chefs de compétence extraterritoriale, mais l'utilité ainsi que l'intensité de l'influence de chacun d'eux dépend toujours du cas

particulier : il n'est pas possible de formuler ici une règle universelle précise. A la liste que vous avez établie, j'ajouterais encore la réciprocité, la proportionnalité et le principe de bonne foi.

9. Les limites portant sur l'utilisation de différents chefs proviennent de la nature essentiellement territoriale de la compétence (*jurisdiction*) de l'Etat. Il faut donc qu'il existe une liaison (un rapport) d'ordre territorial entre — d'une part — le comportement qui a eu lieu à l'étranger ou les biens y situés et — d'autre part — l'Etat légiférant qui veut soumettre ce comportement ou ces biens à sa réglementation. Autrement dit, l'exercice valable de la compétence extraterritoriale se fonde sur une connexion territoriale et y trouve son origine. Le concept de cette connexion et son étendue varient d'un cas à l'autre.

Quant à l'exemple que vous donnez, à savoir la compétence personnelle passive, celle-ci doit être interprétée d'une façon restrictive. Cette compétence n'entre en ligne de compte que dans l'hypothèse où l'Etat national du coupable ne le punit pas malgré la criminalité de l'acte selon son droit national. Mais si l'acte ne constitue pas un crime (ou une infraction grave) selon ce droit, le fondement de la compétence personnelle passive devient problématique.

10. En soulevant la question de priorité vous envisagez, sans doute, une situation où le droit international autorise chacun des deux Etats légiférants d'exercer sa compétence. Autrement dit, l'hypothèse est celle de la légalité, au regard du droit international, de l'exercice de la compétence qui mène à des ordres inconciliables. Dans cette situation, le droit général n'établit pas de règles détaillées tranchant la priorité, sauf dans quelques domaines particuliers (navires de commerce dans les ports et dans les eaux intérieures ou passant dans la mer territoriale ; aéronefs). Pourtant, les principes sous le N° 8 et les critères sous le N° 12 peuvent aider à trouver une solution. Il est aussi utile de se demander si le titre d'un Etat à exercer sa compétence ne l'emporte pas sur le titre analogue de tout autre Etat grâce à l'existence d'un lien territorial plus proche ou plus fort dans le sens que l'individu, son comportement ou ses biens sont plus étroitement rattachés au territoire d'un Etat qu'à celui de tout autre Etat.

La priorité peut résulter des arrangements conventionnels, par exemple des traités sur le service militaire en cas de pluripatridie ou sur la double imposition.

11. La Commission doit se prononcer sur les méthodes de coopération qui permettent d'éviter ou de régler les conflits de compétence. Les mesures unilatérales que vous indiquez ne sont pas sans valeur, mais un système basé sur elles aura toujours des lacunes. Pour arriver à une solution plus parfaite, des mesures bilatérales ou multilatérales semblent inévitables.

12. Les critères que vous énumérez sont tous pertinents.

B. *Compétence judiciaire*

13. Tout ce qui a été dit sous les N^os^ 6-12 s'applique, *mutatis mutandis*, à l'exercice de la compétence judiciaire.

C. *Compétence exécutive*

14. Un acte coercitif effectué par un Etat sur le territoire d'un autre Etat sans le consentement de celui-ci est illicite. Sont également illicites divers actes d'autorité effectués par voie postale ou par des fonctionnaires autres que les consuls, tels que convocations à des procédures, demandes de renseignements, notifications de décisions officielles, etc. D'autre part, la voie consulaire peut devenir admissible : cela dépend des pratiques en vigueur entre l'Etat d'envoi et l'Etat de résidence. Ces pratiques peuvent admettre la transmission des actes judiciaires ou extra-judiciaires par un consulat étranger.

15. La manière illicite (au regard du droit international) dont un acte fut effectué à l'étranger n'influence pas nécessairement la légalité des actes d'exécution sur le territoire de l'Etat, au regard — uniquement — de son droit interne. Dans les relations interétatiques le droit international a la primauté et se superpose aux différents droits nationaux. Mais dans l'ordre juridique interne le droit national est souvent supérieur, sans toucher à la question de la responsabilité internationale de l'Etat.

16. L'Etat a le droit de placer une personne (étrangère) sur une liste noire si le fait même de l'établissement d'une telle liste est conforme au droit international.

17. J'ai l'impression que votre rapport a présenté un tableau détaillé des limites portant sur l'exercice de la compétence exécutive extraterritoriale.

18. La coopération entre Etats par voie conventionnelle est déjà, dans une mesure considérable, un fait accompli. De nombreux traités sur l'entraide judiciaire et sur les relations juridiques en matière civile ou pénale en témoignent.

11. *Observations de M. K. Doehring*

Le 12 juin 1986

Cher confrère,

Excusez, s'il vous plaît, le retard à vous apporter mes réponses à votre questionnaire. Néanmoins, j'espère que mes réflexions pourront encore être utilisées.

1. *a)* Oui. La Commission devrait procéder à une recherche approfondie portant sur les principes généraux en la matière.

b) Non. La recherche ne devrait pas exclure des domaines qui touchent aux principes généraux concernant le sujet d'une manière fondamentale. Le droit pénal, par exemple, pourrait être utilisé comme intervention dans un ordre juridique étranger, et c'est vrai aussi pour d'autres matières envisagées dans cette question.

2. Il ne semble pas nécessaire de définir le sens des concepts contenus dans le titre de la Commission puisque ces notions peuvent prendre des significations différentes dans le contexte concret de leur emploi. La juridiction, par exemple, peut avoir une portée différente en cas d'application du principe de la personnalité ou, au contraire, du principe de la territorialité. En tout cas, il s'agit d'une compétence fondée sur la souveraineté étatique. Le concept d'extraterritorialité n'est pas exclusivement lié au fait que l'acte en question a eu lieu sur le territoire étranger ; un acte accompli par un Etat sur son propre territoire peut, lui aussi, produire des effets extraterritoriaux.

3. Voir ma réponse à la question 2. Les nuances sont à examiner cas par cas.

4. Voir mes réponses aux questions 2 et 3.

5. Je suis en faveur de cette division, car la compétence législative peut être donnée, tandis que la compétence exécutive ne peut pas l'être. La compétence juridictionnelle devrait être envisagée séparément, parce qu'elle ne dépend de toute façon pas des compétences susmentionnées. Les moyens non judiciaires ne devraient pas faire partie de la recherche prévue.

6. Je suis d'accord. Les énumérations paraissent exhaustives.

7. *a)* La compétence personnelle s'étend aux personnes, physiques et morales, qui possèdent la « nationalité » de l'Etat compétent. Si une personne morale dépend effectivement d'une société mère tout en étant enregistrée comme personne morale dans un autre Etat, c'est néanmoins la nationalité de ce dernier Etat qui est décisive pour le statut juridique de la personne en question. Il n'existe pas de principe bien établi de l'unité de l'entreprise. Pour la compétence personnelle, c'est l'ordre juridique national qui compte.

b) En ce qui concerne les nationaux, ils sont soumis à la compétence personnelle, tandis que les résidents ne sont tenus de respecter que les lois de l'Etat où ils résident sans être liés ou obligés autrement. En particulier, ils ne sont pas liés à cet Etat par des obligations qui dépassent le régime conventionnel du droit des étrangers. L'Etat de résidence est naturellement libre d'offrir davantage mais il ne peut pas exiger, par exemple, une fidélité particulière.

c) La compétence personnelle peut aussi, en quelque sorte, s'étendre aux biens des nationaux résidant à l'étranger. Bien que l'exécution d'ordres *in rem* ne soit juridiquement pas possible, un certain comportement des nationaux quant à leurs biens peut être ordonné, éventuellement la vente de ces biens,

pourvu que les lois de l'Etat de résidence qui se trouvent en conformité avec le droit international ne soient pas lésées par un tel exercice de la compétence personnelle. Un tel ordre est donné *in personam* et non pas *in rem*. Une « confiscation » ordonnée en vertu de la compétence personnelle signifierait alors seulement l'ordre de transférer les biens selon les lois de l'Etat de résidence ; elle ne serait donc pas *self-executing*.

8. Le droit international impose de respecter au moins le principe de non-intervention, la notion d'abus de droit, le droit des étrangers et les droits de l'homme. En ce qui concerne les autres principes mentionnés, j'hésite à leur attribuer une grande valeur juridique. Le droit de voisinage et l'obligation de coopérer dépendent du droit matériel régissant une situation particulière, comme par exemple dans le domaine de l'environnement.

9. Je ne vois pas une telle limitation, sous réserve de ma remarque précédente.

10. Si un législateur émet des ordres qui produisent des effets sur son propre territoire et qui sont compatibles avec le droit international public, ces ordres l'emportent sur les ordres législatifs d'un Etat étranger, même si ce dernier dispose de la compétence personnelle. Si aucun des deux législateurs ne dispose d'une compétence personnelle, c'est-à-dire permettant de donner un ordre à un étranger, il n'y a pas primauté de l'un sur l'autre. Le résultat dépend alors de la compétence exécutive.

11. Il faut toujours chercher à éliminer les conflits. La méthode indiquée dans la question 11 *b)* produit les meilleurs résultats.

12. La réciprocité se réalise en général d'elle-même. Les intérêts respectifs de la "*reasonableness*" sont des notions plus ou moins extra-juridictionnelles ; ils sont susceptibles de détruire la légalité. La violation du droit interne d'un autre Etat est illégale dans la mesure où celui-ci respecte lui-même le droit international public.

13. Je ne vois pas la nécessité de modifier mes réponses 7, 8, 9. Quant à la question 10, d'après la conception dualiste, admise par la majorité des Etats, le juge doit appliquer les lois internes. Ce n'est que dans les systèmes juridiques qui donnent la prééminence au droit international public que le juge aurait à appliquer ce dernier. Dans ce cas, il pourrait y avoir divergence entre les ordres du législateur et ceux du juge.

14. Cette règle s'applique sans exception aux actes coercitifs. Les autres actes mentionnés dans la question violeraient aussi la souveraineté de l'autre Etat si leur but consistait en un ordre *iure imperii* produisant un effet juridique direct. La compétence personnelle ne justifie pas une action d'autorité publique sur le territoire étranger. Seuls sont admis les actes d'information, y compris les informations sur le comportement individuel, ordonnés par l'Etat dans le cadre de la compétence personnelle.

15. *a)* Que de tels actes doivent ou non être exécutés dépend du droit interne de l'Etat en question. Le droit international public ne se prononce pas.

b) Pas de différence par rapport à la question 15 *a)*.

16.-17.-18.-19. Non.

12. *Observations of Mr W. Rudolf*

July 21, 1986

My dear Confrère,

Please excuse me for answering your questionnaire so late. As I have been very busy in my department, I have unfortunately not been able to send you my replies at an earlier date. However, this delay in answering the questionnaire gave me the opportunity to take into consideration the latest developments regarding the extraterritorial application of the competition rules in the USA as well. After the diverging decisions in the *Timberlane* and *Laker* Cases, the *DeConcini* proposal of February 1985 and the legislative initiative led by the government in January 1986, possible solutions, which are not restricted to the law of competition but may be useful for the development of a legislative system oriented towards practice in general, are presented with the final version of the restatement of the American Law Institute in May 1986.

As concerns the extraterritorial application of national law, two aspects are, in my opinion, of paramount importance:

— Firstly the attempt has to be made possibly not to confront individuals (and juridical persons) with conflicts arising from the fact that different national legal orders require opposing conducts from them. In this respect, the subject of our examination includes an aspect of the protection of the individual.

— Secondly, it should be ensured that neither a State, simply because it is a stronger economic power with its legal order, nor a strong market-controlling company prevails over the legal order of another State solely because the latter is smaller and weaker. The principle of mutual respect should be a determining factor for the extraterritorial competences of States.

As to the detailed questions I would like to make the following remarks:

1. *(a)* Yes. Taking into consideration the particularities of each single field, general principles of the subject, which could eventually provide perceptions for the individual legal case as well, should be worked out.

(b) No, because otherwise no general perceptions can be acquired. A comparative legal material study that is not restricted to the USA and the European Communities would be useful, although it could hardly be made by our Commission itself.

2. Yes.

ad *(c)* The concept of jurisdiction should be differentiated between :

— legislation in the broadest sense of delivering orders,

— enforcement, and

— judicial competence to adjudicate.

Insofar, the task of the Third Commission should also be demarcated.

3. The principle of territoriality as the initial principle which was broken through by other principles should be understood in a broad sense. The increasing number of breaks through the principle of territoriality since the *Lotus* case, which, in my opinion, are necessary, signify at the same time a specification of this principle in the present.

4. Yes, the more so as the term jurisdiction is controversial. A term comprising *all* the sovereign acts should be taken as a basis.

5. Yes, I think that such a separation of the examination is indispensable. Jurisdiction to prescribe should be understood in the broad sense of delivering orders. Jurisdiction to enforce should only be seen in the sense of execution with the consequence of judicial decisions, for instance, not being subsumed under enforcement.

Adjudication can cover prescription as well as enforcement. Competences to either the executive or the judicial power are assigned in different ways by the national legal orders.

I do not see a special role for non-judicial means (for instance black-listing) as these means — as well as those of all other special fields mentioned by the restatement — can be included in the jurisdiction to prescribe or jurisdiction to enforce.

6. Yes, because the concept of extraterritoriality can only be defined and specified in this way. The four « *compétences* » mentioned turn out to be some of the exceptions to the principle of territoriality. The effect doctrine is, ultimately, such an exception as well.

7. *(a)* Personal jurisdiction covers individuals and juridical persons who hold the " nationality " of the State in question. The place of foundation as well as the domicile of the juridical person can be a point of reference *(circonstance de rattachement)*. Basically, the question is whether a company possesses its own juristic personality according to the law of the State of residence. The unity of the company, however, cannot remain unconsidered. According to the effect doctrine, the parent company is likely to be included in the personal jurisdiction in a subsidiary way.

(b) To a limited extent, personal jurisdiction also covers permanent residents, whereas, *vice versa*, unlimited personal jurisdiction must be restricted in the case of permanently absent nationals.

(c) To a limited extent, personal jurisdiction can also cover extraterritorial property of nationals. This is valid for obligations of nationals *iure gestionis* as well as for obligations *iure imperii*. As regards jurisdiction to prescribe given in accordance with public international law, there will frequently be no possibility of enforcement if the State *rei sitae* does not grant assistance.

8. *Non-intervention*

The sovereignty of States, protected by international law, comprises, according to the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", unanimously adopted by the General Assembly of the United Nations in 1970, also "the right freely to choose and develop its political, social, economic and cultural system". Therefore, *inter alia* in the case of suspected attacks on its economic constitution, each sovereign State must be able to refer to the principle of non-intervention and hence be allowed to object to effects of foreign sovereign acts in its own territory.

However, since foreign sovereign acts having an effect in alien territories deal with matters relating to the acting State as well as to the State whose economic order, for example, is affected, the principle of non-intervention cannot be resorted to in the classical way as a defence against alien interference in internal or external affairs. Wherever simultaneous relations of several States are involved, the prohibition of intervention should rather be developed further towards a principle of mutual respect (good faith). It requires States to balance their own national interests with those of the State whose sovereignty is affected by the intended measure (balancing test).

Reasonableness

This ambiguous term has become the key-word of the finally adopted version of the restatement. The reasonableness test is, with the aid of an exemplary catalogue of balancing criteria, supposed to help finding out for each imaginable single case whether it is appropriate to exercise sovereign power over matters abroad with foreign effects. Within the framework of this judicial balancing obligation, which is, at present, hardly a seizable, internationally homogeneously applied criterion of international law, generally valid and generally acknowledged criteria for the settlement of conflicts between States might, nevertheless, be built up in the course of the years. In German law, reasonableness could be best compared with the legal concept of "*Treu und Glauben*", which also has gained value for individual cases only by continuous practice. In the short run, reasonableness does not prove helpful as suitable balancing criterion.

It also seems doubtful whether under international law necessarily national interests relating to the idea of sovereignty, and thus of highest value, must be weighed against each other. How is a judge supposed to consider the weight of a State's decision in favour of a severe antitrust law against that

of another State's decision in favour of very tolerant competition rules ? Both decisions are subject to full sovereignty and thus to free appraisal by the States, *i.e.*, they are of equal value. Here, the concrete danger may arise that the judge will, although unconsciously, tend to consider his own familiar *lex fori* as being more reasonable and will thus give priority to his own *lex fori*.

Apart from this, one should take into consideration that the concept of reasonableness has been developed in the American legal system and is therefore part of a common system of values with Supreme Courts of undoubted authority. In the heterogeneous community of States, this common connecting idea of a legal order is indeed missing. If, through the principle of reasonableness, not only the American convictions are supposed to influence values in public international law, reasonableness will hardly be able to offer an effective boundary stone for extraterritorial effects of sovereign acts in the near future.

« Abus de droit »

On the assumption that there is a legal rule in public international law on the prohibition of abuse of rights, this principle would only apply to extreme cases of sovereign acts having an extraterritorial effect and involving, in addition, obviously inferior national interests. The prohibition of the *« abus de droit »* might be of little value in practice, with approximately comparable national interests governing the matter.

« Droit de voisinage »

International law does not yet seem to include special neighbourhood provisions with specific rights and duties as an acknowledged legal principle. However, it is imaginable that, for example, in view of conflicts concerning crossfrontier pollution, which have recently increased in number, special neighbourhood relations require concrete legal positions in environmental law from the States concerned. Thus, a duty to provide information, a right to be heard or the compliance with special minimum standards on environmental pollution might be conceivable.

« Coopération »

The duty of States to co-operate in economic and social affairs, codified in chapter IX of the Charter of the United Nations, is indispensable for the effective prevention and suppression of certain market conditions likely to cause detrimental economic and social effects to all the States concerned. Only close co-operation between States, aimed at building up an international controlling system, may in particular prevent transnational companies from evading national economic law by transferring their activities to other countries. Insofar, the principle of co-operation supplements national sovereign acts with extraterritorial effects or may even render them unnecessary.

« *Droit des étrangers, droits de l'homme* »

Law concerning aliens, in particular with regard to procedural law, requires the observance of certain minimum standards. In this respect, human rights, too, play an important part. If a State imposes sanctions upon a person for failure to comply with its directives although the person concerned is hindered from abiding by this directive precisely because of a prohibition on the part of another State, this constitutes an infringement of the principle *nulla poena sine culpa* laid down in art. 11 (2) of the Universal Declaration of Human Rights. Insofar, human rights set a limit for the imposition of contradictory directives by several States upon the same person and subject to sanctions in the case of non-observance.

« *Autres* »

There are no other independent criteria to be mentioned for the determination of the limits of national sovereign acts. Further variations should be integrated within the balancing process of reasonableness, which as already been discussed above.

9. Public international law sets a limit to all the points of reference for national sovereign acts. In the *Lotus* Case, the Permanent Court of International Justice stated that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". Insofar, the freedom of States to submit matters to their jurisdiction is strictly limited to the territory.

10. A general, basic priority for some given point of reference cannot be derived from public international law. Thus, writers who consider the principle of territoriality as being prior to the principle of personality cannot be followed. This view especially holds for anti-trust rules. The principle of territoriality cannot lead to one State infringing upon another, while the latter, according to public international law, makes use of its personal jurisdiction in respect of its own nationals. On the basis of the principle of personality, at least in the sense of active personality, the State can prescribe to its own nationals any conduct abroad. Compared to such an order, the directives of the State that exercises territorial sovereignty are to be considered subordinate in the individual case. If this constellation were negated in favour of a general priority of territorial sovereignty, one State could obstruct justified interests of another State by sheer defensive legislation. As a consequence, both the principle of territoriality and the principle of personality are basically of equal status.

In order to prevent, in the case of competing personality and territoriality principles, the more powerful State from forcing a swing of the pendulum in favour of one principle or the other, the conflict should be settled by a strict application of the criteria mentioned in question No. 8. However, the balancing

thus to be effected will usually result in favour of the principle of territoriality as a direct consequence of territorial sovereignty.

This higher efficiency of the territoriality principle, which can be observed in practice, may be explained by considerations of enforcement. The principle of territoriality is unrestrictedly valid for the law of procedure. Each State applies exclusively its own procedural law.

11. State practice proves that, at least up to now, States have hardly been prepared to reach multilateral agreements for the settlement of conflicts of jurisdiction. As already pointed out in question No. 8 under « *coopération* », particularly such multilateral codes of conduct may help to mitigate conflicts and thus to prevent harm to international relations. However, apart from some rules on the exercise of sovereignty in the high seas, embodied in the United Nations Convention on the Law of the Sea, and from efforts of the OECD, GATT and UNCTAD, no further activities with a view to concluding multilateral agreements are apparent. While, in these discussions, recommendations or declarations call for consultations, but only with little success, the main issue of the problem, *i.e.* the question of how far the exercise of sovereignty is permitted, remains regularly unanswered.

(a) Unilateral measures of self-limitation are to be welcomed as a first step and should be preferred to the total absence of legal rules. However, they should not constitute the final purpose but should be the starting point for the conclusion of at first bilateral and then multilateral agreements. In the course of these efforts the principle of reciprocity should be placed into the foreground. Nevertheless, there seems to be no sufficient guarantee that, in the first stage, the State which has comparatively more power and the more powerful companies does not force the accomplishment of its own interests on its partners, for instance in anti-trust law or in business law. But in this context one should not underestimate the value of national judgments, capable of limiting the activities of powerful persons even with the help of socially and economically unilateral codifications. However, in the case of purely unilateral regulations without simultaneous efforts of harmonization with other States, the danger of contradictory solutions and thus of divergent legal conceptions remains.

(b) In this context, the European Conferences on Shipping-Lines of 1960/61 can be quoted as examples which have led to the first major disputes on extraterritoriality. Bilateral measures can also be recognized in the field of anti-trust law (for instance, the Anti-Trust-Co-operation Agreements of the USA with the Federal Republic of Germany, Canada and Australia). These bilateral agreements, too, keep silent on the question of the exercise of sovereignty; however, they lay down obligations of co-operation and consultation. Bilateral measures are to be preferred to unilateral efforts, as they settle the problem of reciprocity and make available compulsory mechanisms of dispute settlement. However, the danger that States with great economic and political potential

intrude their ideas and interests upon smaller States through bilateral agreements cannot be neglected.

Nevertheless, the Commission should suggest bilateral measures by States to settle jurisdictional conflicts as a first step in some selected areas. For this purpose, anti-trust regulations offer a good basis to start negotiations; the agreements already existing could serve as a reference.

12. In order to promote an exercise of competences which is as uniform as possible with comparable limits of sovereign power, the Commission should already in the present state, provide the States with certain minimum standards. In doing so, the Commission could use the catalogue of balancing criteria laid down in the restatement as a guideline. As has already been pointed out, reciprocity and the significance of mutual interests are of special importance to prevent a development towards a predominance of the strongest States. It should be ensured that no State may request its nationals to infringe the laws of another State. However, when taking the restatement as an orientation, one ought to take into consideration that the term reasonableness, no matter how clearly it might be structured in American law, does not mean very much to a large number of States. Therefore, other aspects relating to conflicts of law, developed by State practice, must be taken into account or possibly new principles should be worked out. Not only private concerns are to be balanced against each other, but the interests of the State have to be considered as well.

13. The jurisdiction to adjudicate should be treated in the same way as legislative competence (see above 8 ss.). Restrictions are only to be made for question No. 10 since a judge always applies his own *lex fori* as the procedural law.

14. Undoubtedly, each act of sovereignty performed by a State's public authority within the domestic jurisdiction of another State without the latter's consent is not in accordance with international law. In this context, it should be mentioned that the prohibition by public international law from carrying out acts of enforcement with effects in the territory of another State without the consent of the alien State concerned is exclusively intended to protect the interests of the States as such and not the interests of individuals. Yet, in the determination of the limits of enforcement measures with an effect in foreign territories according to public international law, the substance and contents of such measures and their effects on the persons affected should be examined. No administrative act with a negative effect on the legal position of a person can be admitted without the consent of the host country.

(1) All measures of constraint are inadmissible.

(2) The exercise of sovereign acts by mere postal delivery should depend on contents of the document to be delivered.

(a) Summons for a procedure are also admissible abroad without the consent of the host country if non-compliance entails no negative consequences.

As for purely informatory summons, international law does not provide for their enforcement by measures of constraint in case of non-attendance (for instance, penalties for contempt of court, coercive detention). Exceptions only exist in the case of summons for consular interrogations in a foreign country, insofar as the rules of consular law are applicable.

(b) Mere requests for information, with no negative legal consequences in case of refusal to furnish information, are admissible. However, it is difficult to set the limits because, even in cases without direct coercive consequences following a refusal to provide information, the danger of an *ex officio* decision (adjudication of the case as matters stand) to the disadvantage of the person liable to discovery can mean an actual and direct compulsion to supply information, the effect of which might be stronger than that of any penalty.

(c) The same is valid for the service and the announcement of administrative and judicial decisions or other forms of administrative acts. If compulsory rules of conduct for the recipient follow as a consequence, they are not admissible without the permission of the host country.

(3) and (4) Consular services and requests to own and alien nationals in a foreign country are basically admissible with detailed regulations resulting from consular law.

(5) Without the express consent of the foreign State, measures *iure imperii* by government officials other than consular officials are inadmissible in a foreign territory.

15. *(a)* There is no evidence that public international law provides a rule on whether an act of sovereignty within the own territory is admissible if necessary acts of service in a foreign territory have not been effected in due form. If defective acts of service were regarded under the viewpoint of a violation of sovereignty as an international wrong to the host country, the reparation could be effected through the obligation to restore the *status quo ante*. It should be examined to what extent the principles developed by the American law of criminal procedure on the fruit-of-the-poisonous-tree doctrine can be transferred into public international law. However, practice shows that the U.S. Supreme Court has pronounced a judgment by default without taking into account the specific situation of public international law.

(b) If the sovereign act delivered by mail only results in the person concerned being permitted to exercise a right, sovereign measures stemming therefrom are admissible Within the national territory, since there was no duty of consultation of the host country before the delivery.

16. The mere order of setting up a blacklist in one's own territory does not yet amount to an inadmissible « *acte d'exécution* ». Insofar, the drawing up of a blacklist is covered by the jurisdiction of the acting State. If, however, existing trade agreements or other treaties have already been disregarded by ordering the blacklist in one's own territory, this would constitute a violation of public international law.

17. There are no further limits of the « *compétence exécutive* » than the permission of the State concerned, granted by a free decision.

18. *De lege ferenda* agreements should be welcomed in all of the fields mentioned. In order to preserve and to lay emphasis on the principle of sovereignty, agreements in the consular field should be preferred to those on mere service by mail. Possible abuses of the hardly controllable postal route for the transmission of inadmissible sovereign acts would be considerably restricted through consular transmission.

Agreements on the transmission of sovereign acts by authorized represensatives of the requesting as well as of the requested State are to be welcomed as well.

19. Other ways of co-operation with the aim of preventing jurisdictional conflicts are offered through judicial assistance. Improvements could be achieved especially in the field of execution. In the courts, when deciding on cases with foreign concern, exercised restraint in rendering judgments and orders with an extraterritorial effect and if they followed their request immediately by means of judicial assistance, violations of foreign sovereignty, which often occur in practice, would be avoided to a large extent. On the other hand, a request of the court claiming judicial assistance would more readily be fulfilled than a direct sovereign order. A State from whose territory the exhibition of documents, for instance, is requested by a foreign court will be prepared to release the documents if the request is made by way of judicial assistance with due respect for its territorial sovereignty, whereas it will be reluctant to do so under an order from abroad by means of a sovereign act. Especially British courts regularly regard any foreign judicial order to surrender documents situated in Great Britain as a violation of British sovereignty, unless the request is followed by means of orderly judicial assistance. Being slightly more moderate, the German Federal Government has not considered such orders *per se* as infringement of sovereignty; it has, however, argued that agreements on judicial assistance could thus be undermined. Many of the problems and conflicts mentioned in the questions above could be avoided by making use of the instruments of mutual judicial assistance which are already at the States' disposal.

With many kind regards.

13. *Observations de M. Ch. Dominicé*

Le 29 août 1986

Je fais partie de la Dix-neuvième Commission, depuis quelques mois seulement, de sorte qu'il ne m'a pas été possible de répondre dans le délai imparti au Questionnaire annexé à votre très intéressant Rapport préliminaire.

Voici néanmoins mes observations, dont j'espère qu'elles pourront contribuer au débat, qui s'annonce captivant, sur un sujet particulièrement complexe.

C'est précisément la complexité de la matière qui rend délicate *a priori* l'opération consistant à délimiter avec une précision suffisante l'objet de nos travaux et le but que nous pouvons nous assigner. Le sujet qui nous est proposé est en effet énoncé en termes très larges et généraux, si bien que notre première tâche — et cela résulte d'ailleurs de votre Questionnaire — me paraît être de nous mettre d'accord sur ce qu'il est raisonnable d'entreprendre et possible d'achever dans des délais convenables.

Avec cette interrogation présente à l'esprit — je ne discerne pas, pour l'heure, les termes exacts de la réponse à lui donner — je vous soumets mes observations :

1. *a)* Je pense que nous devons nous efforcer de mettre en lumière les principes généraux qui régissent notre matière, exercice qui me paraît utile même si nous devons parvenir à la conclusion que nos travaux devront se limiter à quelques aspects de l'application extraterritoriale du pouvoir étatique.

Je crois pour ma part qu'il existe assurément quelques principes généraux qui dominent l'ensemble de la matière, mais que l'application concrète de ces principes conduit à des conclusions très différentes selon le domaine que l'on prend en considération. Ainsi, si l'on part du principe qu'un Etat doit avoir un titre de compétence pour régir la condition ou les actes de personnes résidant dans un pays étranger, et si l'on admet que la nationalité constitue un tel titre de compétence, on devra néanmoins reconnaître que l'Etat d'origine peut, certainement, fixer les obligations militaires de ses nationaux à l'étranger, qu'il peut, mais avec des nuances, s'appuyer sur la nationalité aux fins de l'application de ses lois pénales, que c'est beaucoup plus douteux s'il s'agit d'obligations fiscales, et que c'est inadmissible s'il s'agit de l'obligation de produire des documents en violation du droit de l'Etat de résidence. Autrement dit, le même titre de compétence est admis dans certains cas et pas dans d'autres, ou, plus exactement, le même point de contact, ou rattachement, constitue un titre de compétence dans certains domaines, mais pas dans d'autres.

Il me paraît donc important de souligner que, dès qu'il veut aller au-delà de la territorialité — qui constitue l'essence de sa compétence comme vous le rappelez fort bien dans votre Rapport préliminaire — l'Etat doit pouvoir se fonder sur un titre de compétence international, tant pour la réglementation que pour l'exécution. Mais il convient d'indiquer également que les divers titres de compétence dont on peut penser qu'ils sont admis par le droit international se voient reconnaître une validité et une portée très variables selon les fins auxquelles ils sont utilisés.

Peut-être aussi est-il utile de s'interroger sur l'existence de principes énonçant des prohibitions valables tout à fait généralement, telles l'interdiction d'ordonner à une personne, physique ou morale, d'effectuer à l'étranger des

actes qui y sont illicites, ou celle d'effectuer des actes de puissance publique sur territoire étranger, sauf autorisation.

b) S'il est possible d'énoncer des principes généraux — fussent-ils assortis de réserves et d'exceptions — couvrant l'ensemble de la matière, je crois qu'il y aurait intérêt à le faire et je souhaite que nous y parvenions. Sinon, il conviendra de sélectionner un ou deux domaines spécifiques, mais cela impliquerait à mes yeux une modification du titre de notre Commission, avec l'approbation de l'Institut.

2. Je pense qu'il est nécessaire, aux fins de la discussion au sein de notre Commission, de nous mettre d'accord sur le sens que nous donnons aux termes que nous utilisons. Autre est la question de savoir si, lors de l'élaboration d'une éventuelle résolution, il conviendra d'énoncer des définitions, question qui ne pourra être utilement abordée qu'à un stade ultérieur de nos travaux.

3. Si, dans la perspective de ma réponse à la question 1 *a)*, il s'avère possible et utile d'énoncer certains titres de compétence, il s'agira d'en préciser, autant que faire se peut, les contours et la portée.

4. Voir ma réponse à la question 2.

5. Je pense qu'il convient de distinguer la compétence de réglementation *(jurisdiction to prescribe)* de la compétence d'exécution *(jurisdiction to enforce)*, quand bien même il existe entre les deux d'évidents points de contact. Quant à la compétence juridictionnelle *(jurisdiction to adjudicate)* elle ne me paraît pas exiger un examen distinct, mais cela peut dépendre de l'orientation de base que l'on adopte (voir Question 13).

Vous évoquez aussi l'exécution (il s'agit plutôt de contrainte) par des moyens non-judiciaires. Dans quelle mesure s'agit-il d'un problème de compétence extraterritoriale, qui est notre sujet ? Si, par exemple, le procédé des listes noires est utilisé pour infliger des sanctions aux personnes et sociétés qui ont traité avec des pays figurant sur un telle liste, on se trouve sur le terrain de l'application extraterritoriale des lois pénales. Si le procédé est utilisé à d'autres fins, le problème peut se présenter différemment, mais il me paraît, de manière générale, que le recours par un Etat, sur son territoire, à l'égard de personnes qui s'y trouvent ou y ont des biens, à des moyens de contrainte, n'est pas en soi illicite, et qu'il s'agit de déterminer si les lois à l'appui desquelles ces moyens sont mis en œuvre sont susceptibles d'application extraterritoriale, ou si cette application constitue une violation du droit international.

A. *Compétence législative*

6. J'estime qu'il nous incombe d'examiner les divers titres de compétence normative, mais avec notamment pour objectif de marquer pour chacun d'eux que sa validité en droit international varie selon les fins auxquelles il est utilisé (voir Question 1). Cela me paraît constituer l'une des contributions les plus utiles que nos travaux puissent apporter.

7. Aux fins de la compétence législative extraterritoriale (car il peut être utilisé à d'autres fins, notamment la compétence juridictionnelle interne), le concept de compétence personnelle me paraît fondé essentiellement sur la nationalité, celle-ci étant déterminée, pour les personnes morales, par les critères traditionnels (siège social, incorporation). Autrement dit, un Etat ne peut prétendre légiférer, en se fondant sur la nationalité, pour les filiales sises à l'étranger de ses sociétés-mères nationales. Sans doute, des comportements des filiales sont susceptibles, dans des domaines spécifiques, d'être attribués à la société-mère, et vice versa, mais cette notion d'attribution me paraît distincte de la compétence législative extraterritoriale fondée sur la nationalité.

8. Il résulte de mes réponses précédentes qu'à mes yeux le droit international attribue aux divers chefs ou titres de compétence extraterritoriale une portée ou validité très variable selon le domaine pris en considération (statut personnel, obligations fiscales, règles de concurrence, boycott ou interdictions d'exportation, etc.). Si tel est le cas, c'est, notamment, parce que l'exercice d'une compétence peut venir se heurter à un principe de droit international, par exemple l'un ou l'autre de ceux que vous évoquez.

9. Voir ma réponse à la question précédente. A mon avis, le titre fondé sur la nationalité, dont le principe de la compétence personnelle passive en matière pénale (nationalité de la victime) n'est qu'un aspect, se voit imposer de très importantes limitations, notamment en matière de transactions commerciales et de règles de concurrence.

10. Il me paraît qu'en cas de conflit entre ordres inconciliables, il y a lieu d'examiner tout d'abord si tous deux ont été émis en vertu d'un titre de compétence admis par le droit international. Si l'un d'eux excède ce qui est admis, la situation, du point de vue du droit international, est claire. De manière générale, le respect de la souveraineté territoriale des Etats doit rester un critère déterminant, étant entendu qu'en certaines matières les solutions satisfaisantes doivent être trouvées par voie d'accord international (par exemple production de documents dans le cadre d'une procédure judiciaire). Il est évident que tout titre de compétence doit être utilisé avec mesure et raisonnablement.

11. D'accord. La méthode la plus satisfaisante est celle des accords internationaux, mais les autres méthodes ont leur vertu tant que cet objectif n'est pas atteint.

12. Je pense qu'il convient d'abord de tenter d'énoncer les principes généraux applicables et, si nous y parvenons, de recommander aux Etats de les respecter. C'est à ce stade qu'il sera possible de déterminer s'il y a lieu d'énoncer des propositions.

B. *Compétence judiciaire*

13. Etant entendu qu'il ne s'agit pas de la compétence judiciaire en général, mais uniquement de la compétence des tribunaux d'un Etat d'appliquer les lois de ce même Etat à des faits, actes et comportements localisés à l'étranger, mes réponses sont les mêmes que pour la compétence législative.

C. *Compétence exécutive*

14. 1° : oui.

2° : oui pour *a), b)* et *c).*

3° et 4° : il convient de s'en tenir à ce que stipule le droit consulaire applicable.

5° : oui.

15. *a)* Il me paraît que, même valable du point de vue du droit interne, une procédure qui est entachée d'une irrégularité du point de vue du droit international ne doit se voir reconnaître aucun effet externe.

b) Cela me paraît être une distinction délicate à opérer dans bien des cas (exemple : notification d'une décision avec indication d'un délai de recours).

16. Voir ma réponse à la Question 5.

17. Le problème majeur est celui de l'exercice par un Etat d'une compétence en soi légitime — la compétence d'exécution territoriale — pour assurer la mise en œuvre de prescriptions à portée extraterritoriale dans des circonstances où celles-ci sont contraires au droit international. On rejoint ici le problème de la compétence normative, car c'est alors celle-ci qui, par hypothèse, est utilisée en violation du droit international.

18. et 19. Il appartient aux Etats de décider ce qui leur convient.

Provisional Report

Introduction

A Preliminary Report on "The Extraterritorial Jurisdiction of States" prepared by the present Rapporteur and dated 13 April 1985 was distributed among members of the Nineteenth Commission with a view to its being discussed by them in the course of one or more working-sessions to be held in the course of the *Institut*'s Helsinki Session.

Prior to the Helsinki Session, the Rapporteur received written observations on his Report from one member of the Nineteenth Commission *viz.*, Mr *Skubiszewski*. In the course of the Helsinki Session, Mr *Salmon* handed in his observations on the subject. Mr *Wortley*'s comments although dating from after the *Questionnaire* to be mentioned below, come in the same category of observations on the Preliminary Report.

On 24 and 26 August 1985, at Helsinki, two working-sessions were devoted to the Preliminary Report. Members of the Nineteenth Commission taking part in the discussions, in addition to the Rapporteur, were Messrs *Dinstein, Doehring, Henkin, Oda, Reese, Rudolf, Salmon,* and *Zemanek*.

A *Questionnaire* having been omitted intentionally in the Preliminary Report, the two working-sessions were aimed at a general discussion of the entire topic and a common drafting of a *Questionnaire* as a result of it. Thus, the *Questionnaire* was expected closely to correspond with the views of the members present, views hitherto unknown to the Rapporteur. The outcome of the Commission's endeavours was a conglomerate of no less than 19 questions which it was decided to circulate to the Committee's membership. After some redrafting, the *Questionnaire* dated 11 November 1985 was circulated by the Secretary-General. The document is in French owing to the language predominantly used during the discussions.

After the Helsinki Session, three more members were elected by the *Bureau* to man the Nineteenth Commission, *viz.*, Messrs *Dominicé, Manner,* and *Pescatore.*

At the moment of writing, ten members of the Nineteenth Commission did respond to the *Questionnaire,* namely, Messrs *Dinstein, Doehring, Dominicé, Henkin, Manner, Reese, Rudolf, Salmon, Skubiszewski,* and *Zemanek.* Their replies constitute the basis of the Rapporteur's continued consideration of the subject.

One problem has to be kept in abeyance, for the time being. After the Helsinki Session, a new Third Commission was established, its subject being « *La compétence judiciaire des Etats* ». If not altogether overlapping, the terms of reference of the Nineteenth and Third Commissions should one way or another be adjusted to each other. However, it is not before both Commissions have come to a decision as to what exactly they want to include in their studies that a delimitation of their respective concerns appears to be feasible.

In the analysis of observations made by members of the Nineteenth Commission, it is proposed to follow the numbering of questions in the *Questionnaire.* For the sake of convenience, the text of each question will be reproduced at the head of the relevant observations.

Since sections 402 and 403 of the tentative draft No. 2 of the revised *Restatement of the Foreign Relations Law of the United States* were included in Annex 2 to the Rapporteur's Preliminary Report, it is appropriate to note that in early 1987 the American Law Institute expects to be able to circulate a final text. *Cf.* Benedict Tai, "A Summary of the Forthcoming Restatement of the Foreign Relations Law of the United States (Revised)", *Columbia Journal of Transnational Law,* Vol. 24, pp. 676 *et seq.*

1. *The Questionnaire: analysis of observations made by members*

Question 1

a) La Commission doit-elle, à votre avis, envisager son travail comme impliquant une recherche des principes généraux de la matière ?

b) Doit-elle, si la Commission répond d'une manière affirmative à la question *a)*, limiter son champ d'investigation d'une manière ou d'une autre ? Par exemple en excluant certains domaines tels que le droit pénal ou le droit antitrust ou en évitant les questions présentant des aspects politiques ?

Part *a)* of this Question received an affirmative answer from all members responding to the *Questionnaire*. But if reference is made, in part *a)*, to the « *principes généraux de la matière* », the question arises how to define « *la matière* ». Should the Commission tackle the entire subject of the extraterritorial jurisdiction of States, deducing from it a complete set of general principles, or rather should it show a measure of self-restraint ? In the latter hypothesis the expression « *principes généraux* » clearly would lose some of its meaning.

From the answers to part *b)* of Question 1, it appears that Judge *Manner* and Professor *Reese* let themselves be guided by practical considerations : one should avoid problems not reflected in practice, or the study of which is not urgent as, for instance, criminal jurisdiction, in contrast with jurisdiction in anti-trust matters. Professors *Dinstein, Henkin,* and *Zemanek* argued in favour of a somewhat different approach. The former would have no *a priori* limitations, but lend more weight *a posteriori* to one field than to another, the latter two proposing to inquire into the reasons why certain branches of our subject called for a special sort of treatment differing from the main line of reasoning, such as criminal and fiscal jurisdiction, which then could be dealt with in less detail.

The other members — Professors *Doehring, Dominicé, Rudolf, Salmon,* and *Skubiszewski* — preferred an all-round study of the subject, one among them stressing the point that no effects of it should be side-stepped on account of their being politically sensitive (as also underlined by Professor *Reese*).

So much about « *la matière* ». What about the « *principes généraux* » themselves ? Professors *Dominicé, Salmon, Skubiszewski,* and *Zemanek* indicated their views in this respect. It is the rules permitting or limiting the exercise of national jurisdiction we should look for, as well as those relating to the solution of conflicts of jurisdiction (*Salmon, Zemanek*). More in particular, " the various

bases for extraterritorial jurisdiction (nationality, protection of fundamental interests, universality) and the interplay of certain rules of international law (equality of States, non-intervention) " should have our attention (*Skubiszewski*). Professor *Dominicé* emphasized the diversity in the application of otherwise general principles, depending on the subject-matter dealt with, together with the possibility of exceptions to their very applicability.

It is in their answers to Questions 6 to 10 that members of the Nineteenth Commission had occasion to specify their opinion as regards the « *principes généraux de la matière* ».

Question 2

Estimez-vous nécessaire que l'on clarifie tout d'abord le sens des concepts utilisés dans le titre de la Commission ou impliqués par celui-ci, à savoir :

a) le concept de territorialité (voir question 3) ;

b) le concept d'extraterritorialité ;

c) le concept de "*jurisdiction*" (en français « compétence ») (voir question 4) ?

Replies in the negative came from Messrs *Doehring* and *Henkin*. The former saw a possibility of different connotations depending on the context in which the concepts referred to were to be used. In his opinion, for instance, "jurisdiction" was a concept ranging further with the application of the personality principle than in correlation with the principle of territoriality. But the Rapporteur wonders whether in both cases the essence of jurisdiction would not remain unaltered, and a definition of the concept, therefore, would not continue to be feasible.

Mr *Henkin* is of the opinion that the Commission need not spend time defining territoriality or extraterritoriality, but in the end of his reply to this and the following question, speaking of "activities or interests that are wholly extraterritorial", in fact assumes the existence of a definition.

The other members all agreed to the need for some form of clarification of the concepts used. The Rapporteur feels best at

home with Professor *Dinstein*'s view according to which "it is always useful to commence every attempt at codification with a series of definitions. The latter need not be regarded as having binding — or even general — application. They must simply be viewed as governing the text prepared by the Commission".

Question 3

Si la Commission répond de manière affirmative à la question 2 *a)*, êtes-vous d'accord pour que l'on étudie certaines constructions juridiques tendant à étendre la notion de territorialité *(constructive territoriality)* telles que celle de l'effet *(effect doctrine)*, du lien significatif de rattachement *(significant link)* et certaines fictions de territorialité (îles artificielles, engins, etc.) ?

Professor *Doehring*, referring to his reply to Question 2, and acknowledging that an act performed within a State's territory may have effects outside, nevertheless appears to be unfavourable to anything beyond a study of contingencies.

His colleagues on the Commission, on the other hand, all showed their willingness, though to different degrees, to enter upon a study of a general character of what the Rapporteur called "constructive territoriality" (Preliminary Report, para. 1.2.). At this point, the Rapporteur wishes to note that "constructive territoriality" as such is a *technique* of legal fictions (*e.g.*, "you are deemed to be here, though actually staying elsewhere"). The text of Question 3 in speaking of « *certaines fictions* » at the end of it only, inadvertently creates the impression that the effect doctrine and the doctrine of a significant link should not be fiction-based. The text, therefore, should have made reference to « *certaines* autres *fictions* ». But then the question arises whether the « other fictions » meant here should have been included in Question 3 at all. Professor *Zemanek* voiced some doubts as to the correctness of their inclusion. These "other fictions", he thought, have no direct bearing on the subject "as we have defined it in Helsinki". The Rapporteur accepts his criticism. There certainly is an extraterritorial element in claiming jurisdiction over seagoing vessels, artificial islands, etc. (see Preliminary Report, para 1.2., *in fine*), but it differs from the

extraterritorial element in claims to jurisdiction overstepping the borders between sovereign States. And, at any rate, claims to jurisdiction over seagoing vessels, artificial islands, etc., do not belong under the heading of a fiction-based "constructive territoriality" as meant in Question 3. As a result, the Rapporteur would like to propose that no further attention be given to the "other fictions" at the end of Question 3.

In spite of his *negative* reply to Question 2 *a)*, Professor *Henkin* nevertheless agrees to study the doctrines of effect and of a significant link. Professor *Skubiszewski* asks for their clarification and for a subsequent opinion on their correctness and usefulness. At a later stage, when replying to Question 6, he reverts to the effect doctrine wondering whether it is solid enough to warrant the control of the activities of foreign companies. Professor *Dinstein* sees the effect doctrine as one of paramount importance and the demarcation of its legitimate bounds as our greatest challenge.

Professors *Reese* and *Salmon* were divided over the amount of energy to spend on the two doctrines. Should the Nineteenth Commission give considerable attention to them, or just be brief, realizing that the crux of the matter is in their acceptability on the legal plane ?

Question 4

Si la Commission répond de manière affirmative à la question 2 *c)*, estimez-vous que la Commission doit se prononcer sur la nature et le fondement du concept de "*jurisdiction*" (en français « compétence ») (voir chapitre 2, sous 2, du rapport préliminaire) ? Ou faut-il éviter d'aborder cette question théorique ? Peut-on se passer de se prononcer à cet égard ?

The ayes and noes to Question 4 proved to be almost evenly divided between members replying. Close scrutiny of their answers, however, reveals that some of them failed to grasp the real meaning of this Question and practically put it on a level with Question 2. In fact, it is not the definition of jurisdiction which Question 4 has in view, but its "nature and foundation". The Question was inspired by the Rapporteur's conviction that much of a lawyer's attitude towards a fundamental concept like jurisdiction may be explained

in terms of the place he assigns to it within the totality of legal concepts, either consciously or unconsciously. Most especially, he may be guided by the position he takes in the well-known controversy on sovereignty as a pre-legal fact *versus* sovereignty as a quality imparted by law. For if jurisdiction is an aspect of sovereignty, how could one's position as to jurisdiction remain unaffected by one's option as to the nature of sovereignty ? Is it not inevitable to have a more liberal view of jurisdiction if the concept of sovereignty fundamentally is of a pre-legal nature ?

Professor *Doehring*, one of those who replied in the negative to Question 4, yet in his reply to Question 2 contributed to an understanding of the "nature and foundation" of jurisdiction when observing that, anyhow, « *il s'agit d'une compétence basée sur la souveraineté étatique* ». It is the very same opinion one finds in Professor *Skubiszewski*'s positive answer to Question 4. In his perspective, "the Commission should explore the interconnections between jurisdiction and sovereignty, independence and territory". Professor *Rudolf* expressed himself in a similar vein.

Professor *Zemanek* even calls it "inevitable" to study the concept of jurisdiction, and his reference to Mr Robinson's speech (Preliminary Report, Chap. 2, para. 2) is most to the point. But he also hints at the question of whether the Nineteenth Commission should go beyond the limits of a discussion creating an amount of awareness of the main problem involved.

Question 5

Etes-vous d'accord pour que l'on divise fondamentalement l'examen de la matière en deux parties :

a) la compétence législative ("*jurisdiction to prescribe*") ;

b) la compétence exécutive ("*jurisdiction to enforce*") ?

Faut-il traiter de manière distincte la compétence juridictionnelle ("*jurisdiction to adjudicate*") comme le fait le nouveau *Restatement* aux Etats-Unis ?

Faut-il faire un sort particulier, comme le fait le nouveau *Restatement* aux Etats-Unis, à l'exécution par des moyens non-judiciaires (par exemple *blacklisting*) ?

Question 5 is clearly based on the (tentative) assumption that adjudication and enforcement are one and the same thing, witness the end of its last paragraph : « *l'exécution par des moyens non-judiciaires* ». In fact, this is one conception out of two, the other one being that adjudication and enforcement are two things apart. Professor *Zemanek* rightly pointed at the existence of a divergence of opinion in this respect. In his reply to Question 5, he also wondered whether in national and international law a different approach may be desirable, in other words whether a possible equation of adjudication and enforcement in the national legal order may not be unacceptable in the legal order of the world. In the Rapporteur's opinion, there is little doubt possible in the matter since enforcement in the international legal order still is such an unpalatable notion to sovereign States that the cause of adjudication would hardly be served by fitting adjudication and enforcement together in one single concept.

Fortunately, therefore, five members of the Nineteenth Commission spoke out in favour of three categories to be distinguished, *viz.*, Messrs *Dinstein, Doehring, Manner, Reese,* and *Skubiszewski.* Professors *Henkin, Rudolf,* and *Salmon,* on the other hand, replied affirmatively to the first paragraph of Question 5, Professor *Dominicé* did so provisionally only, while Professor *Zemanek* would prefer to postpone a decision until a later stage of the Commission's work.

As to the second paragraph, Professor *Salmon,* recalling the creation of the Third Commission, proposed that this Third Commission should exclusively deal with adjudication. The Rapporteur is not sure whether in Professor *Salmon's* proposal enforcement — identical with adjudication, in his mind — should also be left to the Third Commission.

With regard to blacklisting and other « *moyens non-judiciaires* » — see para. 3 of Question 5 — doubts were expressed by Professors *Dinstein* and *Zemanek* concerning the desirability of their inclusion in the Nineteenth Commission's work. Professor *Doehring* preferred not to include them, whereas Messrs *Henkin, Manner,* and *Skubiszewski* argued in favour. Professor *Henkin* added a few more examples of non-judicial methods, *viz.*, serving process in another

country, sending police to arrest a person in another State's territory, and denial of a licence to trade to someone abroad. In Professor *Skubiszewski*'s view, blacklisting clearly is a form of enforcement, whereas in Professor *Rudolf*'s opinion it may come under jurisdiction to prescribe and under jurisdiction to enforce as well. Even the term " blacklisting " in itself gave rise to some misunderstanding, Professor *Dominicé* putting it in the context of the extraterritorial application of criminal law, which in the Rapporteur's opinion is a different concept. The diversity of opinion demonstrated here warrants an attempt at a definition of enforcement. It could be made in the context of a definition of jurisdiction (see Question 2).

A. *Compétence législative*

Question 6

Etes-vous d'accord pour que l'on analyse les différents chefs de compétence extraterritoriale, soit :

— compétence personnelle active (voir question 7) ;
— compétence personnelle passive ;
— compétence de protection (dite parfois compétence réelle) ;
— compétence universelle ?

Pour mémoire : les constructions juridiques relatives à la notion de territorialité (" *constructive territoriality* ") mentionnées sous la question 3.

Quelles questions particulières faut-il se poser à leur égard ?

Existe-t-il d'autres chefs de compétence ?

In the opening sentence of this Question as circulated to the members of the Nineteenth Commission, the word " *extraterritoriale* " should be substituted for " *territoriale* ". The point was made by Professors *Henkin* and *Salmon*. The mistake persisted in Judge *Manner*'s and Professor *Rudolf's* answers. It was corrected in the text above [1].

All members replied in the affirmative to paragraph 1 of this Question. Regarding constructive territoriality, Professor *Dinstein* rightly warned against stretching it unduly. As he sees it, it should

[1] *Cf.* p. 50.

remain reasonable so as not to wipe out the very concept of extraterritoriality.

In reply to the other two paragraphs, observations of great interest were made by Professor *Henkin*. Inquiring whether more « *chefs de compétence internationale* » exist than those enumerated in paragraph 1, he connects the question with a problem laying at the very root of the concept of jurisdiction, the question, namely, of whether a State's jurisdiction originally is limited to its territory, or not. If originally limited as indicated, the four motives for extraterritorial jurisdiction should be in the nature of (exceptional) enlargements, or widenings, of jurisdiction, and the burden of proof relating to a possible additional « *chef de compétence* » would rest on the State claiming the existence of such additional title to jurisdiction. But if a State's jurisdiction originally is not so limited, the aforesaid motives (in the Rapporteur's paraphrase of Professor *Henkin*'s observations) rather would be ever so many symptoms of freedom, and their number would take on a less rigorous, more fortuitous, character. The burden of proof, in this case, would lay with the State opposing another State's claims to a further title to extraterritorial jurisdiction.

With a view to the second hypothesis, Professor *Henkin* then asks whether international law actually developed " a principle of limitation on the exercise of jurisdiction designed to safeguard interests of other States or of private persons affected, where the State exercising jurisdiction has no significant links to the person or the activity involved " (and comp. Professor *Zemanek*'s intention to focus on the point where conflict arises with the territorial State). The criterion of the significant link in his opinion seems to signify the limit to which extraterritorial jurisdiction may be exercised, generally, and the four « *chefs de compétence* » in paragraph 1 appear but to be illustrations of the application of that principle. The list of our illustrations in paragraph 1 he presumes to be " not exhaustive ". See to the same effect Professor *Rudolf*'s reply to Question 6.

It is proposed to retain the criterion of the significant link for further discussion. The Rapporteur forms the impression that Professor *Henkin*'s second hypothesis (of an original freedom in the exercise of legislative jurisdiction up to a point where no

significant link can anymore be identified) is a natural ally of the liberal view of jurisdiction set forth in the course of the analysis of answers to Question 4. If this view is correct, it would be proof of the practical impact of one's conviction as to « *la nature et le fondement du concept de* " jurisdiction " » (Question 4).

In a very different vein, Professor *Dinstein* saw it as the Nineteenth Commission's mission to lay down the scope of application of the different titles to jurisdiction. More specifically, Professor *Skubiszewski* stated that the four « *chefs de compétence extraterritoriale* » in paragraph 1 principally are of a criminal law character. He inquired whether they should be equally valid in the field of private law. He also drew attention to the fact that extraterritorial jurisdiction in anti-trust cases may entail consequences in the sphere of criminal law.

Specific answers to the question in paragraph 3 were given by Professors *Salmon* and *Skubiszewski*. Whereas the former recalled Professor *Rousseau*'s thesis of a State's jurisdiction in the regulation of its own public service, even when abroad, Professor *Skubiszewski* added a State's jurisdiction with regard to offenses under international law (war crimes, offenses against humanity, or against peace and security). The Rapporteur would be inclined to let these offenses be covered by the principle of the *compétence universelle*.

Question 7

Quelle est, à votre avis, l'extension du concept de compétence personnelle (" *personal jurisdiction* ") ?

A qui s'étend ce concept :

a) personnes physiques et morales ; question des sociétés mères (" *parents* "), succursales (" *branches* ") et filiales (" *subsidiaries* ") ; problème de l'unité de l'entreprise ?

b) nationaux, résidents permanents ?

c) les ordres peuvent-ils porter seulement sur les comportements (actes ou omissions) ou aussi sur les biens ?

" Personal jurisdiction " is a concept to be *defined* under Question 6, whereas its *sphere of action* is being raised in Question 7.

But can the two be entirely separated ? Judging by the answers received to Question 7, the Rapporteur, sharing Judge *Manner*'s opinion, would think that there must be some connexion between them. He, at least, on the basis of those answers, came to some distinctions which appear not to be immaterial for the definition of the concept of " personal jurisdiction ". To illustrate his thought, he may be allowed to note the following propositions.

" Personal " jurisdiction is not " territorial " jurisdiction, but personal jurisdiction may be exercised in the guise of territorial jurisdiction. Such *quasi-territorial* jurisdiction is exercised whenever State A orders an individual present in its territory to perform some act in the territory of State B, or directs a company incorporated under its law and present in its territory to prescribe and enforce some specific conduct by the company's branch or subsidiary present in the territory of State B. Instead of acting through the parent company within its borders, State A may also be seen to address its branch or subsidiary abroad in a direct manner. The two options stand for *indirect* and *direct* (exercise of) *personal jurisdiction.* It is submitted that the two variants of personal jurisdiction, together with the identifications of quasi-territorial jurisdiction, may provide useful elements when defining the concept of " personal jurisdiction " under Question 6.

It is on the basis of the distinction drawn here between indirect and direct personal jurisdiction that replies to Question 7, paragraph 2 *a)* are now to be analysed.

Paragraph 2 a) - Answers to this part of Question 7 first suggest a further distinction to be made between natural or juridical persons abroad, *i.e.*, inside State B in the examples aboves, *viz.:*

i) such persons devoid of any link with State A ;

ii) such persons having some sort of a link with State A. With regard to category i), the Rapporteur would think of the examples provided in discovery cases. Persons in category ii) may be natural persons constituting mere branches of companies in State A ; subsidiaries of such companies, wholly or partly owned, clothed with legal personality ; and parent companies of branches or subsidiaries in State A.

According to the system thus developed, answers by members of the Nineteenth Commission to paragraph 2 *a)* are as follows :

Indirect personal jurisdiction : Professors *Henkin* and *Salmon* both addressed the case of State A directing a parent company on its soil to prescribe and enforce specific conduct by the parent's subsidiary in State B. Both appear to accept its legality, or at least the possibility of its being legal, Professor *Salmon* adding as a practical condition that the parent company effectively controls its subsidiary.

Direct personal jurisdiction : No direct personal jurisdiction is vested in State A regarding a subsidiary in State B of a parent in State A, assuming a subsidiary to have its own legal personality. Such is the opinion of Professors *Dinstein, Doehring, Dominicé, Salmon, Skubiszewski,* and *Zemanek.* Professor *Henkin* quotes a number of factors to be considered : " whether the enterprise is or is not " unitary " ; whether the state of the parent company seeks to reach property rather than activities of the subsidiary ". Professor *Rudolf* proposes that " the unity of the company cannot remain unconsidered ". Professors *Doehring* and *Skubiszewski,* on the other hand, reject « *l'unité de l'entreprise* » as an established principle. Professor *Salmon,* meanwhile, points at exceptions to the rule of no direct personal jurisdiction with regard to subsidiaries abroad : they may be justified under the principles of passive personal jurisdiction and of protection (see Question 6). According to Professor *Zemanek,* financial control of a subsidiary by its parent is no good reason for direct personal jurisdiction, and Professor *Doehring* seems to be in agreement with him.

" No direct personal jurisdiction with regard to subsidiaries in State B of parent companies in State A " has its counterpart in " no direct personal jurisdiction over parent companies in State B of subsidiaries in State A ". The point is rightly made by Professor *Skubiszewski,* but he qualifies his statement by adding « *à moins que la succursale (ou la filiale) n'agisse en tant qu'agent de la société mère* ». And see to the same effect Professor *Rudolf*'s reply to paragraph 2 *a),* reasoning on the basis of the effect doctrine.

Paragraph 2 b) - There is general agreement with regard to

nationals, not with regard to permanent residents. As to nationals, Professor *Dinstein* is more emphatic than his colleagues in saying that a State has jurisdiction "over all its nationals in all cases", a statement permitting of no exceptions as, *e.g.*, in fiscal matters (Preliminary Report, Chap. 1, para. 1.6.1.). Possible exceptions are suggested by Professor *Reese*, in whose opinion "whether jurisdiction exists in a particular case would, of course, depend upon other factors. It is essential that in each case the exercise of jurisdiction be fair and reasonable". The "other factors" remain unidentified in this view. Professor *Rudolf*'s answer is slightly more specific in stating that "personal jurisdiction must be restricted in the case of permanently absent nationals".

In the opinion of Messrs *Dinstein* and *Zemanek*, there is no room for personal jurisdiction over permanent residents. State A, in other words, has no jurisdiction over foreigners in State B who are permanent residents in State A. Other members were less peremptory. Professor *Henkin* even observes that "it has been generally accepted that a State may exercise jurisdiction to prescribe extraterritorially on the basis of certain links or relationships to the person acting, such as nationality, or domicile, or permanent residence". He does not go into detail, however, nor does Professor *Skubiszewski* when stating that, « *dans certains cas* », one may assimilate permanent residents to nationals. Professor *Salmon*, in his reply, limits himself to the factual aspect of a claim to personal jurisdiction over permanent residents who are no nationals : « *Il est plus rare que l'on donne des ordres aux étrangers à moins qu'ils ne soient des résidents permanents* ». Professor *Reese* was equally non-committal : the quotation above taken from his reply also applies to this part of paragraph 2 *b)*.

Paragraph 2 c) - The expression « *les biens* » is general enough to encompass real estate and movables as well. The question as formulated — « *les ordres peuvent-ils porter aussi sur les biens ?* » — consequently refers to both. But what is meant by « *les ordres* » ? Taken literally, and having regard to « *les comportements* », one would think of no more than an "order" (either legislative, or administrative, or judicial) to do (or omit) something while abroad and, one way or another, to include into one's conduct a piece of

movable or immovable property situated abroad. In a less liberal sense, however, the question may be understood (also ? or only ?) to relate to the authority of State A to influence or change the legal *status* of a *" bien "* in State B. From the answers to paragraph 1 *c)* of Question 7, it appears that members differently interpreted its wording. The Rapporteur would like to propose that both interpretations be retained for future reference.

With a reservation to be entered on account of the uncertain meaning of paragraph 2 *c)* and the confusion possibly created, the replies of members of the Nineteenth Commission to this part of Question 7 may be provisionally summed up as follows. Professor *Zemanek* is the only member unreservedly declaring that " personal jurisdiction does not extend to property located in foreign territory ". The statement appears to be double-edged in the sense intimated above. A positive reply came from Professor *Doehring,* but it was restricted to the literal interpretation of paragraph 2 *c).* Professor *Skubiszewski*'s reply is a positive one too, but, if rightly interpreted, exclusively deals with a change in legal status of movables abroad, whether belonging to nationals or to foreigners who are permanent residents. All other members may be deemed to refer to both aspects possibly implied in paragraph 2 *c)* (inclusion in personal conduct, change of legal status), and to recognize some measure of jurisdiction both ways in State A with regard to property abroad.

According to Professor *Doehring,* nationals residing abroad may perhaps be ordered to sell or transfer property located in a foreign country, provided the law of the country of residence would allow them to do so.

Professor *Skubiszewski,* rightly excluding real estate which is subject to the *lex situs,* claims jurisdiction for State A over movables belonging to a national, but located in State B. He then observes : « *mais l'Etat étranger peut refuser l'effet extraterritorial de ces lois* (*i.e.,* of State A) *si elles ne sont pas conformes à son ordre public ou si elles enfreignent le droit international* ». In his view, State A is possessed of the same power with regard to movables abroad belonging to foreigners permanently residing in the territory of State A, namely, in case of nationalization or confiscation of property. Stating his opinion in terms of law, Professor

Skubiszewski avows that in some countries the recognition of extraterritorial jurisdiction with regard to movables is a matter of comity rather than of law.

Among members addressing both possible aspects of paragraph 2 *c)*, as the Rapporteur surmises, Professor *Dinstein* proposes that, "if both the national and his property are abroad, the State lacks jurisdiction to enforce (*vis-à-vis* the property), though it has jurisdiction to prescribe as well as to adjudicate (*vis-à-vis* the national)". Professor *Reese* notes that the concept of jurisdiction "can also extend to property", and thereupon recalls the "other factors" mentioned in the quotation inserted in the Rapporteur's analysis of replies to paragraph 2 *b)*. In Professor *Salmon*'s opinion, finally, personal jurisdiction extends to income and vessels of nationals abroad : income may be taxed, vessels may be sequestrated in time of war (implying a change of legal status). Mr *Salmon* wonders whether it should not be possible for a State in nationalization or confiscation cases to claim extraterritorial jurisdiction with regard to assets abroad.

To conclude this analysis of answers to Question 7, Judge *Manner* may be quoted according to whom "in these days many different forms of international commercial intercourse support an extensive interpretation of the concept" (of personal jurisdiction). If this may be true for personal jurisdiction in commercial matters, the question remains whether it should apply to other contacts as well. Sacrifices in sovereignty, furthermore, almost automatically depend on reciprocity. Reciprocity, in turn, is easiest between equals, but among States equality, and in volume of commerce especially, is a rare occurrence.

Question 8

Le droit international limite-t-il l'utilisation de (ou impose-t-il des principes d'interprétation à) l'ensemble des différents chefs par des principes généraux tels que :

— non-intervention ?
— "*reasonableness*" (voir *Restatement no. 2 draft*) ?
— abus de droit ?

— droit du voisinage ?
— coopération ?
— droit des étrangers ?
— droits de l'homme ?
— autres ?

Five members of the Nineteenth Commission argued in favour of reasonableness, Professor *Dominicé* doing so in his answer to Question 10, and in Professor *Henkin*'s view it was the dominant principle "overriding many if not all of the other concepts listed in this question". Professor *Salmon*'s acclaim, meanwhile, was limited to an exhortation to study the principle, while Professor *Zemanek* made any use of reasonableness conditional upon its being "administered internationally". Professor *Rudolf* saw three reasons why reasonableness should not be adopted as a general principle limiting the use of the « *chefs de compétence* » in Question 6 : (1) it is in the long run only that judicial balancing of national interests may lend any substance to the criterion ; (2) national courts of law are not supposed to subject to a judicial balancing process the decisions of sovereign States regarding their national interest in, *e.g.*, anti-trust matters ; and (3) there is no common system of values between States on the strength of which the concept of reasonableness could be applied.

Non-intervention and human rights came out second, each scoring four votes, followed by two votes for abuse of right (one with a question-mark), one for the law relating to the legal status of foreigners (« *droit des étrangers* »), and one for co-operation.

Suggestions under the category « *autres* » were made by several members : sovereign equality (two votes), territorial sovereignty (one vote), and measures decided or recommended by Security Council or General Assembly of the United Nations regarding the activities abroad of nationals of Member States (one vote). Professor *Salmon* suggested *ius cogens*, however controversial the concept may be, acknowledging the fact that non-intervention and sovereign equality may already belong to it. The Rapporteur objects that *ius cogens*, far from being a concept denoting a specific field of international law, is a quality that may attach to any field. It would not fit in well, therefore, with the other principles enumerated in

Question 8, let alone that *ius cogens* applies *eo ipso* and, thus, needs no mentioning in any such list. It is readily agreed, however, that reasonableness, too, is somewhat misplaced in this context.

Messrs *Dinstein, Manner,* and *Skubiszewski,* though recognizing with Mr *Dominicé* the occasional weight of every single item listed, proved to be sceptical as to the feasibility of a rule doing justice to each of them. Professor *Dinstein* went farthest in rejecting any further study of them which, in his opinion, only could divert the Commission's attention from its subject proper.

Question 9

Le droit international limite-t-il l'utilisation de certains de ces chefs en particulier (par exemple le principe de la compétence personnelle passive) ?

Professors *Doehring* and *Salmon* said no, Professors *Dinstein, Henkin, Reese,* and *Skubiszewski* said yes (or virtually yes), whereas Judge *Manner* took no firm position, and Professor *Zemanek* outlined the consequences of a denial of limitations by international law in the use of the « *compétence personnelle passive* », the « *compétence de protection* », or the « *compétence universelle* ».

Questions 8 and 9 differ in that the former is of a general character, addressing the possible limitations by international law of the use of *any* of the titles to extraterritorial jurisdiction enumerated in Question 6, whereas Question 9 has in view such limitations with regard to the use of one or more *particular* titles. Strictly speaking, members replying to Question 9 had to abstain, therefore, from making reference to their answers to Question 8. Professor *Reese* was, nevertheless, justified in pointing again at the principle of reasonableness championed by him in the context of Question 8, for, as he remarks, " the principle of reasonableness may restrict use of some of these concepts more than it does in the case of others ".

The same principle of reasonableness also shows up again in the more elaborate replies given by Professors *Dinstein* and *Henkin.* Mr *Dinstein* in some detail sets forth the limitations under international law inherent in each of the five jurisdictional principles

individually, *viz.*, the territoriality principle together with the four extraterritorial principles as specified in Question 6. That, however, is an answer to Question 6 rather than to Question 9. Question 9 is concerned with a *comparison* of titles to extraterritorial jurisdiction in terms of practical importance : should an appeal to one of them be more frequently allowed than to another, does international law impose varying degrees of caution with regard to them ? This query is answered by Mr *Dinstein* only in so far that applications of the passive personality principle should be limited to " exceptional circumstances ", which also appears to be Mr *Dominicé*'s opinion. It is in the same spirit that Mr *Henkin* refers to " the very narrow view of what may be reached through ' the protective principle ' ".

Professor *Skubiszewski*, whether intentionally or not, provides the Commission with a criterion for the relative strength of a title to extraterritorial jurisdiction : the stronger the link of a case with the territory of the State claiming extraterritorial jurisdiction, the better its title to it is (and see his answer to Question 10, where the criterion is, in fact, being formulated). In his view, indeed, territory is the initial basis of jurisdiction (see also Preliminary Report, Chap. 1, para. 1.1., and Judge *Manner*'s reply to Question 10), and territorial jurisdiction, therefore, comes first and foremost. Professor *Salmon*, as it appears, is of the opposite opinion. The passive personality principle and the principle of protection and universality are not necessarily weaker than the territoriality and active personality principles, if that is what he means when replying to Question 9 in the following terms : « *Je ne pense pas. Ce qui ne signifie pas qu'il est raisonnable d'envisager une priorité à la compétence territoriale sinon à la compétence personnelle active* ».

Professor *Zemanek* focuses attention on the " protection of self-defined interests " through the last three devices in Question 6 : a " test of power " will ensue in the event of a territorial State claiming jurisdiction for itself, unless " appropriate international procedures " be instituted. The Rapporteur would deem a (peaceful) test of power to be less of a problem than possible harm to individuals or companies, a subject discussed in Question 10.

Question 10

Le droit international établit-il des règles de priorité quant à l'exercice par plusieurs Etats concernés de la compétence législative, en particulier lorsque deux ordres juridiques distincts donnent au même destinataire des ordres inconciliables ?

All members of the Nineteenth Commission agreed, it seems, on the *need* to establish priority of jurisdiction to prescribe in the conditions contemplated in Question 10. Opinions differed, however, as to the existence in general international law of rules regarding such priority.

Professors *Dinstein, Doehring, Dominicé* and *Zemanek* proved to believe in a rule proclaiming priority of territorial over other forms of jurisdiction.

Judge *Manner,* on the other hand, voiced doubts on whether international law (and practice) offer any clear-cut rules on priority. Professors *Henkin, Reese, Salmon,* and *Skubiszewski* went further in denying the existence of any rule of general international law in the matter, and in so far as Professor *Reese* is concerned, in suggesting even the impossibility of any regulation: "so much depends upon the facts of the particular case", as he has it. The other members in this group are less pessimistic. In Professor *Henkin*'s opinion, the territorial State should ordinarily have preference over the State of nationality. "In complex situations, however, that choice may not be obvious and one might do better with a requirement of balancing the competing interests and a general principle of reasonableness". In the same vein, Professor *Skubiszewski* calls for a general rule (*i.e.*, applying to all contingencies) incorporating the principles in Question 8 and the criteria in Question 12, and possibly giving priority to the State the title to jurisdiction of which territorially speaking is the stronger one (comp. his reply to Question 9). Professor *Salmon,* on the contrary, sets his hopes on conventions to be concluded between States on specific subjects of mutual concern, and as already in existence on fiscal and military matters (also referred to by Professor *Skubiszewski*).

Professor *Rudolf,* while not believing in a *general* rule about priority, yet appears to see one case in which a *specific* rule

attributes priority to the territoriality principles, *viz.*, the case of procedural law. "The principle of territoriality", he states, "is unrestrictively valid for the law of procedure. Each State applies its own procedural law exclusively". For the remainder, "the principle of territoriality and the principle of personality are basically of equal status". A conflict between them is to be solved "by the strict application of the criteria mentioned in question no. 8" (*i.e.*, non-intervention, co-operation, the law concerning the legal status of foreigners, and human rights — judging after Professor *Rudolf*'s reply to that question). But, he notes, the territoriality principle will usually prevail.

Question 11

Etes-vous d'accord pour que la Commission propose aux Etats de prendre des mesures de coopération pour éviter ou régler les conflits de compétence ?

Quelles méthodes suggérez-vous :

a) mesures unilatérales d'auto-restriction inconditionnelles ou sur base de réciprocité, notifications de politiques économiques, etc. ?

b) mesures bilatérales : négociations ou arrangements informels, accords internationaux, autres ?

No member responding to Question 11 spoke out *against* unilateral or bilateral measures of co-operation, but some made it clear that the bilateral method in their eyes was more efficient than the unilateral one. Some also pleaded the cause of multilateral agreements.

Members approving of unilateral measures to avoid or settle conflicts of jurisdiction were Messrs *Dominicé, Manner, Reese, Rudolf, Salmon, Skubiszewski,* and *Zemanek.* Professor *Skubiszewski,* while recognizing the use unilateral measures as suggested in part *a)* of Question 11 might have, rightly pointed at the inevitability of *lacunae* under this method. Professor *Zemanek* once more (see his answer to Question 9) raised the point of a test of power. In order to avoid this, "reciprocity might, therefore, be a valid proposition if it were really respected". Professor *Rudolf*

would like to see unilateral measures of self-limitation on a basis of reciprocity as a first step to harmonization and agreement. In the Rapporteur's opinion, reciprocity, essential though it may be, has a drawback inasmuch as, actually, it rests on an assumption of equality or, at least, of comparable volumes of business and, therefore, would not seem to be able to bring much of a solution of jurisdictional problems between, say, a mini - and a super - State.

Most members proved to be in favour of the bilateral method. In this context, Professor *Henkin's* proposal of a "network of bilateral agreements" deserves to be mentioned, and he suggested that "the Commission might well offer guidelines as to what such agreements should provide". Professor *Rudolf* advocated bilateral measures as a first step in the regulation of jurisdictional conflicts "in some selected fields and regions".

Multilateral agreements as a third possibility were proposed by Professors *Dinstein, Henkin, Rudolf* and *Skubiszewski,* but Professor *Rudolf* also hinted at the paucity of results obtained sofar.

Question 12

La Commission doit-elle proposer aux Etats en application du droit international ou au-delà de celui-ci de tenir compte de certains critères pour déterminer le caractère approprié ou les priorités dans l'exercice des compétences :

— la réciprocité ;

— l'importance des intérêts respectifs (voir la notion de "*reasonableness*" à la question 8) ;

— la violation du droit interne d'un autre Etat, etc. ?

Observance of all three heads in Question 12 was welcomed by Messrs *Manner, Reese, Rudolf, Salmon, Skubiszewski,* and *Zemanek,* although some of them expressed reservations or preferences. Mr *Dominicé* found the question to be premature.

Reciprocity, according to Professor *Doehring,* should not be unduly stressed since it is automatic. Professor *Zemanek,* referring to his answer to Question 11 *b),* attributed a limited significance

only to the concept, as did Professors *Dinstein* and *Henkin*. Professor *Dinstein* had no use for reciprocity outside the field of extradition, but extradition, as the Rapporteur sees it, is not necessarily related to a conflict of jurisdiction. Professor *Henkin* would like to put a brake on reciprocity in the interest of human rights.

Reasonableness was most important among the three criteria in Professor *Reese's* view. Professors *Dinstein* and *Zemanek* positively appreciated the concept, and the former made a special link with the effect doctrine in the context of which reasonableness may be a valuable tool. "In other instances, I believe that it would be more productive to demarcate precise frameworks for the application of each jurisdictional principle", he observed. Professor *Henkin* repeated his opinion that the Commission should support a principle of reasonableness and a balancing of interests. But Professor *Doehring* voiced his mistrust of such more or less extra-juridical (?) concepts, as did Professor *Rudolf* with regard to reasonableness.

As to the last head in Question 12, Professor *Dinstein* was not sure what it meant. The Rapporteur sees a return, here, of problems already broached in Question 10, *in fine*, though from a different angle. In Question 10, the problem was whether in the presence of two conflicting orders to one individual or company *international law established a priority* for one of the States concerned. Question 12 is concerned with *a weighing by those States* of different elements, among which the occurrence of conflicting orders, in order to establish a priority themselves. It is felt, therefore, that, rather than to Question 12, Professor *Doehring* replies to Question 10 in observing that violating the internal law of another State normally speaking is illegal, supposing the other State to respect itself the rules of international law. The same may apply to Professor *Zemanek* who expressly refers back to his answer to Question 10.

B. *Compétence judiciaire*

Question 13

Si la Commission estime qu'il convient de traiter séparément la compétence judiciaire, vos réponses aux questions mentionnées sous A seraient-elles différentes pour la compétence judiciaire ?

Most replies to this Question were in the negative, albeit that four members made reservations to the effect that, after all, differences between jurisdiction to prescribe and jurisdiction to adjudicate may not be altogether excluded. Judge *Manner* and Professor *Skubiszewski* gave no particulars to underscore their reservations, couched in the most general terms. Professor *Reese*, on the other hand, doubted whether all titles to extraterritorial jurisdiction in Question 6 also applied to the jurisdiction to adjudicate — a most fundamental issue, in fact. Professor *Doehring* raised an interesting point in calling to mind the existence of two constitutionally differing varieties of judicature, the one under duty to apply *internal* law (in the majority of States, as he claims), the other subject to the primacy of *international* law over internal law. Hinting at Question 10, he then suggests that internal and international law may diverge as to the priority in jurisdiction to prescribe (the subject dealt with in that Question) and that, on that score, a court having to apply internal instead of international law may be bound to decide in violation of a rule of international law binding on its own State. The Rapporteur notes that the preliminary question to ask, here, obviously is to what extent international law should tolerate constitutional prescriptions of internal law frustrating its purposes.

Professors *Henkin* and *Salmon* clearly consider an answer to Question 13 to be premature. Whereas the former postulates the existence of differences between legislative and adjudicative jurisdiction warranting "detailed examination", the latter, without further ado, would like to refer the substance of Question 13 to the Nineteenth Commission.

C. *Compétence exécutive*

Question 14

Estimez-vous que le principe d'interdiction d'accomplir des actes d'exécution sur le territoire d'un Etat étranger sans son accord s'applique :

1° aux actes coercitifs ?

2° aux actes suivants effectués par voie postale qui, sans être par eux-mêmes coercitifs, participent à l'acte d'autorité :

a) convocations à des procédures ;

b) demandes de renseignements ;

c) significations et notifications de décisions administratives ou judiciaires ou d'autres types d'injonction ?

3° *idem* que 2° par voie consulaire pour les ressortissants ?

4° *idem* que 2° par voie consulaire pour les non-ressortissants ?

5° *idem* que 3° et 4° par la voie d'autres agents de l'Etat que ses fonctionnaires consulaires ?

The wording of Question 14 probably caused Professor *Reese* some difficulty. He simply answered " no " to all of it, including the section dealing with coercive acts by State A in the territory of State B. But the question was not whether such acts were permitted, but whether they were prohibited. And since the Rapporteur cannot normally suppose Professor *Reese* to approve of coercive acts in other countries, he ventures to take his " no " for a " yes ". With regard to sections 2 to 5 inclusive, he feels forced to do the same : Professor *Reese*'s negative answer, indeed, relates to Question 14 and 15 *en bloc*, and the impression he, in fact, creates is that, in his opinion, none of the acts in either Question is in accordance with international law.

Converting Professor *Reese*'s " no " into a " yes ", there is general agreement among responding members of the Nineteenth Commission on the prohibition under international law of coercive acts in the territory of another State. Disagreement prevails, on the contrary, on all the other subjects included in Question 14.

As to acts performed through the international postal system, Professor *Dominicé* replied with a simple " yes " to the question of whether they should be considered as prohibited under international law. Professors *Doehring*, *Rudolf*, *Skubiszewski*, and *Zemanek* expressed almost similar opinions. As Professor *Doehring* puts it, acts intended to be *acta iure imperii* entailing a direct legal effect are in violation of the other State's sovereignty. Professor *Rudolf*'s detailed reply appears to amount to the same. The only acts Professor *Doehring* considers to be permissible are requests for information. An even stricter attitude is taken by Professor *Skubiszewski* who condemns « *divers actes d'autorité effectués par la voie postale, tels que convocations à des procédures, demandes de*

renseignements, notifications de décisions officielles, etc. ». The formula used by Professor *Zemanek* is attractive : « When the legal force of the legal act is subject to its being served on the person concerned, then serving is part of the authoritative act and may only be performed on foreign territory with the permission of the territorial State. Such permission may be expressed in a general way, through international custom or by treaty ; it may also be given *ad hoc* ". But exactly the opposite was proposed by Professors *Dinstein* and *Salmon :* while the former sees no objection to use of the mail for the transmittal of legal documents, the latter denies any violation of sovereignty in the process. Intermediate positions were taken by Professor *Henkin* and Judge *Manner*. Professor *Henkin* raises the possible inference that States participating in an international postal system implicitly agree to the acts under scrutiny. And if States consent to the establishment of a consulate entitled to such activities, why should they object to similar activities by international mail ? Professor *Henkin* draws attention to two Conventions in this respect, *viz.*, the Convention concluded at The Hague on 15 November 1965 on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (*Tractatenblad* 1966, No. 91 ; 658 *U.N.T.S.* 163), and the Convention concluded at The Hague on 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (*Tractatenblad* 1979, No. 38 ; 847 *U.N.T.S.* 231). The implications of accession, or non-accession, or of accession with reservations should be studied. The Rapporteur was informed that, at the moment of writing, 25 States had ratified, or did accede to, the 1965 Convention, whereas 18 States did so with regard to the 1970 Convention. In Judge *Manner*'s opinion, the prohibition relating to coercive acts " may not be applicable " to " non-coercive acts that are executed by mail and without co-operation by the other State ".

Coming to the use of the consular service to the same ends as in number 2 of Question 14, Professor *Reese* (see *supra*) considers that the consular service is prohibited from any assistance in the matter with regard to nationals and non-nationals alike, Professor *Doehring* limiting his rejection of such assistance to its participation in *acta iure imperii*. More lenient answers were provided by other members of the Committee. They came in three categories, empha-

sizing either the consular function as such, or the personal status of the receiver, or the nature of the activity concerned. In the first bracket, Professor *Dinstein* wants to admit anything within the scope of the 1963 Vienna Convention on Consular Relations, Professor *Henkin* anything coming within " the ordinary consular functions ". Professor *Skubiszewski* refers to the « *pratique en vigueur entre l'Etat d'envoi et l'Etat de résidence* », while Professor *Zemanek* thinks of the " accepted consular functions ". Professors *Dominicé* and *Rudolf* refer to consular law. In the second bracket, a distinction is being made between nationals and non-nationals. Judge *Manner* and Professors *Henkin* and *Salmon* belong in this group, Professor *Henkin* apparently putting on a level " nationals " and " domiciliaries ", and Professor *Salmon* wondering whether an agreement between the two States concerned should not be required with regard to non-nationals of the sending State. In the third bracket one finds Professors *Henkin* and *Zemanek*, both interested in the nature of the acts performed through the consular service. Professor *Henkin*, in particular, would like to distinguish according to whether an act imposes a burden on the recipient or benefits him, or whether the act holds an information or notice rather than a judicial or administrative injunction or order. As demonstrated, here, one category is all but exclusive of another.

As to section 5 in Question 14, none of the responding members of the Nineteenth Commission saw room for other than consular officials in the matter, except Judge *Manner*, whose answer would depend on " prevailing circumstances ". It goes without saying that the two States concerned may agree about other officials, as implied by Professor *Rudolf* and observed by Professors *Salmon* and *Skubiszewski* (*e.g.*, on the transmittal through the consulate of a third country).

Question 15

Si vous répondez de manière positive à la question 14 (2° à 5°) :

a) Estimez-vous que le droit pour un Etat d'accomplir des actes d'exécution sur son propre territoire ne peut néanmoins être exercé lorsque les significations préparatoires nécessaires à l'étranger n'ont pas été effectuées de manière licite au regard du droit international ?

b) Faut-il faire une exception si le contenu de l'acte transmis par la voie postale, consulaire ou autre, a simplement pour but de permettre à l'individu qui le reçoit d'exercer un droit ?

In part *a)* of this Question, the words « *ne peut néanmoins être exercé* » must be read in the light of international, not of national, law. Whatever national law may determine is irrelevant to international law unless international law should beforehand acquiesce in its own frustration (comp. the Rapporteur's observation in the context of Question 13 dealing with jurisdiction to adjudicate). The *moment* of frustration, however, depends on what international law actually prescribes in the matter at hand. The ambitions of international law may be higher or lower: it may attach nullity to enforcement acts in a State's own territory preceded by preparatory acts abroad which were in violation of international law, but it may also do less and, leaving the issue of validity alone, be satisfied with a State's international responsibility for the service in another State's territory of documents in a way not permitted by international law and/or for the performance and consequences of enforcement acts at home based thereon. The choice will depend on the measure of realism proper to international law, or attributed to it by those called to speak on its behalf. Something one cannot expect of international law is to prohibit enforcement acts as in Question 14 for no other purpose than to let them go unpunished when performed. It is with these considerations in mind that the Rapporteur proceeds to an analysis of answers received.

Professor *Salmon* was the only member to touch upon the issue of validity. Logically speaking, he says, enforcement acts performed in the circumstances contemplated in Question 15 *a)* should be considered as vitiated, and numerous are the precedents correctly following the principle. The only member raising the international responsibility of the State for enforcement acts based on preparatory acts abroad which are at variance with international law was Professor *Skubiszewski*, although he did so somewhat in passing.

All other replies were less conclusive. Professor *Reese* limited himself to a simple "no". Professor *Doehring*, on the contrary, thinks international law has nothing to say on the subject, but, as intimated above, why then should international law prohibit the

performance abroad of certain *acta iure imperii*, as claimed by Professor *Doehring* himself ? Can international law be interested in what thus amounts to a vain gesture ? In Professor *Henkin*'s opinion, " in some cases, the most effective deterrent to violation by a State of its international obligation is to require that State to forego the fruits of the violation ". In the same vein, Professor *Rudolf*'s answer suggests an obligation for the acting State to restore the *status quo ante*, whereas Professor *Dominicé* would be satisfied with the absence of all « *effet externe* ». With an eye to the legal status of foreigners in international law, Professor *Zemanek* suggests an approach along the lines of State responsibility. For as he sets forth, a State's right to treatment of its nationals according to international law is violated in case of proceedings against one of its nationals in the territory of another State on the basis of a preparatory notification made without due regard to international law.

No replies to Question 15 *a)* were produced by Professor *Dinstein* and Judge *Manner*.

As to section *b)* of Question 15, Professor *Doehring*, in keeping with his answer to section *a)*, once more stresses the absence in international law of any rule regarding acts of enforcement at home. Professors *Dominicé*, *Reese*, and *Salmon* are negative on exceptions to be made as contemplated in *b)*. Positive to some extent were replies given by Judge *Manner* (" depending on circumstances ") and Professors *Henkin* (" ordinarily, the territorial State would not object "), *Rudolf* (" there has never existed any duty of consultation of the host country before the delivery "), and *Zemanek* (" the information does not interfere with the territorial sovereignty of the State on whose territory it is received ").

Professors *Dinstein* and *Skubiszewski* did not reply to Question 15 *b)*.

Question 16

Est-ce que vous estimez que le fait pour un Etat de placer une personne sur une liste noire constitue un acte d'exécution illicite bien qu'il ait été exclusivement accompli sur le territoire de l'Etat qui prend la décision ?

Most replies received were in the negative (Professors *Dinstein, Doehring, Henkin, Reese,* and *Salmon*). Without making it a condition for the legality of blacklisting, Professor *Henkin* insisted on "some due process of law": notice, some opportunity to be heard, findings of fact, and a decision based on reasonable application of legal standards. Judge *Manner* and Professor *Zemanek* thought of discrimination as a possible reason for illegality. More explicit than the former, the latter considered blacklisting to be contrary to international law in the event (a) of its purpose being the enforcement of rules or orders not permitted under international law, or (b) of itself being discriminatory on grounds not permitted under international law. Professor *Rudolf,* if the Rapporteur understands him well, pointed at the possible breach of a trade agreement or other treaty in blacklisting somebody, but that does not seem to be a problem the Nineteenth Commission is concerned with.

Professor *Dominicé* referred back to his reply to Question 5, but as indicated in that context, he there appears in actual fact to have thought not of blacklisting, but of the extraterritorial application of criminal law.

Professor *Skubiszewski*'s answer was somewhat tautological.

Question 17

Envisagez-vous d'autres limites en vertu du droit international à l'exercice de la compétence exécutive ?

No such further limits were seen by Professors *Dinstein, Doehring, Dominicé, Henkin, Reese, Rudolf,* and *Skubiszewski.* Professor *Henkin,* here too, seems to value a requirement of "due process of law" (comp. Question 16).

Professor *Salmon* would, in fact, add two more requirements. In his view, (auxiliary) acts of enforcement permissible in another State's territory, either by mail or through the consular services, should respect local legislation and not intervene in internal matters of that other State. Professor *Zemanek* is on the same wavelength when referring back to his answer to Question 8. Just like

legislative acts provided with an extraterritorial dimension, acts of enforcement in another State's territory should, he deems, respect the principles of territorial sovereignty, sovereign equality, non-intervention, and human rights. Professor *Dominicé*'s reply appears to convey the same idea.

Judge *Manner* abstained from replying to Question 17.

Question 18

Estimez-vous que la coopération entre Etats devrait être exercée par voie conventionnelle en vue de permettre les actes mentionnés à la question 14, 2° *a), b), c)* :

— par voie postale ?
— par voie consulaire ?
— par d'autres agents de l'Etat requérant ?
— par des agents de l'Etat requis ?

Professors *Dinstein* and *Doehring* failed to see any use for further co-operation on the conventional level regarding the delivery of documents in another State's territory *via* the postal or consular services or otherwise. According to Professor *Dominicé*, it was for States themselves to take a decision following their inclinations.

All the other members replying did so in a more or less positive vein. Thus, Judge *Manner* entered a plea for bilateral agreements, whereas Professor *Henkin* expressed a preference for multilateral conventions. Professor *Rudolf* argued in favour of agreements on consular service of documents in preference to postal service. Possibilities of abuse of the postal route could, thus, be better kept in check. Professor *Zemanek*, on the other hand, while agreeing on international regulation generally, found delivery by mail, consular service, or by other agents of the enforcing State to be ill-suited for regulation because of the difficulties for the territorial State in keeping an eye on it. In his opinion, the only means of conveyance lending itself to the purpose of conventional regulation is delivery through agents of the territorial State. As he has it, agreements on mutual assistance in judicial and/or administrative matters are the appropriate instruments. Professor *Rudolf* expressed himself to

similar effect, though including agents of the acting State as well as agents of the territorial State (and see his reply to Question 19 on judicial assistance). Professors *Henkin*, *Salmon*, and *Skubiszewski* pointed at the proliferation already of international agreements in the interest of mutual assistance in the judicial and administrative fields, and Professor *Salmon* raised the possibility of adapting consular conventions — but that, clearly, would not have Professor *Zemanek*'s support. Professor *Salmon*, meanwhile, had his own misgivings with respect to practical chances for international agreements relating to the enforcement abroad of a State's orders : as he sees things, the political will of States to co-operate in the enforcement of foreign emanations of sovereignty varies considerably depending on the subject they deal with (judicial, administrative, fiscal, anti-trust, etc.).

Question 19

Envisagez-vous d'autres modes de coopération ?

From Judge *Manner* and Professors *Dinstein*, *Reese*, and *Skubiszewski*, no reply came forth. A simple " no " was the answer of Professors *Doehring*, *Salmon* (« *à première vue* »), and *Zemanek*. Professor *Dominicé*, once more, preferred to leave the matter to the discretion of States.

A positive stand was taken by Professor *Henkin* who, pending the extension of the Hague Conventions to the subject under consideration (Question 18), advocates policies of co-operation with a maximum of goodwill and a minimum of formalities.

2. *Propositions offered for considerations*

The propositions now to be offered by the Rapporteur for consideration by members of the Nineteenth Commission are all his. Much of their content, however, has been derived from the observations made by members as an answer to the *Questionnaire*. In places, the Rapporteur had to follow his own preference, especially where opinions of members diverged.

The character of the propositions varies : some are statements *de lege lata*, others are not, and the former are not identified as

such. At the present stage of the Commission's work, it was not thought indispensable to do so. There will also be propositions concerning the Commission's policy.

The materials have been arranged in a form not adopted in the *Questionnaire*. In order to allow members to check a particular proposition against the observations received, the numbers of relevant Questions will be indicated at the end of each proposition.

It is hoped that the Nineteenth Commission will have occasion to discuss the present propositions at ease. They constitute a first and cautious attempt at consensus within the Commission's membership which on essential matters proved to be divided. On the basis of such consensus the Commission may then look for further aspects of its subject-matter to be covered. Having filled in the white spots, it may finally make an endeavour towards a draft-Resolution to be submitted to the *Institut*.

The Commission's Policy

Proposition 1

The Commission should discuss the entire field of extra-territorial jurisdiction so as to be able to extract the general principles relating to every aspect of it. At a later stage, and if it chooses to do so, the Commission may spread its attention over such special fields as anti-trust legislation, criminal law, fiscal law, etc. (Question 1).

Proposition 2

The general principles pertaining to the Commission's subject are those permitting or limiting the exercise of a State's jurisdiction, together with those pertaining to the solution of conflicts of jurisdiction between States (Question 1).

Proposition 3

Constructive territoriality as applied through the (fiction-based) doctrine of effect is of eminent concern to the Commission. The Commission should, on the other hand, abstain from any study of (not fiction-based) claims to jurisdiction over artificial islands,

machinery, etc. The Commission should decide how much energy to spend on the aforementioned doctrine (Question 3).

Definition of jurisdiction

Proposition 4

Jurisdiction is to be understood as a State's authority to subject persons, movables and immovables to its legal order, to give that order a content in terms of rights and duties, legislatively as well as judicially, and to enforce the rules of conduct so created (Question 2).

Nature of jurisdiction

Proposition 5

It is important to realize that jurisdiction is one aspect of State sovereignty and, therefore, is of a pre-legal nature and one of the most fundamental concepts of international relations, liable to change with history, and less susceptible of detailed regulation by law (Questions 4 and 6).

The three aspects of jurisdiction

Proposition 6

Jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce are the three aspects of jurisdiction, each having its own characteristics. In a perspective of extraterritoriality, all three of them represent different impacts the varying weights of which determine much of their acceptability in international law. There is good reason to examine them separately, though without losing sight of their common origin in one and the same authority of the State (Question 5).

Proposition 7

Jurisdiction to adjudicate exists whenever there is jurisdiction to prescribe (Question 13).

Proposition 8

An attempt should be made at a definition of enforcement in order to find out whether blacklisting and other non-judicial methods are included in the concept (Questions 5 and 16).

Proposition 9

Jurisdiction to enforce is strictly limited to the territory of the enforcing State and other places assimilated to it by international law. Enforcement in another State's territory is conditional upon the latter State's express agreement. Acts in another State's territory which are auxiliary to adjudication or enforcement in the territory of the State exercising jurisdiction, and are performed through the diplomatic or consular services or the international postal system, or through any other agency, are contrary to international law unless expressly permitted by the territorial State (Questions 14, 17 and 18).

Territorial jurisdiction

Proposition 10

Territorial jurisdiction is jurisdiction over persons, movables and immovables situated in the territory of the State exercising jurisdiction (including places assimilated to it by international law), and the effects of which are limited to the territory of that State. The effect doctrine should not be stretched unduly (Questions 2, 3 and 6).

Extraterritorial jurisdiction

Proposition 11

The first title to extraterritorial jurisdiction in Question 6 (« *compétence personnelle active* ») is subject to no other condition than the existence of a significant link between the acting State and the person concerned (Questions 3 and 6).

Proposition 12

Although jurisdiction has its historical origin in territorial power, jurisdiction to enforce is its only aspect strictly limited to a State's own territory (Proposition 9). A title to extraterritorial jurisdiction to enforce must, consequently, be proved by the claimant State. Extraterritorial jurisdiction to prescribe and to adjudicate may, on the contrary, be exercised in all cases in which the absence

of a significant link has not been proved by an opposing State. As a matter of legal reasoning, the absence of such a link must not necessarily follow from an existing rule of customary international law, nor from a convention (and to this extent, the phrase in the *Lotus judgment* to the opposite effect has, thus, become obsolete : *Series A*, no. 10, pp. 18-19) (Question 6).

Proposition 13

Extraterritorial jurisdiction, whatever the title under which it is claimed (see Question 6), shall be exercised with due regard to the principles of reasonableness and non-intervention in the internal affairs of other States (all the other principles named in Question 8 or suggested by members either applying to the exercise of any right, or being too remote from the subject). Reasonableness consists, *inter alia*, in the balancing of interests of the States concerned (Questions 8 and 12).

Proposition 14

Active personal jurisdiction is jurisdiction over persons sojourning or residing in the territory of another State, exercised either directly, or indirectly through persons in the territory of the exercising State. Active personal jurisdiction extends directly to (1) natural persons who are nationals (or permanent residents ?) of the exercising State, and (2) branches of companies incorporated and registered in the territory of the exercising State ; and indirectly to effectively controlled subsidiaries of such companies. (Note : branches have no separate legal personality, whereas subsidiaries do). It does not extend directly to such subsidiaries, nor does it extend, either directly or indirectly, to parent companies having a subsidiary in the territory of the (would-be) exercising State. Possible exceptions to these rules have to be studied. The amount of active personal jurisdiction has to be determined for each of the three categories separately. Active personal jurisdiction does not extend to the legal status of property, rights, or interests (Question 7).

Proposition 15

Passive personal jurisdiction and jurisdiction exercised under the principle of protection (which, in the Rapporteur's opinion are identical to some extent) shall in all circumstances be kept within narrow confines (Questions 6 and 9).

Conflicts of jurisdiction

Proposition 16

In the event of contradicting orders emanating from two States exercising jurisdiction at a time, the jurisdiction of that State shall prevail which shows the closest territorial link with the addressee of the two orders. On specific subjects of mutual concern, States are encouraged to conclude agreements establishing a priority of jurisdiction (Question 10).

Proposition 17

Below the level of agreements, States shall seize any other means at their disposal to avoid conflicts of jurisdiction, such as self-restraint and consultations prior to the actual exercise of jurisdiction the effect of which may be to generate a conflict of jurisdiction (Questions 11 and 19).

International responsibility

Proposition 18

Infringement of the rule formulated in Proposition 9 entails the international responsibility of the infringing State regardless of any damage inflicted other than the immaterial damage to the territorial State (Question 15).

November 1986

Observations of the Members of the Nineteenth Commission on the Provisional Report

1. *Observations of Mr L. Henkin*

4 August 1987

Dear Colleague,

I regret that academic duties will prevent me from attending the Cairo session of the *Institut*, and therefore also the meeting of our Commission on the Extraterritorial Jurisdiction of States. I am compelled therefore to reduce to writing my comments on your excellent Provisional report.

For common convenience I address my remarks to the "propositions offered for consideration" set forth on pages 42-49 [1] of your report.

Proposition 1. This suggestion seems eminently sound. I assume that the suggestion that the Commission might later decide to consider how general principles apply to particular fields (anti-trust, drug smuggling, etc.) does not preclude references to any such particular field in the course of the Commission's development of general principles and as examples of the application of such principles.

Proposition 3. The significance of the effect in a State's territory of actions taken outside the territory is surely of eminent concern to the Commission. I am struck, however, by a terminological use that may prove to have substantive significance — the reference to the relevant doctrine as "constructive territoriality" and as "fiction-based".

In my view, effect within a State's territory is no more a fiction than activity within the territory. The Commission might conclude that under international law a State's jurisdiction is different when it addresses an effect in the territory than when it addresses an act committed in the territory, just as a State's jurisdiction may be different as to different kinds of acts, or different kinds of effects. I am reluctant, however, to appear to prejudice our inquiry by referring to any aspect of the problem as involving legal fiction. A State's jurisdiction to address effects in the territory is based on a legal fiction only if one focuses exclusively on the place of the actor; but is that exclusive focus inevitable, or desirable?

[1] *Cf. supra*, p. 128-133.

I suggest that the terms of reference of our Commission, as reflected in its title "The extra-territorial jurisdiction of States", should not be interpreted as meaning only "the jurisdiction of States in respect of acts committed outside its territory". Rather, it should mean "the jurisdiction of States with respect to matters that have significance beyond its territory". Our terms of reference, then, would include consideration of a State's jurisdiction to regulate activities (or other matters) outside its territory that have significant consequences inside its territory; activities (or other matters) inside its territory that have significant consequences outside its territory; as well as activities (or other matters) that neither occur in its territory nor have consequences in its territory but that might legitimately concern the State (protective jurisdiction, passive personality, universal jurisdiction, *erga omnes*).

Proposition 4. In addition to "persons, movables and immovables", would it be desirable to mention also "status", "relationships", "interests"? I have in mind matters such as marriage, divorce and child custody. Also, in some circumstances, a State may seek to regulate an interest in property rather than the property itself.

Proposition 5. I am not confident that I grasp the full import of this proposition. Does the term "pre-legal", imply a jurisprudential proposition, that a State can exercise any authority unless that exercise is barred by an agreed principle of international law, casting the burden on those who would challenge a particular exercise of jurisdiction to prove the existence of a principle of international law forbidding it? (Compare the discussion in the S. S. *Lotus* Case). Some might suggest that the "pre-legal" autonomy (sovereignty) of a State is a general proposition, applicable to all acts by a State and all its international relations, not merely to exercises of jurisdiction. In any event, how far should the Commission go into those deep waters, requiring incursion into legal history, and the character and sources of international law, including debates about natural law and its place in international law?

I agree that concepts of jurisdiction — like all law — might change with history; but I am not persuaded that it is therefore less susceptible to regulation by law. If the proposition means to assert that international regulation of the exercises of jurisdiction must be by guiding principles rather than by detailed rules, I am wholly in agreement.

Proposition 7. This proposition needs to be modified. A State has jurisdiction to prescribe law for an activity committed in its territory, but it may not have jurisdiction to adjudicate in respect of that activity — for example, to bring the actor to trial for that act, unless he is present in the State at the time of trial, has been given notice, etc.

Proposition 8. I agree with the spirit of the proposition. I would suggest, however, that it is not a matter of defining "enforcement" to determine whether blacklisting, etc., are included in the concept. For me, enforcement

is not a "concept"; one can define it as one wishes. It is rather a matter of deciding whether international law addresses or should address measures of the kind indicated when they have extra-territorial significance. If so, the Commission can decide whether it wishes to address them, and whether it wishes to do so under a category labelled "enforcement", or under some other category.

Proposition 9. This proposition seems generally sound as regards certain kinds of "enforcement", but may not be sound if one considers certain other measures to be means of enforcement.

It might be prudent to omit the first sentence, since the principal point is in what follows. The following sentences also seem broad. Must the other State's agreement be "express"? Is it a violation of international law for State A to use the international mails or its consular mission to serve process on one of its nationals residing in another country, to give him notice of tax due, or to order him to appear for national service? Should there be some mention of international agreements, such as the Hague Convention on taking of evidence and on service of process?

Proposition 10. As I suggested in commenting on Proposition 4, one might add status, relations, interests.

Should "territorial jurisdiction" be defined to exclude jurisdiction by a State over acts committed in its territory, that have effects outside its territory? Increasingly, more and more acts inside a territory have effects outside the territory, but international law has not precluded exercise of such jurisdiction. Such a definition would require us to define (*i.e.*, limit) "effects outside the State", to parallel a definition that some would require for the "effects doctrine" (effects inside the territory) noted in the last sentence. And see my comment on Proposition 3.

That issue might be avoided by a somewhat different statement. As worded, proposition 10 assumes — or creates — a concept of "territorial jurisdiction". It might be better to attempt a normative proposition rather than a definition, and to link it to Proposition 13. I have in mind something like: A State may exercise jurisdiction in relation to persons, activities, property, or interests inside its territory (including places assimilated to its territory by international law), subject to the principle of reasonableness (see Proposition 13). In some circumstances the principle of reasonableness might exclude an exercise of jurisdiction where the effect of an action within the territory is largely outside the State's territory. Acts outside the State's territory that have effect in its territory are within the State's territorial jurisdiction but the effects doctrine is also subject to the principle of reasonableness and should not be stretched unduly.

Proposition 11. It is not clear how this proposition relates to Proposition 14.

The suggestion that jurisdiction here is subject to "no other condition" than the existence of "a significant link" requires elaboration if not modi-

fication. As worded, it seems to imply that a particular link is sufficient for exercise of jurisdiction of every kind and in all circumstances. It is likely that some link — say a branch of a company — may be significant and sufficient to support some exercise of jurisdiction in some circumstances but not others. It would be preferable, I believe, to modify this proposition accordingly and relate the proposition also to the concept of reasonableness in Proposition 13.

Proposition 12. See my comment on Proposition 9.

In regard to both Propositions 9 and 12, it may be desirable to focus on particular means as the basis of the international law rule. In this context, the distinction should not be between "enforcement" on the one hand and prescription or adjudication on the other hand. In fact, if a State purported to perform an act of prescription (by having its legislature sit and legislative) in the territory of another State; or if a State set up a court and purported to adjudicate in the territory of another State — the "sovereignty" of that State would be offended, surely more so than by service of process in that State through the international mails. The objection, then, is not to the category of jurisdiction exercised but to the character of the activity. A State is entitled to claim an offense to its sovereignty when, without its consent, a foreign State performs an official act that can legitimately be characterized as an instrusive exercise of sovereignty.

Proposition 13. I support this proposition. But, particularly in view of my comment on Proposition 10, I would not limit the principle of reasonableness to exercises of extraterritorial jurisdiction as narrowly defined. Any exercise of jurisdiction, including those based on links to territory, *e.g.*, an act in the territory that is one element of a complex transaction much of it taking place outside the territory; an act in the territory that has effects largely outside the territory; or an act outside the territory that has effect within the territory (the effects doctrine) — all these should be subject to the principle of reasonableness.

Proposition 14. Again, I would suggest a normative proposition rather than what looks like a definition. And, as I said in my comment on Proposition 11, it seems desirable to link this proposition to the principle of reasonableness in Proposition 13; that would provide guidance for your statement that "possible exceptions to these rules have to be studied". It may be better to build a principle of reasonableness into a rule rather than have to justify "exceptions" to a rule. (That would be in the spirit of your Proposition 1).

Does the last sentence imply that a State could not expropriate property of one of its nationals where the property is situated in the territory of another State Or pass title to a bank account in another State as part of a divorce settlement? The territorial State might refuse to give effect to such attempts to affect the status of property situated in its territory, but does international law preclude the expropriating State from doing so, by a narrow conception of jurisdiction?

Proposition 15. I agree. Again, might we not apply a principle of reasonableness ? The principle does not give specific answers but does give some guidance and can be given particular content in different contexts.

Proposition 16. The proposition is sound. I would suggest a small modification :

" ...the prevailing jurisdiction shall be that of the State that has the strongest interest in, or link to, the activity addressed, ordinarily the State with the strongest territorial link ".

Proposition 18. Is an exercise of enforcement jurisdiction likely to inflict other than " immaterial " damage on the territorial State ? The offense in such cases is to sovereignty and dignity ; are these " material " ? Surely, the violating State ought to be responsible internationally in such cases, though the remedy or form of reparation may differ with circumstances.

This proposition addresses only infringements of Proposition 9. Should the Commission not address the question of international responsibility for infringement of other norms limiting the exercise of jurisdiction, *i.e.*, those addressed in Propositions 7-8, 10-16 ?

2. *Observations of Mr W.L.M. Reese*

March 22, 1988

Dear Professor Bos

First of all, I wish to congratulate you on work well done and on your plans for the future. I do think that the full Commission should be able to give preliminary consideration to your draft before the draft is submitted to the *Institut*. As you say, the earliest time for our preliminary discussion would be 1989. This means that the report could not reach the *Institut* until 1991. This delay is unfortunate but is inevitable.

I think you have done a remarkable job on the propositions. I think that the great majority of the Commission will agree with them.

Speaking for myself, I agree with all the propositions except that I would perhaps alter proposition 7 a bit more cautiously. As it reads now, the proposition is that a State has jurisdiction to hear a case in all situations where it could apply its law to determine the rights and liabilities of the parties. Surely, this would be true in the great majority of situations. But I am not sure that it will always be true, although I cannot think of a hypothetical case where a State having power to apply its law could not also try the case in its courts. And yet the universality of the proposition makes me a bit uncomfortable. Could you perhaps soften the proposition by saying that it will " usually " or " almost invariably " be the case ?

3. *Observations de M. Ch. Dominicé*

29 mars 1988

Mon cher Confrère,

.....

Vous souhaitez que les membres de la Commission s'expriment sur les propositions énoncées aux pages 42-49 de votre rapport provisoire [1]. C'est bien volontiers que je vais m'efforcer de le faire, tout en présentant tout d'abord quelques brèves observations.

I. *Observations générales*

1. Je ne voudrais pas m'exprimer sur vos propositions sans vous avoir remercié de votre rapport. Le problème est extraordinairement complexe, comme l'a souligné la perplexité des membres de la Commission lors des réunions que nous avons eues au Caire, mais je suis certain que, si nos discussions ont pu être utiles, nous le devons pour beaucoup au travail considérable que vous avez accompli, qui permet de mieux identifier les problèmes, et fournit une bonne base de réflexion.

2. Au plan général, je crois qu'il importe de rappeler, comme vous le faites à juste titre, que la compétence normale, légitime, de l'Etat est fondée sur sa souveraineté territoriale (avec les exceptions et restrictions prescrites par le droit international public). Il en résulte que toute prétention à régir des actes ou comportements, ou le statut des personnes ou des biens, en dehors de la sphère territoriale, doit reposer sur un *titre ou chef de compétence.* Cela me paraît être un principe de droit international public.

3. C'est précisément au moment d'aborder la question des divers chefs de compétence que l'on est amené à constater que leur signification, ou leur pertinence, varie sensiblement selon le domaine pris en considération. Je l'ai indiqué dans ma réponse à votre rapport préliminaire, et je crois que cette observation explique pour une part la suggestion faite au Caire d'étudier chacun des chefs de compétence.

Depuis l'affaire du *Lotus*, la discussion sur les chefs de compétence a souvent été influencée par les caractères spécifiques de la compétence en matière pénale. Il y a cependant d'autres domaines fort importants où les problèmes se posent probablement en termes différents : questions fiscales, lutte contre les entraves à la concurrence, affaires boursières, recherche des preuves, législations « politiques », etc.

C'est à la lumière de ces observations qu'il convient de comprendre mes brefs commentaires de vos propositions.

[1] *Cf. supra*, p. 128-133.

II.

Proposition 1.

D'accord.

Proposition 2.

D'accord.

Proposition 3.

D'accord en substance. Il faut clarifier les concepts utilisés.

Proposition 4.

D'accord en substance, mais je ne suis pas certain que l'expression "*legal order*" soit satisfaisante. Dans diverses circonstances, un Etat peut appliquer quelques-unes de ses prescriptions à des actes et comportements localisés à l'étranger.

Proposition 5.

Je crois que cette proposition engendre des ambiguïtés. Il suffit de souligner le lien étroit qui existe entre compétence de l'Etat et souveraineté territoriale.

Proposition 6.

D'accord avec cette proposition, mais je crois qu'il convient de préciser les contours de chacune des trois compétences énumérées, car je constate qu'il y a des différences dans les définitions données par les auteurs.

Proposition 7.

Je crois que cette proposition est exacte.

Proposition 8.

D'accord. Cela rejoint d'ailleurs la préoccupation que j'ai indiquée ci-dessus sous proposition 6.

Proposition 9.

D'accord.

Proposition 10.

Cette proposition me donne des difficultés. Je ne comprends pas bien la deuxième partie de la première phrase. Si, dans un Etat, deux époux étrangers qui y sont domiciliés recourent aux tribunaux locaux pour y obtenir le divorce, le jugement aura bien souvent des effets dans le pays d'origine, mais ces tribunaux auront néanmoins exercé une compétence fondée sur la territorialité. Je préférerais que l'on s'efforce de définir le principe de territorialité en sa qualité de principale base de compétence de l'Etat.

Proposition 11.

Il me semble que la question 6 à laquelle la proposition 11 fait référence est influencée par des notions propres au droit pénal. Elles sont importantes, mais il y a d'autres approches.

De manière générale, je suis d'accord pour dire que l'assujettissement, par un Etat, à sa compétence, de personnes dont les actes sont localisés à l'étranger exige un « lien significatif ». Mais quel lien ? N'y a-t-il pas des distinctions à faire selon le domaine pris en considération ? Voir aussi proposition 12.

Proposition 12.

Les deux premières phrases relatives à la compétence d'exécution ne suscitent pas de difficulté.

Quant aux compétences d'ordonner et de juger, j'estime quant à moi (*cf. supra* I) qu'elles doivent pouvoir se réclamer d'un chef de compétence, de sorte qu'il m'est difficile de me rallier à l'idée qu'il appartient à l'Etat qui s'estime lésé de prouver l'absence d'un lien suffisant.

Proposition 13.

Je pense qu'il s'agit d'une proposition utile, mais il faut bien admettre que ce qui peut être raisonnable pour un Etat ne le sera pas nécessairement pour un autre.

Proposition 14.

Je rappelle ici mes observations sous proposition 11. Je crois qu'il importe d'analyser les *fins* auxquelles un titre de compétence est utilisé. Ainsi, la nationalité ne saurait autoriser l'Etat d'origine à prescrire à ses ressortissants domiciliés à l'étranger d'enfreindre les lois locales. Il convient donc d'examiner les diverses hypothèses, et les différents domaines, pour pouvoir formuler des règles acceptables. Le titre de compétence fondé sur la nationalité me paraît être un bon exemple de la nécessité d'une approche nuancée.

Proposition 15.

D'accord. Cela vaut en matière pénale.

Proposition 16.

J'hésite à me prononcer à ce stade. Si un tribunal américain ordonne à une société américaine de lui fournir des documents de sa succursale *(branch)* en Suisse, alors que le droit suisse interdit ce transfert à l'étranger, ne va-t-on pas considérer, selon le critère de la proposition 16, que c'est avec les Etats-Unis que l' "*addressee*" a les contacts les plus étroits ? Je pense qu'il convient d'étudier encore les diverses hypothèses de conflits.

Proposition 17.

D'accord.

4. *Observations de M. J. Salmon*

24 octobre 1988

Cher Collègue,

Je vous prie de m'excuser de vous adresser avec un tel retard les commentaires ou réponses que vous souhaitiez à votre excellent rapport provisoire qui soulève tant de questions passionnantes dans une matière si complexe.

Propositions 1 et 2 : oui.

Proposition 3 : La question de la compétence sur les îles artificielles et les engins ne me semble pas pouvoir être laissée totalement en dehors du champ d'étude de la commission car vous devez pouvoir classer ces hypothèses dans votre typologie des compétences. Au surplus la relation entre l'Etat disons d'immatriculation et les constructions ou engins est évidemment un lien significatif *(significant link)* mais qui est néanmoins susceptible d'entrer en conflit avec d'autres chefs de compétence dont peuvent se prévaloir d'autres Etats. Les îles artificielles sont de plus couvertes, par exemple, par votre proposition 9 (première phrase) et 10. Je ne suis pas, au surplus, convaincu que la doctrine de l'effet soit fondée sur une fiction, mais peut-être vous ai-je mal compris ?

Proposition 4 : oui.

Ne faut-il pas aussi ajouter la notion d'intérêts. On parle souvent de « biens et intérêts ».

Proposition 5 : Je ne crois pas qu'il soit indispensable de se prononcer sur des questions aussi générales.

Proposition 6 : oui.

Proposition 7 : Il est vrai que les deux compétences sont souvent liées ; mais pas toujours. Il n'est pas exclu qu'un juge applique et sanctionne un autre droit que le sien. Il faut être prudent dans une formulation qui n'est peut-être pas indispensable.

Proposition 8 : Il y a bien d'autres raisons à se pencher sur le concept d'exécution *(enforcement)* que celle que vous indiquez. Je suis persuadé que le concept d'acte d'exécution ou d'*enforcement* est susceptible de divers degrés d'intensité, les Etats réagissant très différemment à cet égard. Votre proposition 9 fait d'ailleurs allusion à certaines formes très différentes d'exécution.

Comme j'ai eu l'occasion de vous le dire oralement lors de notre rencontre à Bruxelles, je pense que la question des niveaux d'intensité de la compétence exécutive devrait aussi faire l'objet d'une étude préparatoire séparée que vous pourriez confier à un membre de votre commission.

Proposition 9 : Le concept d'acte « auxiliaire à la juridiction et l'exécution »

me semble devoir être approfondi avant que nous puissions nous prononcer (*cf.* proposition 8).

Ma première réaction serait en tout cas de nuancer la dernière phrase de la proposition. Je suis convaincu que tout acte même préparatoire à l'exécution qui constitue un ordre ne peut être valablement exécuté par un agent de l'Etat A sur le territoire de l'Etat B, même à l'égard d'un ressortissant de l'Etat A, sans l'accord préalable de l'Etat B (cet accord est par exemple donné par l'*exequatur* pour les consuls ou par des conventions d'entraide judiciaire).

Je suis beaucoup plus perplexe de considérer qu'un acte transmis par voie postale serait contraire au droit international car il est notoire que de nombreux Etats y procèdent sans avoir ce sentiment et sans protestation. Il faudrait au minimum renverser ici la présomption que vous faites en fin de votre proposition. Toutefois, je pense que la typologie devrait ici être affinée.

Proposition 10 : Vous définissez la juridiction territoriale. Ne convient-il pas alors de définir les autres types de juridiction (extra-territoriale).

Quant à la définition de la juridiction territoriale, je ne comprends pas bien pourquoi vous ajoutez "*and the effects of which are limited to the territory of that State*". Ces termes ne sont pas nécessaires à la définition de la juridiction territoriale et ils sont discutables et insuffisants si vous voulez traiter aussi ici des limites prescrites par le droit international à la compétence territoriale. Discutables car la compétence territoriale d'un Etat peut évidemment avoir des effets extra-territoriaux (par exemple par les règles de droit international privé ou d'exécution des actes ou décisions étrangères), insuffisants car il y a d'autres limites : ne fut-ce que le bon sens : on n'impose pas tout son droit à des touristes étrangers de passage (par exemple impôts, règles sur la construction des véhicules, etc...).

La doctrine de l'effet me semble mériter plus qu'une ligne.

Proposition 11 : Il faudrait peut-être définir la compétence personnelle ? Auquel cas une liaison avec la proposition 14 s'imposerait.

De manière générale — en ce qui concerne la structure générale du texte — vous pourriez peut-être envisager de traiter d'abord de la compétence personnelle active et passive (propositions 11, 14 et 15) avant de passer à la compétence d'exécution (proposition 12) ?

Reste encore la compétence universelle à traiter.

L'actuelle proposition 13 qui les concerne tous viendrait alors après l'actuelle proposition 15.

Pour ce qui est du fond de la proposition 11, je reste passablement sur ma faim. Ne doit-on pas expliquer plus clairement dans quelle situation le lien est significatif ?

Comme pour la proposition 10 on peut se demander s'il ne faut pas d'abord définir la compétence puis examiner les limites de son exercice. Dans votre

esprit le lien significatif relève-t-il de la définition de la compétence ou de son exercice ? En d'autres termes estimez-vous que la nationalité, par exemple, n'est pas un lien significatif en soi et qu'il faudrait en plus qu'il y ait pour exercer la compétence personnelle active à l'égard d'un national un lien significatif entre l'Etat et ce national ?

Si l'on ne définit pas mieux ce que l'on entend par lien significatif on ne peut pas dire que l'on ait fait avancer les choses. A moins que ce terme utilisé aussi dans la proposition 12 soit un « standard » comme le *reasonableness*.

Enfin, si la proposition 11 entend être plus qu'une définition et vise à régler l'exercice de la compétence, la notion de lien significatif est sans doute insuffisante (*cf.* le concept de *reasonableness*) ou d'autres règles (*cf.* le cas de la Grande-Bretagne qui a préféré extrader les hooligans impliqués dans le drame du Heysel en Belgique plutôt que de les juger en Grande-Bretagne). Il y a diverses raisons pour lesquelles un Etat est d'accord d'effacer sa compétence personnelle active au bénéfice de la compétence territoriale.

Proposition 12 : La première partie de la proposition ne me semble pas apporter grand chose de plus que la proposition 9.

Peut-être faudrait-il fondre les deux textes en un. L'intensité de l'acte d'exécution me paraît un élément essentiel (*cf.* mes remarques sur la proposition 9). Je ne suis pas sûr de bien comprendre la phrase suivante concernant la compétence législative et judiciaire. D'abord parce que je ne sais pas si le *significant link* est ou non à vos yeux un élément de définition ou d'exercice de la compétence (v. remarques ci-dessus) ni quel est son contenu exact. Vous admettez à la proposition 11, que la compétence personnelle active (qui est un aspect de la compétence tant législative que judiciaire) doit reposer sur un lien significatif. Vous imaginez donc ici qu'un autre Etat pourrait faire valoir lui aussi un tel lien significatif (par exemple la territorialité ou l'effet de l'acte). Pourquoi dans ce cas la compétence législative ou judiciaire devrait-elle s'effacer ? Introduisez-vous ici la règle que vous suggérez à la proposition 16. Pourquoi alors la répéter ?

En ce qui concerne la dernière phrase de votre proposition, je ne puis vous suivre lorsque vous dites que les célèbres attendus de l'affaire du *Lotus* seraient devenus obsolètes. J'estime que les lignes 3 à 19 de la page 19 du texte français et 3 à 20 du texte anglais reflètent encore très bien l'état actuel du droit international même s'il appartient à notre commission d'essayer de nuancer ce principe.

Proposition 13 : A première vue cette proposition semble acceptable, encore que le concept de *reasonableness* — il ne faut pas se le cacher — est lui aussi une fuite en avant — ou plutôt un chèque en blanc en faveur du juge qui devra se prononcer.

Proposition 14 : Toute la première partie de l'article relative à la définition de la juridiction personnelle active me semblerait mieux placée plus haut avec la proposition 11.

La référence faite à l'avant-dernière phrase de votre proposition "*Possible exceptions to these rules have to be studied*" est à mes yeux obscure. S'il s'agit d'ordres donnés à des personnes qui n'ont pas la nationalité ou la personnalité juridique de l'ordre légiférant la question mérite, en effet, examen, car cela est possible mais la chose s'explique alors sans doute par d'autres principes — le principe de protection (qui ne fait dans votre projet l'objet d'aucune proposition alors qu'il est bien vivace notamment en matière pénale) ou celui de l'effet. L'un et l'autre devraient être traités plus à fond.

Je ne puis pas en tout état de cause me rallier à la dernière phrase de la proposition 14. Bien que cela ait parfois été prétendu en doctrine en matière de nationalisations ou d'expropriations, il est notoire que ce principe est faux et que les Etats donnent fréquemment effet sur leur territoire à des législations étrangères ou décisions judiciaires étrangères affectant des biens, droits ou intérêts sur leur territoire, le tout bien entendu sous réserve de l'ordre public international (pensez, par exemple, aux actions des Etats essayant de récupérer les fortunes souvent exorbitantes relevant du patrimoine national enlevées par d'ex-chefs d'Etat en exil).

Proposition 15 : Cette proposition me paraît un peu courte.

Ne faudrait-il pas — après avoir défini de quoi il s'agit — proposer par exemple qu'elle ne soit exercée qu'afin d'éviter le déni de justice, lorsque la juridiction territoriale ou personnelle active n'est pas exercée ?

Proposition 16 : Il y a deux idées dans cette proposition. J'adhère entièrement à la seconde et propose qu'elle soit mise en tête en mettant les mots « priorité de juridiction » au pluriel car dans des accords spécifiques relatifs à des matières particulières (service militaire de doubles nationaux par exemple) de multiples critères peuvent être adoptés.

Je suis beaucoup plus réticent en ce qui concerne la première partie de la proposition. Je ne suis pas persuadé que la priorité doive être donnée *en principe* à l'Etat territorial. La question est beaucoup plus complexe que cela. Il ne faut pas confondre rapport de force et légalité.

Il est vrai qu'en cas d'ordres contradictoires adressés à une personne physique c'est celui de l'ordre territorial qui s'impose avec le plus d'évidence pour la personne concernée sauf à elle de choisir de quitter le territoire. Mais ceci ne signifie nullement que cette personne pourra valablement exciper de cette situation dans un autre ordre dont elle relèverait du chef de la compétence personnelle par exemple. Sans doute la personne pourra plaider l'état de nécessité, l'erreur invincible, *non bis in idem*, etc... Mais pas nécessairement valablement. Tout dépend à vrai dire du point de savoir quels ordres sont vraiment affectés et quelle est l'importance pour chacun d'eux du respect de l'ordre donné. On ne peut pas non plus faire ici l'impasse sur la question du *jus cogens :* pensons aux sanctions imposées par une organisation internationale ou la question dite de l'excuse de l'ordre supérieur, etc...

Proposition 17 : Cette proposition me semble excellente.

Proposition 18 : Je ne pense pas qu'il soit souhaitable de traiter de la responsabilité internationale. Comme l'a répété à plusieurs reprises notre ancien secrétaire général Paul De Visscher, il n'est pas d'usage dans chaque résolution de l'Institut de parler de la responsabilité comme sanction des règles qu'il proclame. Il n'y a d'exception à cela que lorsque la question de la responsabilité pose des problèmes particuliers (*cf.* le cas des résolutions sur la protection de l'environnement).

5. *Observations of Mr K. Zemanek*

Prop. 1 : I agree.

Prop. 2 : I agree.

Prop. 3 : I agree.

Prop. 4 : I accept the definition as a working hypothesis, subject to redrafting if that should prove necessary during the future work of the Commission.

Prop. 5 : For my feeling, the last part of the paragraph is too categorical. While I agree that we deal with an area that has changed with history and is, actually, in a rather fluid state, that does not *per se* exclude " detailed regulation by law ". You are, of course, right that it actually does so in the international community, but that is due to the latter's weak and slow law-creating process which adapts badly to social changes. Thus, the impediment lies in that process and not in the nature of the problem as the text seems to imply. Domestic legislation has learned to deal effectively with dynamic social developments — international law has not yet done so.

Prop. 6 : Subject to the *caveat* which I included in my reply to Question 5 of the Questionnaire, namely that whatever course is chosen for the examination, it should be considered provisional, I agree with the proposition.

Prop. 7 : Although I have, at present, no objection, I still wish to reserve my position on this unqualified affirmative statement until we have gone deeper into the matter.

Prop. 8 : I agree.

Prop. 9 : I agree.

Prop. 10 : I agree with the statement as far as it goes. However, the word " unduly " in the last sentence leaves the problem open. An effort to define the word should be untertaken.

Prop. 11: I also agree with that statement but feel that it, too, leaves the real problem unsolved. In the absence of a broad international consensus on what constitutes a "significant link" (*cf.* the "genuine link" dispute concerning nationality) States may hold conflicting views which will, in the absence of mandatory third party settlement, be resolved very probably in favour of the stronger party; a very unsatisfactory solution. Since our chances to improve the willingness for submitting to third party settlement are nil, only the course to eliminate as many undefined terms as possible from our text is open to us and we should have a try at it.

Prop. 12: I agree with the first two sentences of the proposition. As to the third phrase, I refer to my misgivings concerning the undefined term "significant link" expressed in the previous paragraph (proposition 11). I fear that I do not properly understand the last sentence and suggest that its meaning should be clarified.

Prop. 13: I agree with the proposition; as far as the test of "reasonableness" is concerned, however with the qualification expressed in my reply to Question 8 of the Questionnaire.

The latest draft text of section 403 of the restatement by the ALI available to me (Council Draft No. 8, 7 Feb. 1986) confirms my doubts. While according to lit. 3 of the comment, Subsection (3) of the text (dealing with conflicting prescriptions) "is addressed primarily to the political departments of government", "it may also be relevant in judicial proceedings". Yet domestic courts are unqualified to strike a fair balance between their own and the other State's interests, as demonstrated by the opposing stands which US Courts have taken when claiming jurisdiction and when faced with foreign claims of jurisdiction. The suggested procedure raises moreover the question whether judging a foreign State's interest is compatible with *par in parem non habet imperium.*

Prop. 14: I accept that proposition as a working plan but many of its details will have to be studied further.

Prop. 15: Although I agree with that statement, the "narrow confines" should be spelled out.

Prop. 16: I agree.

Prop. 17: I agree.

Prop. 18: I agree.

Revised Draft Resolution

The Concept of jurisdiction

Article 1

1. Jurisdiction is to be understood as a State's authority to subject persons and things to its legal order.

2. The three aspects of jurisdiction are: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.

3. Jurisdiction to prescribe and jurisdiction to adjudicate are to be understood as a State's authority to lay down rules of general or limited application through the organs officially appointed to that end.

4. Jurisdiction to enforce is to be understood as a State's authority to compel execution of orders emanating from its legal order, either by direct, or by indirect means. Indirect means include non-judicial methods such as blacklisting (trade restrictions).

Scope of Jurisdiction

Article 2

1. In all of its three aspects, a State's jurisdiction is subject to international law.

2. Under international law, a State's jurisdiction is an expression of its sovereignty and must be exercised with due regard to the sovereignty of other States.

3. Under international law, a State is authorized to exercise jurisdiction within the bounds of its territory (including places assimilated to it by international law) subject to immunities and limitations as determined by international law ("territorial jurisdiction").

4. Under international law, no State is authorized to exercise jurisdiction inside another State's territory (including places assimilated to it by international law), unless international law exceptionally permits it to do so ("extraterritorial jurisdiction").

5. The exercise of territorial jurisdiction with unintended legal effect outside the acting State's territory is not also a form of extraterritorial exercise of jurisdiction.

6. The exercise of jurisdiction over persons outside the acting State's territory whose activities have an effect inside that territory ("effects doctrine") is not a form of territorial exercise of jurisdiction unless the effect be a serious one in relation to the peace, order, and good government of the State claiming jurisdiction.

Extraterritorial Exercise of Jurisdiction

Part One:

General Principles

Article 3

(a) Title to extraterritorial exercise of jurisdiction:

1. Title to extraterritorial exercise of jurisdiction if contested is to be shown by the State claiming a right to it under international law.

2. Jurisdiction extraterritorially to prescribe may be exercised on the strength of the principles of active and passive personality, protection, and universality as determined in Articles 5 - 8 hereafter.

3. Jurisdiction extraterritorially to adjudicate exists whenever there is jurisdiction extraterritorially to prescribe.

4. A State may not exercise jurisdiction to enforce in the territory of another State unless the other State expressly gives its consent thereto.

5. Acts in another State's territory which are auxiliary to adjudication or enforcement in the territory of the State exercising jurisdiction, and are performed through the diplomatic or consular services, or through any other official agency, are contrary to international law unless expressly permitted by the territorial State.

Article 4

(b) Principles of reasonableness and non-interference:

Extraterritorial jurisdiction, whatever the title under which it is claimed, shall be exercised with due regard to the principles of reasonableness and non-interference with the internal affairs of other States. Reasonableness consists, *inter alia*, in the balancing of interests of the States concerned.

Article 5

(c) The active personality principle:

1. Active personal jurisdiction is jurisdiction over persons in the territory of another State having a significant link or substantial connection with the exercising State.

2. Active personal jurisdiction extends directly to (a) natural persons who are nationals (or permanent residents ?) of the exercising State, and (b) branches of companies incorporated and registered in the territory of the exercising State ; and indirectly to effectively controlled subsidiaries of such companies. It does not extend directly to such subsidiaries, nor does it extend, either directly or indirectly, to parent companies having a subsidiary in the territory of the (would-be) exercising State.

3. No active personal jurisdiction derives from any link or connection not recognized in the preceding paragraph as a basis of such jurisdiction.

4. The extent of active personal jurisdiction where admitted may vary with the subject matter in which the exercise of it is sought (see Part Two).

5. Active personal jurisdiction does not extend to the legal status of property, rights, or interests.

Article 6

(d) The passive personality principle :

1. Passive personal jurisdiction is jurisdiction over persons (or corporations ?) in the territory of another State having no link (or connection ?) with the exercising State as contemplated in Article 5, paragraph 2, who harmed the legal rights or interests of a national of the exercising State.

2. The exercise of passive personal jurisdiction shall in all circumstances be kept within narrow confines. Its principal purpose should be to prevent a denial of justice.

Article 7

(e) The principle of protection :

1. Under the principle of protection, jurisdiction to prescribe may be exercised in order to protect certain interests of the exercising State.

2. Jurisdiction under the principle of protection extends to persons and corporations regardless of their nationality or the State in which they have been incorporated and registered, and whatever the place where they are located or committed their acts.

3. The interests meant in paragraph 1 include (a) the national security, (b) the national monopoly to issue currency and banknotes, (c) the national monopoly to manufacture national emblems, seals and stamps, (d) the reliability of official documents such as passports and visa permits, and (e) the proper use of the national flag.

Article 8

(f) The principle of universality :

1. Under the principle of universality, jurisdiction to prescribe may be

exercised in order to protect certain interests of the international community as a whole.

2. Jurisdiction under the principle of universality extends to persons regardless of their nationality and the place where they committed their acts.

3. To the exclusion of others, the interests meant in paragraph 1 are those covered by the following conventions: .....

Note: Here, the Nineteenth Commission will have to decide whether to adopt the entire list contained in Article I of the Statute for an International Criminal Court (I.L.A., 1984), or to make a selection from it, possibly adding conventions not included in Article 1 of the Statute, or even interests not yet covered by conventions. Caution is imperative.

In Santiago de Compostela, Professor *Henkin* suggested a non-exhaustive enumeration of principal delicts (*e.g.*, terrorism, hi-jacking, narcotics trade).

A third solution was Professor *Dinstein's*: no enumeration, but a reference to "offences as defined under conventional or customary international law". In the Rapporteur's opinion, the phrase may unduly widen the applicability of the principle.

4. Application of the principle of universality shall be strictly limited to criminal law and is conditional upon (a) the presence of the person concerned in the territory of the exercising State, (b) a preceding offer of extradition to the State of which the accused is a national or to the State of the *locus delicti* which remained unsuccessful.

5. Application of the principle is not dependent on another than the exercising State making the act violating an interest as defined in paragraph 3 an offence under its own legal order.

6. A State has no jurisdiction under the principle over persons who already have been prosecuted elsewhere for the same offence *(ne bis in idem).*

Article 9

(g) Conflicts of jurisdiction:

1. In the event of contradicting orders emanating from two States simultaneously exercising jurisdiction to prescribe or to adjudicate, the jurisdiction of that State shall prevail which shows the closest territorial link with the addressee of the two orders. Failing such link, the jurisdiction of the State most directly involved shall prevail.

2. On specific subjects of mutual concern, States are encouraged to conclude agreements establishing a priority of jurisdiction.

3. Below the level of agreements, States shall seize any other means at their disposal to avoid conflicts of jurisdiction, such as self-restraint and consultations prior to the actual exercise of jurisdiction the effect of which may be to generate a conflict of jurisdiction.

Part Two :

Specific Subjects

(reserved)

22 January 1990

Observations of the Members of the Nineteenth Commission on the Revised Draft Resolution

1. *Observations of Mr Y. Dinstein*

17th April, 1990

Dear Professor Bos,

.....

I read the Revised Draft Resolution with great care. Generally speaking, I agree with the text (subject to minor stylistic matters which will surely be emended in our meeting next year). I do, however, have several substantive comments about some of the clauses proposed:

1. In Article 1, I am in favour of defining separately jurisdiction to prescribe and jurisdiction to adjudicate (currently lumped together in paragraph 3).

2. I do not believe that Article 2 (6) copes adequately with the effects doctrine.

3. I do not concur with the notion that jurisdiction to adjudicate simply follows in the footsteps of jurisdiction to prescribe (Article 3 (3)). In my opinion, there are cases in which a State has no jurisdiction to prescribe but nevertheless has jurisdiction to adjudicate. The contiguous zone is an example.

4. In Article 5 (2) (active personality principle), I think that the reference should be to nationals and some other exceptional categories of persons who are in the service (military, diplomatic, consular, etc.) of the State. But permanent residents as such should be excluded.

5. In Article 6 (1) (passive personality principle), there should be a reference to corporations. I prefer the term "link" over "connection".

6. In Article 8 (the universality principle), I have not changed my mind since Santiago as to the proper drafting of paragraphs 3 (the third solution indicated in your note) and 4 (delete (b)).

2. *Observations of Mr K. Doehring*

24th July, 1990

Dear Confrère,

.....

I submit the following observations about your Revised Draft Resolution (January 22, 1990) which, by and large, is fully acceptable as the result of an excellent research.

To Art. 1 :

§ 3 should be restricted to " jurisdiction to prescribe ", so that the words " ...and jurisdiction to adjudicate are... " should be deleted. Jurisdiction to adjudicate cannot be understood to lay down rules, but to apply rules.

It, therefore, would be more clear to mention jurisdiction to adjudicate in a special § 4 which could have the following text : Jurisdiction to adjudicate is to be understood as a State's authority to decide about litigations or criminal matters through its own courts.

Consequently, § 4 should become § 5.

To Art. 2 :

§ 2 I propose to formulate : " ...a State's right to exercise jurisdiction results from its sovereignty... ".

§ 3 I propose to delete the words : " ...subject to immunities and limitations as determined by international law ".

The question whether or not immunity will be granted depends on the decision of the national court. This court, of course, has to respect international law but this respectation is required in all cases where international law is involved.

§ 4 The word " exceptionally " may be deleted because the international competence is a rule and not an exception.

§ 6 I did not exactly understand this statement. I think, one can accept the ratio of the effect doctrine, but to act under this doctrine is in every case an exceptional practice. It may be permitted to exercise jurisdiction in those cases, but this exercise cannot be qualified to be " territorial jurisdiction ".

To Art. 3 :

§ 1 should be read : " Title of extraterritorial jurisdiction can only be based on a right to it under international law ". The question regarding the burden of proof is an objective one and not a burden of coming forward with a claim.

§ 2 The wording: "...on the strength of..." should be deleted and replaced by "under".

§ 5 In my mind, orders and messages can be distinguished. The true meaning of an order is the expectancy of obedience, whereas a message solely informs. A message which announces legal consequences is an order. A message may even announce a benefit and does not always impose duties or sanctions.

To Art. 4:

The last phrase should have the text: "...the balancing of internationally recognized interests". To say only "interests" opens a too broad invocation.

To Art. 5:

§ 2 Delete "directly". Then full stop after (b) "...the exercising State". The distinction between directly and indirectly is a dangerous one and hinders to draw a clear line.

§ 5 After the end of this phrase ("...or interests") we should add "situated in foreign States", because the property may be situated in the territory of the exercising State being then not except from jurisdiction.

To Art. 6:

The last phrase should have the text: "The only purpose should be to prevent a denial of justice, *i.e.* to let unprotected the rights of nationals".

To Art. 7:

§ 1 One should add.: "...jurisdiction to prescribe and to adjudicate...". It is true that jurisdiction to prescribe comprises the jurisdiction to adjudicate (Art. 1 § 3), but more clearness helps to understand.

I, nevertheless, propose to speak about "vital" interests.

To Art. 8:

§ 4 The strict limitation of the principle of universality to criminal law is not in conformity with international law as it stands now. If none of the other principles applies but a situation occurs which requires actions of a State in order to protect the fundamental interests of the community of nations, every State is entitled to impose those measures on an individual or corporation which are necessary to prevent violations *erga omnes*. That may be done not only by punishment but also by administrative actions, *i.e.* by orders or by factual measures appropriate to stop internationally wrongful activities. To give a simple example: Why should a State be prevented from confiscating the property of terrorists having not its nationality and committing offences abroad? If punishment is allowed, administrative action cannot be forfidden *(a maiore ad minus)*.

§ 6 The rule of *ne bis in idem* looses its ratio when the prosecution of a foreign State does not correspond at least to a certain minimum standard regarding punishment. Moreover, the rule *ne bis in idem* does not form part of positive international law, so that its creation must be seen as a development *de lege ferenda.*

3. *Observations of Mr A. Philip*

7th August, 1990

Dear Professor Bos,

.....

I wish to make some comments on a particular aspect of the draft resolution having read it all with great interest. It is, of course, its relationship to private international law which particularly interests me.

There seems to be no doubt that the notion of jurisdiction to prescribe includes the right to legislate in civil and commercial matters.

It seems generally accepted to-day that rules of choice of law in each State are rules of national law and not of international law. They are, thus, expressions of the jurisdiction to prescribe of the State concerned.

They do, however, attempt to delimit the scope of application of the law of that State as well as that of foreign States.

To some extent they, therefore, compete with the rules of international law delimiting the jurisdiction to prescribe at the same time as being subject to those rules. The latter rules are not given much attention in the drafting of rules of choice of law although some authors, especially F.A. Mann, have devoted writings to the subject.

There seems no doubt that certain choice of law rules give extraterritorial effect, in the sense of exercising extraterritorial jurisdiction to prescribe, to the law of the issuing State as well as to that of foreign States.

An example : Under the law of some States the law of the domicile of the deceased applies to the administration and distribution of the deceased's estate whereever situated.

Is the extension of the prescribing State's or rules of a third State to assets in foreign States in accordance with any of the principles of jurisdiction in the proposed resolution ?

Can the mere fact that a State prescribes which foreign law to apply to facts which take place abroad be reconciled with any of those principles ?

I am raising these problems more out of caution and lack of close familiarity with the modern development of the notion of jurisdiction in public international law than anything else. Might it not be preferable to except from the scope of the proposed resolution the application of private international law and reserve the subject for later treatment which it might well deserve.

4. *Observations de M. Ch. Dominicé*

5 septembre 1990

Mon cher Confrère,

.....

Je vous communique quelques observations. Elles sont limitées à des questions de caractère général, car votre nouveau texte diffère assez peu de celui que vous nous aviez soumis à Saint-Jacques-de-Compostelle et qui avait permis à la Dix-neuvième Commission d'avoir de très intéressantes discussions. Il me paraît inutile de répéter ce qui a été dit à propos de chaque article du projet.

Je me propose d'évoquer deux aspects principaux de notre sujet, soit tout d'abord la question des notions et définitions (A), puis celle des principes méritant d'être retenus (B). Cela ne correspond pas exactement aux articulations de votre texte — les articles 1 et 2 d'une part, et les "*General principles*" regroupés dans les articles 3 à 9, constituant la première partie, d'autre part — mais cela n'en est pas trop éloigné.

A. — *Notions et définitions*

Il me paraît judicieux de proposer tout d'abord, comme vous le faites, quelques dispositions fixant les notions qui sont au cœur de la Résolution.

Cependant, à la réflexion, j'estime que les définitions doivent rester circonscrites au cadre assigné aux travaux de notre Commission, la compétence extraterritoriale.

C'est dire que j'hésite à penser que nous devions tenter de donner une définition de la compétence, ou des compétences, de l'Etat en général. C'est aller au-delà de la mission de la Dix-neuvième Commission et cela présente des difficultés.

Je préférerais que fût clairement défini uniquement ce qui, dans la Résolution, est entendu par compétence extraterritoriale.

Il y aurait lieu de préciser plus spécifiquement en quoi consistent la compétence de prescrire, la compétence de juger et la compétence d'exécution

de caractère « extraterritorial ». Les incertitudes de terminologie et les divergences dans les conceptions que l'on rencontre dans la doctrine, donnent à penser que ce serait faire œuvre utile de proposer une définition, ou des définitions, de ce que nous entendons.

Ainsi, par exemple, l'article 2, par. 4, du projet de Résolution énonce le principe de l'interdiction de l'exercice d'une compétence extraterritoriale, sauf règle permissive du droit international. Est-il certain que la référence à l' "*extraterritorial jurisdiction*" est suffisante pour définir la portée du principe et que cette notion est claire ?

En bref, il me paraît que la recherche des principes du droit international en notre matière doit aller de pair avec une tentative de clarification des notions utilisées. A cet égard, je crois que nous devons nous limiter à définir ce qui est « extraterritorial ».

B. — *Principes juridiques*

Je me trouve en plein accord avec vous pour affirmer qu'un Etat doit avoir un titre, un « chef de compétence », consacré par le droit international, pour disposer d'une compétence « extraterritoriale ».

La difficulté, nous le savons bien, est double.

D'une part, le problème ne se présente pas exactement de la même manière selon qu'il s'agit de la compétence de prescrire, de juger, ou d'exécuter.

D'autre part, des différences existent également, me semble-t-il, d'un domaine à l'autre : droit pénal, règles de concurrence, affaires fiscales, etc. Le *Restatement* américain ne manque pas d'être éclairant à cet égard.

Pour l'heure, le projet réserve à une étape ultérieure l'étude des "*specific subjects*" (Part two). Dans les principes généraux constituant la première partie, divers titres de compétence sont énoncés (articles 5 à 8) et c'est sur ce point que porte mon observation.

Les titres de compétence énoncés ici sont ceux qui ont été mis en lumière en matière pénale : personnalité active et personnalité passive désignent l'auteur et la victime d'une infraction pénale, alors que les principes de protection (intérêts vitaux de l'Etat) et d'universalité (crimes internationaux) sont eux aussi destinés à servir d'appui à des compétences en matière pénale.

Je ne pense pas que ces mêmes principes soient valables et utilisables en d'autres domaines, singulièrement en matière économique.

Dès lors, je me demande s'il est justifié d'ériger en « principes généraux » des chefs de compétence propres à un domaine particulier. Autrement dit, j'ai peine à me satisfaire d'une approche essentiellement pénaliste des problèmes de compétence extraterritoriale.

A vrai dire, pour y voir plus clair, il faudrait peut-être avoir une idée de

ce qui sera énoncé dans la deuxième partie. Cela permettra de cerner de plus près ce qui mérite d'être tenu pour un « principe général ».

En mettant un terme à ces brèves observations, je ne voudrais pas manquer de vous féliciter du travail considérable que vous avez accompli, particulièrement stimulant.

5. *Observations of Mr K. Zemanek*

6 September 1990

Dear Maarten,

.....

Let me begin with a general observation which is prompted by your accompanying letter. While I agree that a codification should not be *too* detailed, I have the impression that we went to the other extreme and are not detailed enough. There are too many undefined terms in the text, and that especially in areas which are controversial (I shall specify later when commenting on the articles). That appears to me unsatisfactory. Thus, while we may agree on the *principles* on which the text is based, I do not think that we are sufficiently agreed on their *formulation* in the text to face the Plenary in 1991.

Now to my more detailed remarks:

Article 2, para. 6

I am not sure whether I fully understand the text. To me, the exercise of jurisdiction over persons outside the acting State's territory is always "extraterritorial" jurisdiction, whatever the claim on which that jurisdiction is based. Even when the "effects doctrine" is invoked that does not transform "extraterritorial" jurisdiction into "territorial" jurisdiction as the text seems to imply. Moreover, the word "serious" which qualifies "effect" is one of the undefined terms to which I referred in my general observation.

Article 3, para. 4

In article 1, para. 4, you mention "blacklisting" as an indirect, non-judicial method of enforcement. It does not, however, reappear in any form in article 3. "Blacklisting" is used, *inter alia*, in cases where a foreign private party resists a primary claim of jurisdiction to enforce, which it considers illegal, such as opening its books for inspection by a foreign authority. The "blacklisting" itself, however, takes place *in the territory* of the State claiming jurisdiction, although it has effect on foreign territory. It is, so to say, a reverse example of the "effects doctrine". Thus, one would either have to

insert an appropriate text in article 3, para. 4, or in article 2, para. 6, or delete the reference in article 1, para. 4.

Article 3, para. 4, note

I am unable to comment on Judge Manner's wish to enter a line with regard to the European Economic Zone, as long as the constituent legal instrument of that Zone has not been finalized.

Article 3, para. 5 and note

I still think that the discussion in Santiago de Compostela, to which you refer in your note, had some merit. The dividing line, in my opinion, is the legal effect of the notification to a private party. If the notification is purely informative, f.i. of rights and/or duties, I see no reason why international law should not allow it, since it may be beneficial to the recipient. If, on the other hand, the notification is a condition for a legal act to take effect against the person who is notified, then I agree with the idea expressed in para. 5. One might probably express this by replacing the words "auxiliary to" in the first line of the para. by "requisite for".

Article 4

The uncertainty of how "reasonableness" and "balancing of interests of the States concerned" will work in practice, is a criticism already addressed to the US Restatement (§ 403). Even the extensive comment and the Reporter's notes do not really clarify the point. Domestic courts or agencies would need superhuman objectivity to balance the interests of the two States involved correctly. I fear that they would almost certainly put the interest of the forum State before that of the other. (The US point is argued by *Kenneth W. Dam,* Extraterritoriality and Conflicts of Jurisdiction, *Proceedings AJIL* 1983, 370. Critical views by *Karl M. Meessen,* Conflicts of Jurisdiction under the New Restatement, *Law and Contemporary Problems* 50 (1987), 66; *Adelheid Puttler,* Völkerrechtliche Grenzen von Export- und Reexportverboten, Baden-Baden 1989, 148; and the "Interim Report on Extra-territorial jurisdiction in Export Control Law" by the International Committee on the Legal Aspects of Extraterritorial Jurisdiction for the Queensland Conference of the ILA (1990), 12).

It seems, moreover, that the "balancing of interests" by national courts or agencies contravenes the Restatement's own § 443 Subsection (1) and § 451, because in doing so a domestic court or agency unavoidably "sits in judgment" on acts of a foreign government. Hence I do not believe that "reasonableness" and/or "balancing of interests" by national courts or agencies can solve conflicting claims to jurisdiction satisfactorily. That might only be expected of an international tribunal.

Article 5, para. 1

I assume that the terms "significant link" and "substantial connection"

mean something different, but since they are undefined I do not know what. Do they refer to para. 2 (a) and (b) respectively? If they do not, is it necessary to retain the "substantial connection" which is ambiguous and may thus give rise to conflicting claims?

Article 5, para. 2

(a) Whether permanent residents should be assimilated to nationals is a disputed question since decades and we shouldn't reopen it. Personally, I could live with both.

(b) I do not understand how "active personal jurisdiction" extends "indirectly" to "effectively controlled subsidiaries". It may "affect" them when the parent company sets a certain policy for or issues orders to its subsidiary in accordance with legislation applying to the parent company. But that is a factual relationship. In international law the home State of the parent company has no "active personal jurisdiction", whether directly or indirectly, over a subsidiary in a foreign country, which is incorporated there.

Article 6

As to your two questions:

Whether to add "corporations" is generally discussed in your note to article 1, para. 1. I suggest that the Commission should take a decision on terminology which should then be used throughout the Draft Resolution. It may be expedient to use the word "person" and explain its content at the beginning, as you did in your note.

The same applies to "connection", but I refer to my remarks concerning article 5, para. 1.

As to the text itself, it contains some of the undefined terms requiring a value judgment to which I referred in my general observation, like "harm", "interests", and "narrow confines". We should also clarify the relation between the "passive personality principle" and the "effects doctrine" (article 2, para. 6).

Article 7, para. 3

I suppose that the enumeration is non-exhaustive ("include"). But do we know of any other interest which international law protects, and if so, why don't we name it? Unless there are convincing arguments against it, I should rather prefer an exhaustive enumeration.

Article 8, para. 3

I agree with the suggestion in your letter that the choice between the options should be left to the Plenary. To make that choice possible, however, and at the same time avoid drafting in Plenary, we should prepare texts for the different options from which the Plenary could choose.

Article 9, para. 1

I have expressed doubts as to the usefulness of "reasonableness" in solving conflicts of jurisdiction (remarks to article 4). I now wonder what the relation between article 4 and article 9, para. 1 is. They seem to some extent contradictory. Personally, I should prefer the concept expressed in article 9, para. 1 over that of "reasonableness".

Article 9, paras. 2 or 3

Why don't we specifically mention recourse to international tribunals ?

Part II, note

I suggest that we include export control as one of the specific subjects.

.....

6. *Observations de M. J. Salmon*

Le 10 septembre 1990

Mon cher Collègue,

Je vous félicite de votre rapport du 22 mars qui me paraît maintenant synthétiser d'une manière vigoureuse les principales lignes de crêtes de notre matière.

Vous trouverez ci-dessous mes observations article par article. Elles se ressentiront peut-être de mon impossibilité d'assister à la session de Saint-Jacques-de-Compostelle et en conséquence de mon absence aux travaux de votre commission.

Article 1 § 3. — Ne devrait-il pas être subdivisé en deux paragraphes l'un concernant la compétence législative, l'autre la compétence juridictionnelle ? La fonction législative consiste à poser des normes mais aussi des décisions (générales ou individuelles) — ce qu'il faudrait préciser en tout état de cause.

La compétence juridictionnelle les applique aux cas particuliers où il y a litige.

Article 1 § 4. — Il faut supprimer la phrase "*indirect means... restrictions*", qui est un détail tout à fait incongru.

Article 2 § 4. — Je pense qu'il est difficile de dire que le droit international ne permet qu'exceptionnellement une juridiction extraterritoriale alors que tout notre rapport et la pratique prouvent le contraire. J'écrirais plutôt : "*Unless international law permits it to do so as hereinafter indicated in Article 3 to 9*".

Article 2 § 5. — Au point de vue de la rédaction le mot "*also*" me paraît surabondant. Ceci étant je ne suis pas sûr de pouvoir vous suivre quand au fond. L'exercice d'une compétence extraterritoriale est une question de fait et non d'intention me semble-t-il.

Si un législateur, un juge ou un fonctionnaire du pays A exerce sa compétence de manière à affecter le pays B, même s'il le fait sans intention, il a néanmoins exercé une compétence extraterritoriale qu'il faudra annuler, qui sera inopposable ou à laquelle il ne faudra pas donner d'effet. Le concept d'intention est à manier avec circonspection. V. ma contribution aux Mélanges en l'honneur de notre regretté collègue Michel Virally.

Article 2 § 6. — Je ne suis pas convaincu par la formulation de ce paragraphe. En effet, je pense que l'exercice de la compétence sur des personnes se trouvant en dehors du territoire de l'Etat mais dont les activités ont des effets sur le territoire est une compétence extraterritoriale que l'effet soit important ou non.

Votre intention n'était-elle pas de proposer une règle limitative qui aurait alors été mieux rendue en remplaçant les mots "*a form of territorial exercise of jurisdiction*" par le mot "*allowed*" ?

Article 3 § 4. — Je crois l'expression "*expressly gives*" trop forte et vous propose de la remplacer par les mots "*has given*". Ceci ajoute les cas d'accords coutumiers ou d'acquiescement tacite à la faveur de pratiques très fréquentes en la matière. Une pratique ne sera évidemment pas opposable à l'Etat qui a fait connaître son opposition générale de principe ou qui proteste au cas par cas qui viennent à sa connaissance.

Quoique la question reste discutée entre Etats, j'estime que l'Institut pourrait se prononcer sur la simple communication d'ordres, laquelle n'est pas une mesure coercitive.

La transmission d'ordres à des personnes à l'étranger par plis postaux ou recommandés est tout à fait fréquente et à mon avis ne heurte en rien la souveraineté de l'Etat sur lequel le pli est distribué puisque ceci n'implique en soi aucune mesure coercitive (qui peut s'attacher à la non-exécution de l'ordre) sur le territoire de cet Etat.

La formulation la plus nette serait de dire : « *La simple communication d'ordres ou commandements adressés à des personnes privées n'est pas une mesure de coercition* ».

Formule alternative de compromis : « *La simple communication d'ordres ou commandements adressés à des personnes privées ne devrait pas être considérée comme une mesure de coercition* ».

Je ne puis laisser passer sans réagir le paragraphe de votre commentaire concernant les activités militaires. Il est trop évident que les activités militaires sont des mesures exécutives qui sont prohibées par l'article 3 paragraphe 4.

Ce qui se passe, c'est qu'ainsi que l'a montré la Commission du droit international sur la base du remarquable rapport de notre confrère le professeur Roberto Ago, le consentement de l'Etat où se déroulent les activités ou la légitime défense, purge l'acte extraterritorial de son illicéité. Ce sont des conditions d'exonération de la responsabilité.

Article 3 § 5. — Les mots "*acts... which are auxiliary*" ne sont pas très clairs. S'ils couvrent aussi une communication d'ordres, j'estime que la rédaction est trop restrictive et vous renvoie au paragraphe additionnel que je vous ai proposé immédiatement ci-dessus.

On pourrait parler d' "*acts of enforcement which are auxiliary*".

Pour le reste de l'article votre rédaction me semble conforme à la pratique sauf que le mot "*expressly*" est dans certaines circonstances trop exigeant.

Par ailleurs, je me demande s'il ne faut pas distinguer deux types d'agents de l'Etat étranger. Les agents diplomatiques et consulaires et les autres. S'agissant de ces derniers (commission d'enquête *ad hoc* par exemple) j'estime que l'accord doit être reçu de manière expresse.

Par contre, s'agissant des agents diplomatiques et consulaires, ils accomplissent traditionnellement de nombreux actes administratifs ou juridictionnels à l'égard de leurs ressortissants sans qu'un consentement exprès ait été reçu car on ne peut assimiler la formalité générale de l'*exequatur* à un tel consentement. La Convention de Vienne de 1963 ne traite pas en détail des fonctions, les conventions consulaires sont rares, dès lors la matière est le plus souvent régie par la coutume et les usages. Le standard d'acceptation ici devrait donc être similaire à celui que j'ai exposé ci-dessus à propos de l'article 3 § 4. Le consentement ici peut résulter d'acquiescement tacite à des pratiques consulaires. Peut-être pourrait-on utiliser à leur propos les termes "*unless the territorial State has given its consent to them*".

Article 5 § 5. — Je ne puis accepter, pour ma part, le texte de l'article 5 § 5. Un Etat peut évidemment donner des ordres à ses ressortissants à propos de leurs biens à l'étranger, instaurer en infraction certains faits touchant l'usage de propriété, droits et intérêts de leurs ressortissants.

Les lois fiscales de la plupart des pays visent les revenus à l'étranger de leurs ressortissants. La loi pénale *peut* viser l'évasion de capitaux, les biens ayant échappé au contrôle des changes, le recel de biens à l'étranger, l'argent résultant du blanchiment de la drogue, etc... Pendant la guerre, le gouvernement belge a réquisitionné les navires sous pavillon belge à l'étranger, etc... *Cf.* aussi les mesures prises pour récupérer les biens que les chefs d'Etat déchus ont placés à l'étranger et considérés comme relevant du patrimoine national (aff. Duvalier, Marcos, etc...).

Tout autre chose est l'effet que les Etats tiers seront prêts à donner à de telles mesures. Ici joueront certainement l'ordre public de l'Etat du for et le degré de coopération que les Etats seront disposés à s'accorder.

Article 6 § 1. — Il y a peut-être moyen de raccourcir le texte en remplaçant les mots "*having no link... who*" par "*on the sole ground that they*" ou bien en récrivant la phrase jusqu'au bout : "*on the sole ground that legal rights or interests of a national of the exercising State have been harmed*".

Article 6 § 2. — Quant au fond, votre formule est très restrictive. Sans doute trop.

La Belgique faut-il le rappeler a introduit par une loi du 12 juillet 1984 *de manière générale* le principe de la compétence personnelle passive en droit belge (*Moniteur belge*, 31 août). L'article 10 du titre préliminaire du Code d'instruction criminelle se lit désormais comme suit :

« *Pourra être poursuivi en Belgique l'étranger qui aura commis hors du territoire du Royaume...*

5° *Un crime contre un ressortissant belge, si le fait est punissable en vertu de la législation du pays où il a été commis d'une peine dont le maximum dépasse cinq ans de privation de liberté* » (voir détails Chronique n° 1771, *R.B.D.I.* 1986, p. 482-483). Est-ce déraisonnable à une période où la criminalité a plus le sens de l'international que les Etats ?

Article 7 § 1 et article 8 § 1. — Pourquoi limitez-vous la définition de ces compétences à une "*jurisdiction to prescribe*". Elle s'applique évidemment aussi à la "*jurisdiction to adjudicate*". Vous n'avez pas introduit cette limitation aux articles 5 § 1 et 6 § 1. Je vous propose donc d'aligner la rédaction des articles 7 et 8 sur celle des articles 5 et 6.

Article 7 § 3. — La liste est close. Il serait sans doute justifié de prévoir un « notamment » avant l'énumération.

Article 8 § 3. — Aucune liste n'est souhaitable, car elle sera trop longue et immédiatement dépassée par le temps. Il nous faut une définition générale. Toute la question est de savoir si l'on entend couvrir seulement les crimes les plus graves (art. 19, projet C.D.I. sur la responsabilité) ou toutes les infractions internationales coutumières ou conventionnelles.

Dans cette dernière hypothèse qui me paraît plus proche de la pratique internationale je serais disposé à me rallier à la formule de notre confrère, le Professeur Dinstein.

Article 8 § 4. — Je suis partisan de supprimer le *(b)* en tout cas comme obligation. L'exception *non bis in idem* s'applique en Belgique à *tous les cas* de juridiction extraterritoriale sauf les crimes et délits commis en temps de guerre (article 13 du Code d'instruction criminelle). Je ne vois pas de raison de restreindre son application à la compétence universelle.

Article 9. — Je me demande si cet article n'a pas oublié de mentionner une hypothèse importante : celle du conflit entre une loi nationale et une obligation internationale.

Pour prendre un exemple incontestable, si une sanction du Conseil de Sécurité — répercutée par les législations nationales — ordonne un comportement aux nationaux (compétence personnelle active) alors que l'Etat sur le territoire duquel ce comportement doit être exécuté (compétence territoriale) s'y oppose, quelle que soit la difficulté — réelle — dans laquelle se trouve le particulier, il y a une hiérarchie évidente dans l'exemple donné au profit de la compétence personnelle. De manière inverse, l'ordre contraire au *jus cogens* ne doit pas être obéi.

7. *Observations of Mr L. Henkin*

12 September 1990

Mon cher collègue,

Congratulations on a very good revised draft resolution; you are correct in assuming that I subscribe to the principles that guided you.

I offer the following comments and suggestions, including my answers to your questions:

Title and scope of the resolution: The title of the draft resolution is "The Extraterritorial Jurisdiction of States". Most of the resolution does indeed address extraterritorial jurisdiction, but in fact the resolution addresses territorial jurisdiction as well, both in the introduction and in Article 9. We also deal with the "effects principle" which for many of us is an aspect (or extension) of territorial jurisdiction. I would also like us to indicate that the principle of reasonableness (which you include in your draft Article 4) may have some application to territorial jurisdiction as well.

If you agree, we can eliminate the word "extraterritorial" from the title, and add a new subheading "Exercise of Jurisdiction by the Territorial State". I elaborate this suggestion below, and suggest how a redraft might read.

Article 1

Para. 4. "To compel execution of orders emanating from its legal order", etc., is somewhat "heavy", and the difference you suggest between direct and indirect means is problematic. In the example you give, blacklisting seems no less "direct" than a fine or other penalty imposed by a court. Also, it should be made explicit that enforcement may be by judicial as well as non-judicial means.

I suggest the following revision:

4. Jurisdiction to enforce is to be understood as a State's authority, whether exercised by its police, its courts, or other organs of government, to induce compliance or to punish non-compliance with its laws.

Article 2

Para. 1. I suggest saying that "a State's *exercise* of jurisdiction is subject to international law".

Para 2. I do not see what we gain by invoking "sovereignty", a much abused term. The point would be made as well (or better) if you said "Under international law, a State exercising jurisdiction must do so with due regard to the proper interests of other States in the matter".

Paras. 3-6. For the reason indicated in my comments on the title and scope of the resolution, I suggest moving paragraphs 3 and 6 into a new Article (Article 2 *a*) ; moving paragraph 4 into your present Article 3, and eliminating paragraph 5.

Instead, I would place as Article 2, para. 3, what is in your Article 4, the principle of reasonableness, removing the word "Extraterritorial".

Whether or not you move Paragraph 6 as I suggest, I urge revising its substance.

The "effects" principle remains controversial but is much less so than it used to be. Increasingly, more States are exercising jurisdiction on the basis not only of overt "physical" effects but also of economic and environmental effects. In my view the suggestion that a State can exercise jurisdiction on the basis of effect in its territory only where the effect is "a serious one in relation to the peace, order, and good governments", if those terms are construed narrowly, does not reflect the current state of international law. I suggest revision as indicated below in proposed Article 2 *a*.

The purpose of this suggested revision, I stress, is not only to recognize the effects principle more broadly but to indicate that the principle of reasonableness protects against abuse of the effects principle.

Indeed, the principle of reasonableness, I believe, should apply even to the exercise of jurisdiction by a State to persons or things wholly inside its territory. For example, it is generally agreed that under the principle of territoriality a State may exercise jurisdiction over persons on board vessels in its port, as by applying the port State's laws against homicide, or its police and fire regulations. But it would presumably be unreasonable for the port State to regulate the wages or labor relations of seamen on board foreign vessels in port.

Similarly the exercise of jurisdiction by the territorial State to adjudicate or to enforce should not be unreasonable. For example, it might be unreasonable for a State to exercise jurisdiction to adjudicate over a person who is only passing through its territory, or to adjudicate without notice and hearing, or for an enforcing State to impose penalties that are not proportional or are otherwise inappropriate to the violation.

If you accept my suggestions, Articles 2 and 2 *a* would read as follows:

Article 2

1. In all of its three aspects, a State's exercise of jurisdiction is subject to international law.

2. Under international law, a State exercising jurisdiction must do so with due regard to the proper interests of other States in the matter.

3. Jurisdiction, whatever the title under which it is claimed, shall be exercised with due regard to the principles of reasonableness and non-interference with the internal affairs of other States. Reasonableness consists, *inter alia*, in the balancing of interests of the States concerned.

Article 2 a

Exercise of Jurisdiction by the Territorial State.

1. Under international law, a State is authorized to exercise jurisdiction within the bounds of its territory (including places assimilated to it by international law) subject to immunities and limitations as determined by international law (" territorial jurisdiction ").

2. A State may exercise jurisdiction in respect of activities emanating from outside its territory which have a significant effect inside its territory, subject to the interests of other States (notably the State in which the activity was initiated), where such exercise of jurisdiction is not unreasonable (see Article 2 (3)).

Article 3

Your present paragraph 1 addresses a neglected subject, *i.e.*, who can challenge an unreasonable exercise of jurisdiction by another State. The answer you propose is ambiguous. Perhaps we should say that any State whose interests are significantly affected may challenge an exercise of jurisdiction on the ground that it is unreasonable. Usually that will be the territorial State, sometimes the State of nationality; in some cases, for example if the exercise of jurisdiction violates a multilateral human rights treaty, it may be challenged by any States party to the treaty; if the exercise of jurisdiction violates an obligation *erga omnes*, it may be challenged by any State. Perhaps this issue should be addressed at the end of your Article 3 (rather than at the beginning).

I suggest beginning Article 3 with what is in your present Article 2, para. 4, but suggest small modifications in its text. To exercise jurisdiction " inside another state " is ambiguous. If it means " by acts performed in the territory of another State ", the statement is unexceptionable. See the *Lotus* case. It is quite another matter to suggest that an exercise of jurisdiction in regard to persons or things located in another State is *prima facie* prohibited by international law, with the burden on the State exercising jurisdiction to

show that international law permits an "exception". The difference may be largely conceptual, but may have practical consequences.

Perhaps we can avoid the conceptual controversy if the text read as follows:

1. No State may exercise jurisdiction by official actions taken inside the territory of another State.

2. A State may exercise jurisdiction in regard to persons or things outside its territory on the basis of particular links (see Article 5-7), or in respect of activities which international law recognizes as being in the interest of all states to regulate ("universal jurisdiction", Article 8).

Para. 3. It seems to me that a State may have jurisdiction to prescribe extraterritorially but may not have jurisdiction to adjudicate. For example, a State may prescribe for its national abroad, but it may not be entitled to adjudicate that person's interests unless the person is present in its territory and has been given notice. See Restatement Sec. 421, Comment *a*.

I would put the point negatively:

3. Jurisdiction to adjudicate extraterritorially does not exist where there is no jurisdiction to prescribe extraterritorially.

It is still necessary, however, to state the circumstances which justify an exercise of jurisdiction to adjudicate or enforce extraterritorially. They are not the same circumstances that would justify exercise of jurisdiction to prescribe. See Restatement Sec. 421.

Para. 5. As worded, this paragraph would forbid sending notice of judicial or administrative notices or orders "auxiliary to adjudication or enforcement" through diplomatic/consular means, but permits doing so through the international postal service. Is that correct?

Article 5

Para. 2. I would be disposed to include permanent residents.

Is "incorporated and registered" what we mean? How about registered but not incorporated? Or companies having their headquarters or a major place of business in the State?

Para. 3. Is this paragraph necessary? By itself paragraph 2 may imply this, but do we wish clearly to preclude jurisdiction on the basis of other kinds of links — *e.g.*, service in a State's armed forces; or jurisdiction over companies wholly-owned by its nationals?

Para. 5. Would this paragraph preclude the application of a State's inheritance law to property in another State that is devised (or inherited) by a national of the prescribing State? Does the phrase "rights and interests" mean rights and interests *in property located* in another State?

Article 6

Paragraph 2 urges that passive personal jurisdiction be kept within narrow confines, but seems to accept that such jurisdiction is *prima facie* acceptable. Is that not contrary to traditional expressions of the law? Should we be more negative, while suggesting a possible exception for terrorism? See Restatement Sec. 402, Comment *g*.

Article 7

Is the list in paragraph 3 intended to be exhaustive?

Article 8

Para. 1. It may be suggested that sometimes — perhaps in regard to terrorism — we accept universal jurisdiction not really to protect interests "of the community as a whole" but because no State is likely to object or to have any acceptable reason for objecting.

Para. 2. I would add "and regardless of the nationality of the victim".

Para. 4. This seems too strong. Why should universality be "strictly limited to criminal law"? A State may wish to add civil damages to criminal enforcement, *e.g.* against a pirate. Indeed, it may be desirable to accept universal civil jurisdiction even where universal criminal jurisdiction is not yet acceptable. Compare Restatement Sec. 404 and Comment *b*.

In general, I see no reason to distinguish civil from criminal. At most we might refrain from addressing the issue, but we should not foreclose it. If we address it, the exercise of extraterritorial jurisdiction in civil matters should be considered in relation to all the grounds of jurisdiction (*i.e.*, active and passive personality, protective principle).

Para. 4 refers to the "application" of the principle of universality. I take it that in subparagraph *(a)* you are suggesting that the principle of universality applies only to jurisdiction to prescribe, but that jurisdiction to adjudicate or enforce requires territoriality or perhaps some other link. I agree, but the point might be sharpened.

Para. 6. Why should *ne bis in idem* not apply as well where a State exercises jurisdiction on a basis other than universality?

Article 9

In Paragraph 1 the first sentence seems to contemplate two States, both of which have territorial links. It is not clear what determines closeness and degrees of closeness of territorial links.

In the second sentence the State "most directly involved" is ambiguous. You might consider saying instead "the State with the stronger links or interests". Compare Restatement Sec. 403 (3) and Comments *d* and *e*.

I hope these suggestions are helpful. Again, my congratulations on a very good draft for a very difficult subject.

Final Report

Introduction

After a Preliminary Report dated 13 April 1985 and a Provisional Report dated November 1986, the Rapporteur now is able to submit his Final Report on the subject of "The Extraterritorial Jurisdiction of States".

In the interval between the Provisional and this Final Report, the Nineteenth Commission has been active in various respects. First Messrs *Dominicé, Henkin, Reese, Salmon,* and *Zemanek* offered observations on the 18 Propositions contained in the Rapporteur's Provisional Report. The Propositions were intended to be a first endeavour towards a Draft Resolution. The observations are to be found behind the text of the Provisional Report.

Meanwhile, the Rapporteur himself had become convinced that a Second Provisional Report should be prepared following the Nineteenth Commission's deliberations during the *Institut*'s Cairo Session (1987) which the Rapporteur unfortunately was unable to attend. This Second Provisional Report, finished on 7 October 1988 and duly circulated, provided the Commission's membership with a systematic survey of further materials relating to the two main aspects of extraterritoriality, *viz.*, its "concept" and its "principles". As Annex 1 to this Second Provisional Report, a number of sections from The American Law Institute's Third Restatement of the Law (1986) were included in replacement of those taken from the Second Restatement (1962) and quoted in Annex 1 to the Rapporteur's Preliminary Report. Due to its considerable size — 88 pages — it was found impossible to print this Second Provisional Report together with the two previous Reports, except for its Annex 1, Section 403, and the text of Article 1 of the International Law Association's Draft Statute for an International Criminal Court (1984), which now appear at the end of this Final Report.

With a view to the *Institut*'s Session at Santiago de Compostela (1989), the Rapporteur then put together a First Draft Resolution. In the course of two Commission meetings at Santiago, the Draft was thoroughly discussed. A revised Draft Resolution was subsequently submitted to the Commission's Members, and a meeting was planned for all the membership in February 1990 at Heidelberg. This meeting did not materialize, however, and as a result comments on the Revised Draft had to be made by correspondence. The Rapporteur gratefully acknowledges replies received from Messrs *Dinstein, Doehring, Dominicé, Henkin, Philip, Salmon, Seyersted* *, and *Zemanek*. Taking them into account, the Rapporteur amended the Revised Draft wherever he could without losing sight of its main features.

This Revised Draft was then closely examined and reworded in the course of the Basel Session (1991) of the *Institut* and finalized by the Rapporteur after some additional correspondence. As a result, he is now in a position to submit a Final Draft which by and large may be considered to have the support of the majority of the Nineteenth Commission.

1. *Draft Resolution : general observations*

Before setting out the text of the Draft Resolution, the Rapporteur should like to make the following observations :

(1) In the Commission's opinion, the best approach to a subject as complex and wide-ranging as the extraterritorial jurisdiction of States is to distinguish, if possible, between general principles, on the one hand, and the rules applicable to specific subjects, on the other hand. In case such general principles appear to be discernible, they should be set forth systematically, followed at a later stage by the identification of exceptions to be made in particular fields, if any. The latter activity may in the end result in a reappraisal of the general principles formulated before, to the effect that any such formulation is of a provisional character.

With regard to the subject entrusted to it, the Nineteenth Commission believed this approach to be feasible. Hence the expression " General Principles " in the title of Part III of the

* Drafting suggestions written in the margin of the Rapporteur's text (not reproduced here).

Draft Resolution to follow. It is for the *Institut* to decide whether a study devoted to "Specific Subjects" will subsequently have to be undertaken.

(2) The general principles stated in Articles 3 to 10 are principles of *public* international law. They are meant to be overall principles, embodying what public international law has to say on the subject of extraterritorial jurisdiction. Not every imaginable item of extraterritorial jurisdiction is covered by them. In places, problems of extraterritorial jurisdiction may be left to other disciplines, particularly to *private* international law. See Article 3, *Note* to paragraphs 2 and 3, and Article 10.

In addition, almost none of the general principles stated appear to be of a *ius cogens* character. They merely reflect behaviour which any State may claim from any other State unless otherwise agreed. The only sure exception to this may be found in Article 9, paragraph 2, of the Draft, whereas the *Note* to Article 3, paragraph 1, raises a possible further case in point.

(3) A codification of general principles should never be too detailed, whatever its subject. Much may be left to the courts. Nor is there any point in defining the precise meaning of terms like "activities" (Article 2, paragraph 4), "auxiliary" (Article 3, paragraph 5), "non-interference" (Article 4), "nationals" (Article 5, paragraph 2), "property, rights, and interests" (Article 10), etc. Some of them may be interpreted differently from one country to another, others imply value-judgments which may even vary with the personal views of the interpreting authority.

(4) The Nineteenth Commission took care not to overstep its mandate and enter the field reserved to the Third Commission (The Limitation by International Law of the Competence of National Courts). Much of the architecture of the Draft Resolution was so determined. See also Article 2, *Note* to paragraph 4.

(5) Owing to the fact that first of all the Plenary Meeting of the *Institut* should now inform the Nineteenth Commission of its opinion as to the assumptions underlying its work performed sofar, no preamble was attached to the text of the Draft Resolution.

2. *Draft Resolution*

The Extraterritorial Jurisdiction of States

I. *The Concept of Jurisdiction*

Article 1

For the purpose of the present Resolution :

1. Jurisdiction is to be understood as a State's authority to subject persons (natural or juridical) and things to its legal order.

2. The three aspects of jurisdiction are : jurisdiction to prescribe, juridiction to adjudicate, and jurisdiction to enforce.

3. Jurisdiction to prescribe is to be understood as a State's authority to lay down legal norms of general or limited application.

4. Jurisdiction to adjudicate is to be understood as a State's authority to administer justice through courts or tribunals.

5. Jurisdiction to enforce is to be understood as a State's authority to effect compliance with orders emanating from its legal order, whether by police action, or by other official sanction.

II. *Scope of Jurisdiction*

Article 2

1. In all of its three aspects, a State's jurisdiction is subject to international law.

2. Under international law, a State's jurisdiction is an expression of its sovereignty, but must be exercised with due regard to the sovereignty of other States.

3. Under international law, a State is authorized to exercise jurisdiction within the bounds of its territory (including places assimilated to it by international law) subject to limitations as determined by international law (" territorial jurisdiction ").

4. Under international law, the territorial jurisdiction of a State extends to activities performed outside the State's territory

("effects doctrine"), provided the effect is a significant one relating to the State's public order or interest.

5. Under international law, a State is authorized to exercise jurisdiction in respect of persons or things located inside another State's territory (including places assimilated to it by international law) only as provided in Articles 3-8 below ("extraterritorial jurisdiction").

III. *Exercise of Extraterritorial Jurisdiction*

General Principles

Article 3

Title to exercise of extraterritorial jurisdiction

1. A State asserting authority to exercise extraterritorial jurisdiction is under an obligation to justify it under international law.

2. Jurisdiction extraterritorially to prescribe may be exercised on the strengh of the principles of active and passive personality, protection, and universality as determined in Articles 5-8 hereafter.

3. Jurisdiction extraterritorially to adjudicate exists whenever there is jurisdiction extraterritorially to prescribe, provided any requirements international law may impose upon the exercise of jurisdiction extraterritorially to adjudicate are being met.

4. A State may not exercise jurisdiction to enforce in the territory of another State without the other State's express consent thereto.

5. Acts in another State's territory which are auxiliary to adjudication or enforcement in the territory of the State exercising jurisdiction, and are performed through the diplomatic or consular services, or through any other official agency, are contrary to international law unless expressly permitted by the territorial State.

Article 4

Reasonableness and non-interference

1. Extraterritorial jurisdiction, whatever the specific title under which it is claimed, shall be exercised reasonably, while balancing the interests of the States concerned.

2. Nothing in this Resolution is to be construed as an entitlement for one State to interfere with the internal affairs of other States.

Article 5

The active personality principle

1. Active personal jurisdiction is jurisdiction over persons having a significant link or substantial connection with the State asserting authority and who are in the territory of another State.

2. Active personal jurisdiction extends to *(a)* natural persons who are nationals (or permanent residents ?) of the State asserting authority, and *(b)* branches of companies incorporated and registered in the territory of that State and, through such companies, to effectively controlled subsidiaries.

Active personal jurisdiction does not extend to parent companies having a subsidiary in the territory of the State asserting authority.

3. No active personal jurisdiction derives from any link or connection not recognized in the preceding paragraph as a basis of such jurisdiction.

4. The extent of active personal jurisdiction where admitted may vary with the subject matter in which the exercise of it is sought, such as anti-trust legislation.

Article 6

The passive personality principle

1. Passive personal jurisdiction is jurisdiction over persons who are in the territory of another State than the State asserting authority, but have no link or connection as contemplated in Article 5

with the latter, and who harmed the legal rights or interests of a national of the State asserting authority.

2. The exercise of passive personal jurisdiction shall in all circumstances be kept within narrow confines. No passive personal jurisdiction shall be exercised unless the administration of justice would otherwise be obstructed.

Article 7

The principle of protection

1. Under the principle of protection, jurisdiction may be exercised in order to protect certain interests of the State asserting authority.

2. Jurisdiction under the principle of protection extends to persons and corporations regardless of their nationality or the State in which they have been incorporated and registered, and whatever the place where they are located or committed their acts.

3. The interests referred to in paragraph 1 include *(a)* the national security, *(b)* the national monopoly to issue currency and banknotes, *(c)* the non-abuse of national emblems, seals and stamps, *(d)* the issuing and reliability of official documents such as passports and visa permits, and *(e)* the non-abuse of the national flag.

Article 8

The principle of universality

1. Under the principle of universality, jurisdiction may be exercised in order to protect certain interests of the international community as a whole.

2. Jurisdiction under the principle of universality extends to persons regardless of their nationality and the place where they committed their acts.

3. The principle of universality shall apply to offences as defined under conventional and customary international law, such as piracy, the hi-jacking of aircraft, terrorism, and the trade of narcotics.

4. Jurisdiction under the previous paragraph may be exercised irrespective of signature or ratification of any international convention by the State of the nationality of the accused.

Article 9

Conflicts of jurisdiction

1. In the event of contradicting orders emanating from two States simultaneously exercising jurisdiction to prescribe or to adjudicate, the jurisdiction of that State shall prevail which shows the closest territorial link with the adressee of the two orders. Failing such link, the jurisdiction of the State most directly involved shall prevail.

2. Contrary to the rule expressed in paragraph 1, the jurisdiction of a State acting upon a binding decision of the Security Council of the United Nations always prevails over the jurisdiction of a State not so acting.

3. On specific subjects of mutual concern, States are encouraged to conclude agreements establishing a priority of jurisdiction.

4. Below the level of agreements, States shall seek to avoid conflicts of jurisdiction by any other means at their disposal, such as self-restraint and consultations prior to the actual exercise of jurisdiction the effect of which may be to generate a conflict of jurisdiction.

Article 10

The legal status of property, rights, and interests

Unless otherwise provided by international law, the effect of the exercise of extraterritorial jurisdiction on the legal status of property, rights, and interests in the territory of another State is determined by private international law.

3. *Notes to Articles*

Article 1, para. 5

The term "effect" serves to underline the difference between

enforcement and adjudication, concepts denoting different stages in the implementation of legal norms.

Article 2, para. 4

The "effect" may be physical as well as economic or environmental.

Since under the effects doctrine the jurisdiction exercised is territorial in cases fitting the above description, the elaboration of possible further criteria to be satisfied should be left to the Third Commission.

Article 2, para. 5

However frequently it may be exercised in practice, extraterritorial jurisdiction, as compared to its territorial counterpart, is, and must remain, exceptional in a world of sovereign States. The root of the exceptional character of extraterritorial jurisdiction is in the fundamentally territorial nature of State jurisdiction. The principle was forcefully put by Lord Westbury in *Attorney General* v. *Campbell* (1872): "For it would be wholly incompatible with the quality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate (...) things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations, that each could legislate for all (...). The absurd results of such a state of things need not be dwelt on" (quoted from 27 *International Law Reports*, p. 106). In spite of mitigations in later years, the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (A.C. 670) as late as 1984 still had it that "All jurisdiction is properly territorial and *extra territorium jus dicenti impune non paretur*" (quoted from 74 I.L.R., p. 482).

The exercise of jurisdiction with unintended legal effect outside the acting State's territory is not a form of exercise of extraterritorial jurisdiction. Denial of effect in State A, for instance, to a bankruptcy pronounced in State B, either by the legislator or by a court in State A, is a form of exercise of territorial juris-

diction. Occasionally, the denial may have unintended financial repercussions in State B. Nevertheless, the denial lacks an extra-territorial dimension.

For precedents, see Italian Court of Cassation, judgment of 5 October 1959 (*Società Ornati Case*), 28 I.L.R., p. 39 at p. 45 ; and Netherlands Supreme Court, judgment of 17 October 1969 (*Attorney-General of the United States* v. *N.V. Bank voor Handel en Scheepvaart*), 74 I.L.R., p. 150 (the relevant passage, not reported here, appears in the Dutch text only).

Article 3, para. 1

The rule expressed here applies to the exercise of extra-territorial jurisdiction in all of its three aspects (Article 1, para. 2) and is an immediate result of the exceptional character of extra-territorial jurisdiction (Article 2, para. 5).

No State is obliged to prevent other States from exercising jurisdiction in its territory. Whenever a State chooses to do so, it may admit the exercise of extraterritorial jurisdiction. But when it comes to contestation, the other State must be able to justify its behaviour either in virtue of the four principles in paragraph 2, or by showing express consent as stated in paragraphs 4 and 5.

A certain amount of "bilateralism" may result from the system thus outlined, *i.e.*, State A may accept from State B what it declines to accept from State C. In criminal matters, for instance, neighbouring countries may admit each other's police force pursuing criminals, but not those of other States.

One question still open is whether this "bilateralism" is not counter-balanced by a right of *all* States to challenge the exercise of extraterritorial jurisdiction in cases in which the exercise violates an obligation *erga omnes* ; or by a right of States-parties to a multilateral convention to do so when the exercise amounts to a violation of that convention ; or by a right of an individual third State whose national is a victim of a particular form of exercise. The question is important, relating as it does to the problem of *ius cogens*.

Article 3, paras. 2 and 3

The reach of a State's jurisdiction extraterritorially to prescribe or adjudicate is a problem carefully to be distinguished from the factual extension or curtailment through the device of "party-autonomy" (choice of law and/or of forum) of the applicability of that State's laws and of the competence of its courts.

The respective States often leave parties free to contract as they wish, but occasionally oppose their dealings. See, *e.g.*, the two cases decided by the United States District Court, Southern District of New York, on 27 March 1962 (*Pavlou* v. *Ocean Traders Marine Corp.* et Al.), 33 I.L.R., p. 155, and on 16 December 1961 (*Voyiatzis* v. *National Shipping and Trading Corp.* et Al.), 32 I.L.R., p. 103. In the former case, the Court set aside a contractual choice of Greek law, in the latter it not only rejected a choice of law clause, but also the contractual conferment of exclusive jurisdiction on Greek courts. In both cases, the Jones Act 1915 was considered applicable to labour disputes concerning foreign seamen aboard foreign ships: in *Pavlou*, its "specific social objectives" were recalled (at p. 156), in *Voyiatzis* its "clearly expressed policy" (at. p. 107).

Article 3, para. 3

The second half of the sentence holds an implicit reference to the Third Commission.

Article 3, para. 4

Enforcement in another State's territory is an inroad into the other State's exclusive jurisdiction of such magnitude that express consent thereto is elementary. The requirement of express consent, apart from being proportional to the seriousness of the intervention, also provides the territorial State with a simple and decisive defence against unauthorized encroachments.

It is realized, meanwhile, that a State may try to enforce its laws abroad under cover of correspondence, but the privacy of correspondence stands in the way of all effective counter-measures. Thus, the entire subject of correspondence escapes regulation. As a result, there is no room for any distinction in law made between

admissible and non-admissible messages or communications conveyed by correspondence, supposing such a distinction to be practicable at all. This is not to say, however, that the territorial State should suffer any effort at extraterritorial enforcement through the medium of correspondence when discovered. The territorial State then has the discretion hinted at in the *Note* to paragraph 1 above.

Indirect means of enforcement such as "blacklisting", which by definition are beyond the territorial State's reach, are a problem of some complexity. Under the rule stated in paragraph 4, they should in principle be prohibited, but a reservation should probably be entered to the effect that in some fields and in certain circumstances they are legitimate. It is proposed to deal with "blacklisting" and with trade restrictions and export controls generally at a later stage.

The prohibition of enforcement in the territory of another State has no bearing on the exercise of the legitimate right of selfdefence, which remains unimpaired.

Article 4, para. 1

An interesting attempt to define what is "reasonable" is to be found in Section 403 of the Restatement (Third) of the American Law Institute (see Annex I).

"Interests" is a term of art connoting "legal interests", *i.e.*, interests protected, or worthy of protection, by law. See also Article 6, paragraph 1 : "legal rights or interests".

A commendable example of the balancing of interests is to be found in the decision of 24 February 1987 given by the United States Supreme Court in *Asahi Metal Industry Co., Ltd.* v. *Superior Court of California, Solano County, etc.* (U.S. Supreme Court Reports, 94 L. Ed. 2nd, 92). Pessimism as to the ability of national courts fairly to assess the interests of foreign States is out of place.

Article 5, para. 1

The surest form of a "significant link" is nationality (see paragraph 2). Are there other forms of a significant link ? In Question 7 of the Questionnaire, *litt.* b, permanent residents were proposed as

possible candidates for the exercise of active personal jurisdiction by the State of their residence (see paragraph 2). Whether they really are was left undecided by the Rapporteur in his Proposition 14 (Provisional Report). In the United States, a tendency is afoot over the last decades to go even further and to extend active personal jurisdiction to non-resident aliens having a "substantial connection" with the United States. The coming into being of the doctrine was ably set forth by Justice O'Connor in an opinion in the *Asahi Case* referred to in the *Note* to Article 4 (*l.c.*, pp. 102-107). From a European, and generally non-American, perspective, one of the more doubtful side-effects of the doctrine of a substantial connection is to enhance chances of discovery proceedings.

Article 5, para. 2

Voices were raised in the Nineteenth Commission to include permanent residents. The idea was also opposed in favour of the inclusion, instead, of aliens in the military, diplomatic, or consular service of the State.

Article 6, para. 2

"Within narrow confines": the principle is complied with in a recent Belgian statute of 12 July 1984 (*Moniteur belge*, 31 August 1984) amending Article 10 of the Belgian Code of Criminal Procedure. Under the provision as amended, « pourra être poursuivi en Belgique l'étranger qui aura commis hors du territoire du Royaume (...) 5° Un crime contre un ressortissant belge, si le fait est punissable en vertu de la législation du pays où il a été commis d'une peine dont le maximum dépasse cinq ans de privation de liberté ».

Article 7, para. 3

The interests enumerated are formerly so-called "vital interests", a term which lost favour in this century and for this reason was avoided in paragraph 1.

The habitual question on enumerations is whether they are exhaustive or not. In the present paragraph, the term "include" holds a suggestion of non-exhaustiveness. It was, indeed, realized

that in time interests not comprised in the enumeration may prove to deserve inclusion as well. On the other hand, a check should be placed on attempts arbitrarily to expand the list by adding interests which are no more "vital" in the perspective of a modern international law of co-operation.

A compromise between the two points of view was found in not inserting the term "in particular" (« *notamment* ») after "include", which might have encouraged States unduly to widen the sphere of operation of the principle.

Article 8, para. 3

The Commission had a choice, here, between various solutions. One was to adopt, *e.g.*, the entire list contained in Article 1 of the Statute for an International Criminal Court (I.L.A., Conference Report 1984, see Annex II), or to make a selection from it, possibly adding conventions not included in it, or even interests not yet covered by conventions.

Another solution was to insert a non-exhaustive enumeration of principal delicts. A similar approach was followed by the International Law Commission when dealing with international crimes committed by States : see Article 19, para. 3, of the Draft Articles on State Responsibility (*I.L.C. Yearbook*, 1980, Vol. II (Part Two), also in Roberto Ago, *Scritti sulla responsabilità internazionale degli Stati*, II, 2 (Camerino, 1986), pp. 1411-1412).

A third solution was a reference to "offences as defined under conventional and customary international law".

The Commission finally opted for a combination of the second and third solutions.

In the view of some members of the Nineteenth Commission, claims for damages caused by delicts as defined in this paragraph should also be admitted under the principle. Another suggestion was to find ways and means to confiscate the proceeds obtained through such delicts.

States must remain free further to restrict the application of the principle by such additional requirements as a preceding offer of extradition. It was not found feasible, however, to attribute to the latter the character of an obligation under international law.

Article 8, para. 4

Some Commission Members suggested that, in the absence of a rule of customary international law binding it, the State asserting authority under a particular convention should itself be a party to it.

Article 9, para. 1

This paragraph relates to Article 4 as a *lex specialis* to a *lex generalis.*

Article 9, para. 2

On 6 August 1990, the Security Council adopted Resolution 661 (1990) ordering United Nations Members to exercise a considerable measure of extraterritorial jurisdiction in their relations with Iraq. The decision was taken under Article 41 of the United Nations Charter following Iraq's invasion of Kuwait on 2 August 1990.

With a view to the binding character of the decision (Article 25 of the Charter), the rule in paragraph 2 is self-evident. Owing to the paramount authority of the United Nations, it also is in the nature of *ius cogens.*

The words "not so acting" first of all allude to the Member State against which the Security Council's decision is directed. But the priority in paragraph 2 also applies among the other Member States, some of which, indeed, may fail to act in accordance with the decision.

Article 10

For an example, one may think of the question of the extra-territorial effect of nationalization. See J.H.W. Verzijl, *International Law in Historical Perspective,* Vol. I (Leyden, 1968), p. 195 : "On the assumption, however, that the nationalizing State intended to comprise in its nationalization assets or branches (of the nationalized enterprise - B.) being outside its jurisdiction, how is then the legal position and by which law is it governed ? The answer must again be that this is primarily a question of public international law, and only secondarily a problem falling under the municipal rules on the conflict of laws ".

Annex I

The American Law Institute
Restatement of the Law (Third)

Foreign Relations Law of the United States
(May 14, 1986)

§ 403. *Limitations on Jurisdiction to Prescribe*

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Annex II

International Law Association
Statute for an International Criminal Court (1984)

Article 1

Purpose of the Court

There is hereby established an International Criminal Court to try natural persons accused of offences generally recognized under international law. For the purposes of the statute crimes generally recognized under international law are the following offences as defined in the corresponding conventions, provided that they have come into force:

(a) Genocide in the Convention on the Prevention and Punishment of the Crime of Genocide of 9th December 1948 (Art. II, III, IV); UNTS (United Nations Treaty Series), Vol. 78, p. 277;

(b) Piracy on the High Seas in the Convention on the High Seas of 29th April 1958 (Art. 15, 16, 17); UNTS Vol. 450, p. 11, 169;

(c) Offences and certain other acts committed on board aircraft in the Convention on Offences and certain other Acts committed on board Aircraft of 14th September 1963 (Art. 1); UNTS Vol. 704, p. 219;

(d) Unlawful Seizure of Aircraft in the Convention for the Suppression of Unlawful Seizure of Aircraft of 16th December 1970 (Art. 1); International Legal Materials, Vol. X, No. 1, 1971, p. 133; I.C.A.O., Doc. 8920;

(e) Unlawful Acts against the Safety of Civil Aviation in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23rd September 1971 (Art. 1); International Legal Materials, Vol. X, No. 6, 1971, p. 1151; I.C.A.O., Doc. 8966;

(f) Offences defined in the four Red Cross Conventions of 1949, UNTS Vol. 75, Nos. 970-973:

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12th August 1949 (art. 50);

2. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12th August, 1949 (Art. 51);

3. Geneva Convention relative to the Treatment of Prisoners of War of 12th August 1949 (Art. 130);

4. Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12th August 1949 (Art. 147);

(g) Slave Trade in

1. Slavery Convention of 25 September 1926 and amended by the Protocol of 7th December 1953 (Art. 1); LNTS (League of Nations Treaty Series) Vol. 60, p. 253; UNTS Vol. 182, p. 51; Vol. 212, p. 17;

2. Supplementary Convention of 7th September 1956 (Art. 3, paragraph 1, 6); UNTS Vol. 265, p. 3;

(h) Traffic in women and children

1. In the International Convention for the Suppression of the White Slave Traffic of 4th May 1910 as amended by the Protocol of 4th May 1949 (Art. 1, 2); UNTS Vol. 98, p. 101; 53, p. 39;

2. In the Convention for the Suppression of the Traffic in Women and Children of 30th September 1921 as amended by the Protocol of 12th November 1947 (Art. 3); UNTS Vol. 53, p. 13;

(i) Offences related to narcotic drugs in the Single Convention on Narcotic Drugs of 30th March 1961 (Art. 36, paragraph 1., 2. *(a), (i), (ii);* UNTS Vol. 520, p. 151;

(j) Offences defined in the Convention on Psychotropic Substances of 21st February 1971 (Art. 22 paragraph 1., 2. *(a), (i), (ii);* U.N. Doc. E/Conf. 58/6, 19th February 1971;

(k) Currency Counterfeiting in the International Convention for the Suppression of Counterfeiting Currency of 20th April 1929 (Art. 3, 4); LNTS Vol. 112, p. 371;

(l) Offences defined in the Final Act and Convention of the International Overfishing Conference of 5th April 1946 (Art. 5, 6, 7, 8); UNTS Vol. 231, p. 199; Vol. 431, p. 304; Vol. 456, p. 496; Vol. 482, p. 372;

(m) Offences defined in the International Convention for the Prevention of Pollution of the Sea by Oil of 12th May 1954 (Art. III, IV, V); UNTS Vol. 327, p. 3; Vol. 600, p. 332;

(n) Damage to submarine cables in the Convention for the Protection of

Submarine Cables of 14 March 1884 (Art. 2) ; 11 Martens Nouveau Recueil (2d), p. 281 ;

(o) Crimes defined in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14th December 1973 (Art. 2, 3) ; U.N. Doc. 3166 (XXVIII) ;

(p) Crimes defined in the Convention on the Suppression and Punishment of the Crime of *Apartheid* of 30th November 1973 (Art. 1) ; U.N. Doc. 3068 (XXVIII) ;

(q) Crimes defined in the Convention against the Taking of Hostages of 18th December 1979 (Art. 1, 2) ; U.N. Doc. A/34/819 (XXXIV) ;

(r) Crimes defined in the Universal Postal Convention of 26th October 1979 (Art. 13 *(e)*) ;

(s) Offences defined in the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property of Nov. 14, 1970 (Arts. 6, 7, 8) ; No. 10 International Legal Materials 1971, pp. 289-293 ;

(t) Offences defined in the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973 (Arts. V, VI, VII & VIII) (command 5459) ".

Obligations of a company belonging to an international group and their effect on other companies of that group

Les effets des obligations d'une société membre d'un groupe transnational sur les autres membres du groupe

(Fifteenth Commission) *

Rapporteur : *Andreas F. Lowenfeld*

* The Commission is composed of Messrs Lowenfeld, *Rapporteur*, Collins, Crawford, El Kosheri, Feliciano, Gannagé, Goldman, van Hecke, Pierre Lalive, Loussouarn, Mádl, von Mehren, Rigaux, Shihata, Sucharitkul, Waelbroeck.

The Fifteenth Commission has followed a procedure different from the usual one.

The Rapporteur first sent a *Questionnaire* to the Members of the Commission (July 1990).

He then wrote the *Preliminary Report,* accompanied by a *Draft Resolution* (August 1991). Both these documents were discussed by the Members of the Fifteenth Commission during the Basel session of the Institute.

The Rapporteur rewrote and completed his report a first time (*Revised Preliminary Report and Draft Resolution,* September 1992), then, after some finishing touches, he established the *final version* (December 1992).

The documents are presented in the following order: the *Questionnaire,* the answers to it, the final version of the *Report and Draft Resolution* and then the letters of the Members of the Commission.

Those *Observations* were taken into consideration by the Rapporteur when drafting his revised and then final reports.

Questionnaire

1. — *How shall a corporate group be defined ?*

Assumption : Liability of passive or unrelated investors is not here in issue. An enterprise is part of a group when it is linked to another company (or group of companies) by common ownership or control.

2. — *How shall ownership or control be defined for purposes of defining a group ?*

Assumption : One hundred percent ownership of company *B* by company *A* is not necessary to form a group, and ownership may be direct or indirect. Where ownership by the group of Company *B* is greater than 50 percent, control will be presumed ; when ownership is less than 50 percent, the existence of control is a question of fact, which may depend on such factors as whether any other single investor has a substantial ownership interest ; whether the enterprises are linked by management contracts, exclusive sales agreements, technology licenses, or similar arrangements ; whether the enterprise produces a common product or group of products ; and whether the members of the group operate under a common name or trademark.

Quaere : Should one try to develop a separate regime or a sub-rule for joint ventures ?

3. — *Can one distinguish, for purposes of liability of the group, among different types of obligations ?*

Suggestion : In obligations arising out of contract, such as sales of goods or services, the counter-party can often protect itself if it is insecure about the member of the group, for instance by demanding a guarantee from another member of the group with which

it is dealing or from a third party ; there is no such opportunity for riparian owners damaged by an oil spill from a tanker owned by a subsidiary *e.g., Torrey Canyon, Amoco Cadiz, Exxon Valdez* — or for discharged employees denied unemployment or severance benefits — *e.g., Badger/Raytheon.*

Quaere : When may a member of a group avoid its obligations through bankruptcy, while other members of the group, or the group as a whole, continues to operate profitably ?

4. — *May a parent enterprise be held responsible for engagement by its subsidiaries or affiliates in activities that would be forbidden to the parents ?*

Suggestion : Continuous activity, such a wholly owned subsidiaries of British companies supplying oil to Rhodesia, may be charged to parent enterprise ; particular incidents not shown to constitute a pattern, such as an episode of insider trading or corporate bribery by an affiliate or subsidiary, cannot, without more, be charged to the parent enterprise

5. — *In what circumstances may disclosure of documents and other information located with one member of a group be required of another member of a group ?*

Suggestion : Where the information is properly required by a court or other authority, for instance where design information is sought in a product liability action from the domestic subsidiary/seller but the information is held by the foreign parent/manufacturer, intra-group arrangements should not be permitted to frustrate needed disclosure *. Though the subject of taxation is beyond the scope of the commission, requests for disclosure for tax purposes not otherwise covered by treaty would fit within the proposition suggested.

* The problem of disclosure from banks or other financial houses acting as middlemen, while in some ways related, is sufficiently complicated and controversial that I would propose to deal with it by excluding it, with a simple disclaimer.

6. — *Do any of the propositions suggested require differential treatment in the context of investment by a multinational group in developing countries?*

Suggestion: A full report needs to take note of some aspects of international law focused particularly in investment in developing countries, such as the ICSID Convention; overall, however, the principles here developed should prevail regardless of the state of development of either host or home country

July 1990

Answers of the Members of the Fifteenth Commission to the Questionnaire.

1. *Answer of Mr I. Shihata*

September 17, 1990

Dear Professor Lowenfeld,

Enclosed please find my preliminary answers to the questions you raised in your letter of July 10.

I am also enclosing detailed annexes describing the status of the law on the subject in six major industrial countries, an annex on the draft Statute for European Companies, as well as a separate annex on cases involving developing countries.

I hope you will find the enclosures of some use in your preparation of the draft report...

With best regards.

1. — *How shall a corporate group be defined?*

I prefer a broad definition which takes into account the interests of those who deal with any member of the group. One such definition is that adopted by the UN Commission on Transnational Corporations ("TNCs") in the draft Code of Conduct on TNCs (the "Code"). This definition is the product of lengthy debates and compromises among countries' delegations sustaining opposite or different conceptual views on the nature and role of the TNCs.

According to Paragraph 1.(a) of the Code, a transnational corporation[1] consists of

> "enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in

[1] It should be noted that the term "transnational corporation" in the Code refers to the enterprise as a whole or its various entities (par. 1 (c)).

> two or more countries, regardless of the legal form and fields of these entities, which operate under a system of decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others." [2].

It is clear that in this definition the concept of corporate group revolves around the "centralization of decision-making authority" factor, rather than around the element of common ownership.

2. — *How shall ownership or control be defined for purposes of defining a group ?*

If we adopt a definition along the lines of the above-quoted Code concept, ownership by itself would not be as relevant as effective control.

The "central decision-making authority" concept is close to the concept of "control" adopted in national legal systems. The Code assumes that the possibility of effective control by local partners may depend on factors other than local equity participation. Paragraph 23 of the Code provides that

> "Transnational Corporations shall/should co-operate with Governments and nationals of the countries in which they operate in the implementation of national objectives for local equity participation and for the *effective exercise of control* by local partners as determined by equity, contractual terms in non-equity arrangements or the laws of such countries." (Emphasis added).

Majority ownership may be a *prima facie* evidence of control, but there are situations in which control will still exist despite the absence of majority ownership, as when the stock is scattered among several stockholders with no one among them holding a majority ownership while the controlling entity

[2] The OECD Guidelines for Multinational Enterprises (annexed to a Declaration on International Investment and Multinational Enterprises endorsed by the OECD member governments at the 1976 meeting of the OECD), refer to the multinational group in similar terms. Despite the fact that paragraph 8 of the Introduction acknowledges that "[a] precise legal definition of multinational enterprises is not required for the purposes of the Guidelines", it goes on to explain that multinational enterprises

> "usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one

combines a minority equity interest with other factors. This is particularly the case in many of the so-called "new forms of investments", *i.e.*, investment projects where the foreign investor holds no or little equity but nevertheless exercises demonstrable powers over the projects through contractual arrangements (*e.g.*, through licensing agreements, management contracts, franchising, production sharing and risk-service contracts, product-in-hand contracts, etc.). In such instances, while majority equity is absent, control can still flow from other factors, such as appointment of managers and retention of power over major policies, *operational decisions*, competitive technology or marketing [3].

Control has been the parameter used by a number of national domestic courts confronted with transnational cases in which the limited liability

> multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the Guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the Guidelines. The word "enterprise" as used in these Guidelines refers to these various entities in accordance with their responsibilities."

The Guidelines are recommendations jointly addressed by the OECD governments to multinational groups operating in their territories; they represent the collective expectations of these governments and observance of them is voluntary and not legally enforceable.

[3] Professor Kindleberger of the Massachusetts Institute of Technology has described the relative character of control as follows:

> "To Lawyers, a business is or is not controlled abroad by virtue of its 100, 51, 48, or some such numerical percentage of foreign ownership in a cohesive voting bloc. To a student of industrial management, control is not an either-or proposition, but a question of infinite degree of divisibility, depending upon the nature of the decision-making process and the division of authority between the head office and the foreign unit. This control may cover any or all of a variety of separate functions — hiring and firing, investment programming, research and development, pricing, dividend remittances, marketing, and so on. A company can control all phases of a subsidiary's operations with merely 25 percent of the equity, on the one hand, or it may passively receive dividends without interfering on any of the affairs of its 100 percent-owned foreign operation. In the latter case, it is in effect merely a portfolio owner."

Friedmann & Beguin, *Joint International Business Ventures in Developing Countries*, 399 (1971).

principle incorporated in their domestic corporate law was not applied. The examples given in Annexes 1-6 hereto are cases in point. The same principle was adopted in the draft regulation of the Council of European Communities on the Statute for European Companies, as shown in Annex 7.

3. — *Can one distinguish, for purposes of liability of the group, among different types of obligations?*

Liability of corporate groups has been assessed in sundry fields: taxation, family law, corporate law, labor law, landlord-tenant relationships, tort law, administrative law and bankruptcy[4]. The topic is in state of flux in each of those areas, with the richer developments taking place within bankruptcy and antitrust regulation — where the clash between the form of business enterprise and the underlying corporate unit is clearest, as well as taxation, where national authorities have responded to tax avoidance or evasion.

The possibility of imputing liability to a member of the group beyond the limited liability principle is likely to be sought whenever the claimant is not equitably. This is to say liability from a parent is essentially an equitable

[4] A generally applicable international law rule of liability of corporate groups should take into account the domestic models and institutions dealing with the issue. This was the view taken by the International Court of Justice in *Barcelona Traction Light & Power Co., Ltd*, [1970] I.C.J. Rep. 3, *reprinted* in 9 I.L.M. 227, a case in which the Court delved into the relationship between municipal company law and international law in the context of protection of foreign nationals:

> "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of the corporate entity and its shareholders under municipal shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of States with regard to the treatment of companies and law, the Court must devote attention to the nature and interrelation of those rights."

9 I.L.M. 260.

remedy; in this sense obligations stemming from contractual and non-contractual sources may not be analytically far away from each other. As a practical matter, there is an essential evidentiary issue that is the cornestone common to all types of obligations: the claimant's ability to prove in any given context that the entities are so connected, that one company exerts significant control over the behavior of the others. This is important both as a legal matter and otherwise [5].

The *Frigorifico Swift de La Plata, Ingenio La Esperenza* and *Bhopal* cases elaborated on in Annex 8 provide relevant illustrations. It should be noted, however, that a full answer to question (3) requires a thorough examination of the court solutions in the different areas where such a question was relevant.

Consistently, this rationale can be transposed to the assertion later made by the Court in the same case to effect that

> "...the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."

Id. at 265.

[5] The OECD Committee on International Investment and Multinational Enterprises has issued several reports on the aforementioned OECD Guidelines (see *supra* note 2). The 1979 Review Report asserts that "[t]o the extent that parent companies *actually exercise control over the activities* of their subsidiaries *they have a responsibility* for the observance of the Guidelines by those subsidiaries." (Emphasis added). It adds:

> "The Committee also considered the question whether good practice in conformity with observance of the Guidelines should, in some instances, lead parent companies to assume certain financial obligations of their subsidiaries. The Committee has found that this question raises difficult and complex problems in view of the principle embodied in national laws of all Member countries of limited legal liability of companies. The Committee wishes to underline that the Guidelines, according to their nature, described in paragraph 4 above, introduce, where relevant, supplementary standards of a non-legal character and thus do not set standards which could be seen as superseding or substituting for national laws governing corporate liability, which are part of the legal basis on which companies operate. For this reason, in the view of the Committee, the behaviour recommended by the Guidelines in this context cannot be seen in a legal framework and does not imply an unqualified principle of parent company responsibility. Nonetheless, the Committee has noted that parent companies on a voluntary basis have assumed in certain

4. — *May a parent enterprise be held responsible for engagement by its subsidiaries or affiliates in activities that would be forbidden to the parent ?*

Subsidiaries are often created with a view to carrying out activities that are forbidden to the parent or that would be *ultra vires* if done directly by it. National legal systems do not seem to yield a general rule to the effect that the parent must transpose to the subsidiary the legal restrictions which affect its operations. The prohibition of an activity by the parent may come from its charter, from the law governing it or the law in another jurisdiction in which it may wish to undertake the activity through a subsidiary. The outcome may differ in each case.

Notwithstanding the above, affiliates are not to be used in bad faith to circumvent the application of otherwise binding requirements of applicable laws. If tax avoidance cases are taken as a guide, legitimate reasons which indicate that the formation of the subsidiary is not merely a conduit to avoid the application of otherwise pertinent law, but is based on genuine business needs, could make the implementation of the subsidiary an acceptable good faith operation [6]. The lack of any valid business purpose prompted the

> cases such financial responsibility for a subsidiary. The Committee considers generalisation in this area difficult, but the question of such responsibility as a matter of good management practice — in light of such factors as, *e.g.*, aspects of the relationship between the parent company and the subsidiary and the conduct of the parent company — consistent with observance of the Guidelines, could arise in special circumstances. The question of assumption of responsibility, for example, could be of particular relevance in the circumstances set out in paragraph 6 of the Guidelines on Employment and Industrial Relations relating to important changes in the operations of a firm and the co-operation as to the mitigation of resulting adverse effects."

[6] It is interesting to note that the parent's desire for insulation from liabilities that might be incurred while entering into various business transactions in foreign countries — thereby limiting its losses to the assets in the subsidiary — has been found to be a sufficient business purpose for forming the subsidiary abroad and legitimatizing the tax avoidance advantages derived therefrom, *see Johnson Bronze Co. v. Commissioner*, 24 T.C.M. (CCH) 1542; (1965) P-H TC Memo par. 65, 281 (a case involving a Panamanian intermediate holding corporation created to prevent exposure of the American parent to the various risks of foreign operations such as expropriation, economic instability and inflation, potential tort or contract liability. The fact that the subsidiary actually functioned so as to fulfill the intended business purpose of insulation and that the transactions attributed to the subsidiary were not shams, caused the court to pronounce that the parent needed not be heavily laden with business purposes or devoid of tax considerations — which in the case resulted in avoidance of taxes).

disregard of the corporate separateness in *Aiken Indus. Inc. v. Commissioner*, 56 T.C. 925 (1971), where the United States Tax Court pierced the veil when it found that the foreign corporation was an instrument to avoid the United States taxation laws, "merely a conduit for the passage of interest payments" (*id.* at 934) [7]. Under the general taxation statutory framework, the American subsidiary would have been required to withhold tax on the interest which it paid to the Honduran corporation. During the years in which the facts of the case took place, however, a tax treaty between the United States and Honduras was in force. The treaty provided for the avoidance of double taxation by establishing that interest paid by a U.S. corporation to a Honduran corporation not having a permanent establishment in the United States was to be exempt from U.S. tax. On the basis of this treaty, the subsidiary claimed exemption from the withholding provision applicable to United States source income paid to foreign corporations. Having ostensibly conformed to the literal requirements of the withholding regulations prescribed under the treaty, the subsidiary did not withholding the tax. The Court found that the payment of interest by the American corporation to the foreign corporation (organized to collect such interest for another foreign corporation) was an organizational structure that had as its sole purpose the circumvention of the application of the United States tax withholding provisions [8].

[7] MPI, a United States corporation, was a wholly-owned subsidiary of Aiken Ind., also a United States corporation, which in turn was 99.997 % owned by Ecuadorian Corp., Ltd. ("ECL"), a Bahamian corporation. ECL also owned all of the outstanding stock of Compañía de Cervezas Nacionales ("CNN"), an Ecuadorian corporation. Industrias Hondurenas S.A. was incorporated under the laws of Honduras, and in turn, was beneficially owned by CCN. MPI borrowed $ 2,250,000 from ECL, and issued a sinking fund promissory note in recognition of the debt. ECL assigned this promissory note to the Honduran corporation in exchange for nine notes of the Honduran corporation. These notes received by MPI totalled the same $ 2,250,000 amount at the same interest rate. Thus, the Honduran corporation was committed to pay exactly what it collected, making no profit on the acquisition of MPI's note in exchange for its owns.

[8] "In these circumstances, where the transfer of MPI's note from ECL to Industrias in exchange for the notes of Industrias left Industrias with the same inflow and outflow of funds and where MPI, ECL, and Industrias were all *members of the same corporate family*, we cannot find that this transaction had any *valid economic* or *business purpose*. Its *only purpose* was to obtain the benefits of the exemption established by the treaty for interest paid by a United States corporation to a Honduran corporation. While such a tax-avoidance motive is not inherently fatal to a transaction, see *Gregory v. Helvering, supra*, such a *motive standing by itself* is not a business purpose which is sufficient to support a transaction for tax purposes." (Emphasis added).

56 T.C. 925, 934.

A survey of municipal laws indicates that, in effect, there have been situations in which parent companies have been allowed to create subsidiaries with powers exceeding their own. Under American federal legislation, for instance, American commercial banks are prohibited — save for limited exceptions — from dealing in securities for their own account or underwriting any issue of securities. Similar restrictions apply to the branches of American banks abroad. Nonetheless, the foreign subsidiaries of American banks are specifically authorized by law, subject to particular conditions, to engage in the underwriting business outside the United States. Hence, American law authorizes U.S. banks to establish subsidiaries abroad which can specifically take on activities not permitted to the parent.

5. — *In what circumstances may disclosure of documents and other information located with one member of a group be required of another member of a group ?*

There is a procedural legal issue connected with this question, *i.e.*, the scope of the jurisdiction of national courts over members of the group located outside their territory. Few jurisdictional rules (except those incorporated in statutes dealing with matters arising out of the transnational issuance of securities, patents or maritime transactions as well as laws requiring the production of evidence by foreign subsidiaries of U.S. corporations and " blocking statutes " in a number of other countries) deal with transnational situations. The possible bases for jurisdiction of the national court of the host country over the corporate group as *a whole*[9] (which subject the parent located outside the country of the court to its jurisdiction, and therefore, to the reach of the court order subpoenaing the information) should be explored.

[9] In the Code, only two of the four paragraphs envisioned under the heading " Jurisdiction " have been agreed on. The first of them deals with jurisdiction and establishes that an " entity " of a transnational corporation is subject to the jurisdiction of the country in which it operates (par. 55). Since the term " entities " in the Code refers to both parent entities — that is, entities which are the main source of influence over others — and other entities (unless otherwise specified in the Code) (par. 1(b)), it could be argued that the parent will be subject to the jurisdiction of the host country's court if it is found to " operate " therein.

It should be noted, moreover, that under the Code the precise juridical meaning of the word " jurisdiction " is still an open issue.

Bases, such as the "doing or carrying of business" [10] in the host country or the existence of a "functionally integrated enterprise" warrant particular attention [11].

It is apposite to mention here again the *Bhopal* case (*see* Annex 8), 634 F. Supp. 842 (S.D.N.Y. 1986), in which plaintiffs and *amicus curiae* opposed defendant's motion to dismiss the case alleging, *inter alia*, that the American public interest was served "when United States corporations *assume responsibility* for accidents occurring on foreign soil... The specific American interests allegedly to be served by this Court's retention of the case include the opportunity of creating precedent which will 'bind all American multinational henceforward'". (*id.* at 862).

In addition to the above procedural aspect, there are relevant substantive law issues. Prominent among these are the disclosure requirements for TNCs. Various national laws, regulations and standards in both home and host countries of TNCs require reports containing financial and non-financial information of TNCs operations. In many home countries, TNCs are required to include information on the group of companies as if it were a single enterprise.

The Code prescribes that TNCs should disclose to the public, in the countries in which they operate, clear, full and comprehensive information on the structure, policies, activities and operations of the transnational corporation

[10] For example, in *Cascade Steel v. C. Itoh and Company (America)*, 499 F. Supp. 829 (Or. 1980), a case involving a Japanese steel manufacturing corporation with American subsidiaries, the court formulated a set of rules indicating the instances in which a foreign parent corporation would be amenable to fraud antitrust liability and jurisdiction as a consequence of the operation of the subsidiary. If jurisdiction over the parent is ascertainable, any intra-groups arrangements providing for confidentiality of documentation will not stand challenge. The factors enumerated by the court were: i) the existence of a world-wide partnership in business between the parent and the subsidiary; ii) the parent's capacity to influence the decisions of the subsidiary in matters having antitrust consequences; iii) the existence of an integrated manufacturing, sales and distribution system, and iv) whether the subsidiary is the marketing arm of the parent and shares a common imagine.

[11] The ICSID Convention provides a good example of a criterion which can be used to extend jurisdiction over an investor who may seem otherwise to fall outside the scope of this jurisdiction.

Art. 25 of the Convention qualifies the general rule that disputes subject to the Centre's jurisdiction must be between a state party and a national of another state party. Under this exception, a juridical person which has the nationality of the state party to the dispute is eligible to be a party to the proceedings under the auspices of the Centre if that state agrees that the juridical person should be treated as a national of another contracting state because of foreign control.

as a whole (par. 44). The information must include financial as well as non-financial data. Where appropriate, the financial information should be provided on a consolidated basis together with suitable explanatory notes. Il should include, *inter alia*, a balance sheet and information on the following: income, allocation of net profits or income, the sources and uses of funds, new long-term capital investments, and research and development expenditures. Non-financial information should generally cover topics such as the structure of the transnational group (the name and location of the parent, its main entities, its percentage ownership — direct and indirect — in these entities, including shareholdings between them), main activity of the various entities, employment, accounting policies, and policies on transfer pricing. The information so submitted will be in addition to any information required by national laws, administrative practices and regulations of the countries in which they operate (par. 44).

Under the Code, the disclosure mandate includes information held in other countries whenever it is needed to enable the host country to obtain a fair and true view of the operations of the transnational corporation as a whole, and in so far as the information requested relates to the activities of the entities in the countries seeking such information (par. 45).

The Code requirements may be viewed as provisions desirable *de lege ferenda*. *De lege lata*, however, dissimilarities in national reporting and disclosure practices continue to exist in spite of the national and international concern for the lack of harmonization in these fields.

6. — *Do any of the propositions suggested require differential treatment in the context of investment by a multinational group in developing countries?*

There exists, in fact, a widespread feeling that the policies which underlie the limited liability principle for corporations should not apply without reservations to the TNCs operating in less developed countries ("LCDs") which lack a well-developed regulatory infrastructure. Limited corporate liability is a pro-business policy developed to foster entrepreneurial risks. In the context of developing nations, multinational corporations do not always operate as entrepreneurs. There is a general complaint in host countries to the effect that the diminished bargaining skills of the host country and the preponderant power of the foreign firms make it necessary to apply the limited liability principle in a differential fashion.

Advocacy of a special regime for liability of TNCs operating in developing countries is usually based on the oligopoly power of TNCs from industrialized nations in comparison with LDCs. For example, contracts between LDCs and TNCs frequently insert clauses which would be in basic violation of laws of home countries if included in contracts subject to such laws, but the transnational corporation often insists on such clauses as a prior condition of making business and the host country accepts them in the absence of

similar prohibitions in its legislation and at times in spite of such prohibitions (through special legislation). For example, the so-called "tie-in-clauses", which prescribe that the subsidiary or licensee purchase intermediate parts and other capital goods from the same parent which provides the "tying" of basic technology, are prohibited in the United States, but are commonly inserted in transfer of technology contracts between LDCs and American TNCs.

One ICSID arbitration illustrates the legal significance that can be given by an international arbitral tribunal to the "developing" stage of the law of a country in partnership with a multinational group. The case in question involved a joint venture between an industrialized country multinational group (the "multinational"), claimant in the proceedings, and a developing country (the "Government").

The agreement envisioned a project for the construction of a fertilizer factory. The project was supported by feasibility and profitability studies prepared in-house by the multinational, which was to be responsible for the supply and erection of the factory and its technical and commercial management for a period of at least five years. For its part, the Government agreed to furnish a developed site for the factory and to assume the guarantee of payment of a loan covering the price of the factory. The multinational was the majority shareholder in the investment, with 51 percent ownership in the joint venture operating company created for that purpose under the Government's law. After 18 months of unprofitable operation under the multinational's management, the factory was shut down. Some two years later the Government attempted to run the factory, but was forced to close it again.

Believing that the multinational had failed to observe its contractual obligations, the Government stopped payments due under the contract. A request for arbitration by the multinational ensued from this. The request, filed against the Government and the operating company, demanded payment of the outstanding balance of the price for supplying the factory.

Two awards were rendered by ICSID tribunals in this case. The first award declared the Government's debt to be entirely cancelled as a consequence of the multinational's failure of contractual performance. In delivering this award, the tribunal implicitly entertained, at least in part, the Government's allegation that the national law applicable to the substance of the dispute (the host state's law) should be supplemented by the principle of the international law of development according to which an industrialized country enterprise has a more stringent duty of good faith and disclosure towards its less sophisticated developing country partner than would be the case if its contracting partner were a developed country. The language of the award recognized implicitly the differential legal connotations that can be attached to operations taking place in a developing country.

This award was annulled *in toto*, primarily on the grounds that in reaching the above-mentioned conclusion the tribunal was found to have applied equity rather than the proper law. The second tribunal constituted in the case did

not pronounce on the existence of the principle of international law of development put forward by the Government, since it considered that the national law applicable to the dispute provided a sufficient basis for decision.

In a dissenting opinion attached to the second award, an arbitrator posed again the question of whether the obligation of frankness and loyalty should be more stringent in the context of a development contract between a specialized enterprise and a developing country. The dissenting arbitrator regretted the fact that the situation, character and personality of the parties to the contract were not given adequate weight by the award.

Annexes to the answer of Mr I. Shihata

Annex I

ENGLAND

1. — *The general rule*

Under English law (including applicable EEC law) the general position is that a parent company has no liability for the obligations of its limited liability subsidiary companies in excess of its share capital. This was most clearly and authoritatively stated in *Salomon v. Salomon & Co.*, [1987] A.C. 22. This was a case in which Mr Salomon, a boot manufacturer, sold his business to a company in which he held all the shares save for one held by each of his wives, his daughter and four of his sons. At first instance, and on appeal, it was held either that the company was his agent, or his trustee, and that in either case he was personally liable. Upon appeal to the ultimate appellate body, the House of Lords, it was unanimously held that Salomon was not liable.

This position is now regarded, save as discussed below, as firmly established. To cite a leading text book, Gore-Browne on Companies, 43rd Edition, at 1-3: -

> "The separate personality of a company and its entity as distinct from its shareholders was established by the House of Lords in *Salomon v. Salomon & Co.*, where it was held that however large the proportion of the shares and debentures owned by one man, even if the other shares were held in trust for him, the company's acts were not his acts nor were its liabilities his liabilities; nor is it otherwise if he has sole control of its affairs as governing director (*Inland Revenue Commissioners v. Sansom*, [1921] 2 K.B. 492).
>
> The principle of the *Salomon case* (see *e.g. F.J. Neale (Glasgow) Limited v. Vickery*, [1974] S.L.T. 88 for a recent application of the *Salomon* principle), that a company is a legal entity distinct from its members, is strictly applied by the courts whenever it is sought to attribute the rights or liabilities of a company to its shareholders, or regard the property of a company as belonging in law or equity to the shareholders".

2. — *The current exceptions to limited liability*

Professor C.M. Schmitthoff, who has strongly advocated a more open liability for subsidiaries, writes nevertheless as the editor of Palmer's Company Law, 23rd Edition (Vol. 1 at page 193, Ch. 18-12) : -

> " It will be seen that though the [*Salomon*] principle is still firmly established in English and Scots law as, in the words of Lindley L.J., lying " at the root of the legal idea of a corporate body, modern practice, in deference to the reality of economic facts, has frequently admitted exceptions to it in which the veil of corporateness is lifted ".

However, the argument here is about lifting the corporate veil and not about shareholders being liable for the company's obligations by reason of that shareholding. Thus, the veil of incorporation is said to be lifted (at page 201), for example, by the compulsory production of group accounts, or by certain taxing statutes, or by certain anti-trust legislation which looks at the economic groupings rather than the legal persons involved. On the specific question of the liability of a holding company for the debts of a subsidiary, *Palmer* at page 205 states : -

> " The problem is increasingly discussed in modern company law. The legal principle is clear. On principle, " the separate legal existence of the constituent companies of the group has to be respected " ; per Lord Wilberforce in *Ford & Carter Limited, v. Midland Bank Limited* (1979) 129 N.L.J. 543, 544. The rule in *Salomon v. Salomon & Co., Ltd.* thus prevails ; see also Pennycuik J. in *Charterbridge Corporation v. Lloyds Bank Limited* [1970] Ch. 62 ".

The only instances in which a parent company may currently be liable for its subsidiary's obligations are : -

a) Circumstances in which any third party would be liable. Thus, for example, if a parent has guaranteed its subsidiary's obligations the parent will have a liability under the guarantee. Equally, Section 332(1), Companies Act 1948 (which of course, only applies to companies formed and registered under the Companies Act) states that : -

> " If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors... the court... may... declare that any persons [which expression includes companies] who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct ".

This section, although it may apply to a shareholder, is not specifically directed at shareholders.

b) Where the subsidiary has been acting as the agent of the parent. Whilst this is no more than another example of the circumstances in which any third party would be liable (since an agent is, under English law, entitled to be indemnified by its principal against liabilities properly incurred by it in its capacity as agent), it deserves separate discussion since it is indicated that this is a risk in the United States. It is also a subject which is discussed in most text books and articles on the subject. The English position is well stated in Gore-Browne (at 1-4) : -

> " It is important to note that the mere fact that one company is the subsidiary of another, even a " wholly owned " subsidiary, is not by itself sufficient to make the subsidiary an agent of its holding company (*Kodak Ltd. v. Clark* [1903] 1 K.B. 505 (C.A.) ; *Gramophone & Typewriter Ltd. v. Stanley,* [1908] 2 K.B. 89, (C.A.) ; *I.R.C. v. Sansom,* [1921] 2 K.B. 492 (C.A.)). The activities of the subsidiary must be so closely controlled and directed by the parent company that the latter can be regarded as merely an agent conducting the parent company's business ".

In *Smith, Stone & Knight Ltd. v. Birmingham Corporation,* [1939] 4 All E.R. 116 Atkinson, J. (at page 121) laid down six points which he considered relevant in deciding whether or not the subsidiary was acting as agent of the parent. They were : -

> *i)* were the profits of the business treated as the profits of the parent ;
>
> *ii)* were the persons conducting the business appointed by the parent ;
>
> *iii)* was the parent the head and brain of the trading venture ;
>
> *iv)* did the parent govern the adventure, decide what should be done and what capital should be embarked on the venture ;
>
> *v)* did the parent make the profits by its skill and direction ; and
>
> *vi)* was the parent in effectual and constant control ?

That Atkinson, J. had in mind something more than mere shareholder control is borne out by his citation from *Gramophone & Typewriter, Ltd. v. Stanley* at page 95, per Cozens-Hardy, M.R. :

> " The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in he sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of directors, or make the property or assets of the company his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares ".

Further, the reference in *(i)* above can be taken as meaning, " did the parent directly take the profits " rather than " were the profits available for payment by way of dividend by the subsidiary to the parent ? "

As Lord Herschell stated in *Salomon* (at page 43) : -

> " Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled substantially, to the whole of the profits. The other shareholders, too, are said to have been " dummies ", the nominees of Salomon. But... I am unable to see how the facts to which I have just referred can affect the legal position of the company or give it rights as against its members which it would not otherwise possess ".

Thus, under current English law, provided that a company carries on business for its own account and under the direction of its own Board of Directors, it will not be held to be the agent of its parent company.

c) Section 31, Companies Act 1948 (as amended by Schedule 3, Companies Act 1980) which reads as follows : -

> " if a company carries on business without having at least two members and does so for more than six months, a person who, for the whole or any part of the period that it so carries on business after those six months : -
>
> *a)* is a member, and
>
> *b)* knows that it is carrying on business with only one member, shall be liable (jointly and severally with the company) for the payment of the debts of the company contracted during the period or, as the case may be, that part of it ".

It is, of course, permitted that the second member be a nominee of the other member so that the company is wholly owned, beneficially, by one person (*Salomon v. Salomon & Co.*).

d) Where a company is being used for fraudulent purposes or to evade an obligation which properly falls upon the shareholder. In *Gilford Motor Co. v. Home* [1933] Ch. 935 (C.A.), Home's employment with Gilford Motor Co. was terminated. Home, who had been managing director, had a service contract which contained restrictions on his having dealings with customers of his former employer for a period. Home established a company which the court held was effectively his company, which did deal with customers of his former employers. In granting an injunction against Home and his company Lord Hanworth M.R. stated : -

> " I am quite satisfied that this company was formed as a device, a stratagem, in order to mark the effective carrying on of a business of Mr. E.B. Home. The purpose of it was to enable him, under

> what is a cloak or a sham, to engage in business which, on consideration of the agreement... was a business in respect of which he had a fear that the plaintiffs might intervene and object ".

Again, in *Jones v. Lipman* (1962) 1 WLR 832. Lipman contracted to sell his house to Jones, but then thought better of it. To avoid being obliged to complete the sale Lipman sold his house, before the date for completion with Jones, to a company wholly owned by him. He then pleaded he was unable to complete the sale because the property had passed to a third party. After quoting from the *Gilford Case,* Russel J. went on : -

> " The comments on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The case cited illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances ".

> *Note.* — Certain circumstances can give rise to a company's liabilities falling upon directors of a company which are not discussed in the Memorandum. These will normally only arise where there is misfeasance, but can also arise under certain specific statutory provisions.

3. *Proposals to make parent companies liable for the obligations of their subsidiaries*

The pressures for change have come from a number of different sources and each should be analysed separately. However, it is to be noted that the Confederation of British Industry (the " CBI ") are strongly opposed to any change to the current position and that they would have substantial and widespread support in resisting any alteration.

a) The Consultative Committee of Accounting Bodies (the " CCAB ")

The CCAB comprises the six senior accounting institutions in the British Isles. In September 1979 it submitted a memorandum to the Department of Trade called " Extended Liabilities of Groups of Companies " in which it raised three possible changes to the existing law : -

> *i)* companies in a group should be liable for the liabilities of any other member of the group ; or

> *ii)* if a subsidiary holds itself out as being a member of a group of companies, its holding company should be liable for its debts ; or

> *iii)* a holding company should be deemed to have guaranteed all its subsidiaries' actions unless it publicly announces to the contrary.

Of these three possibilities the CCAB professed itself to favour the third solution.

However, on 26th January 1981 a further CCAB memorandum was published which, because of the degree of criticism which its first proposals had met, advocated much watered-down measures including requirements that : -

i) the rights of external creditors should be strengthened where a company acts in such a way that a person might reasonably conclude that a parent company guarantee exists ;

ii) the identity of a company should be readily apparent to those who deal with it ;

iii) the position of intra-group loans in relation to other unsecured creditors should be made explicit in the accounts ; and

iv) the law relating to fraudulent trading should be strengthened.

b) The Report of the Cork Committee

In January 1977 a Review Committee was established to investigate English insolvency law and practice. This Committee, under the chairmanship of Sir Kenneth Cork, reported in June 1982 in a massive 450 pages report (Cmnd. 8558).

The major relevant change, set out in Chapter 51 of the Report relating to groups of companies is that, on the winding up of a company within a group, those of its liabilities, whether secured or unsecured, which are owed to connected persons or companies and which appear to the court to represent all or part of the long-term capital structure of the company, should be deferred to the claims of other creditors and be paid only after such claims have been met in full.

Certain further proposals of the Cork Report are relevant to aspects of limited liability, but these are generally only applicable in instances of fraud or misfeasance.

One further proposed change should be mentioned : this relates to " fraudulent preference ". Currently it is necessary to prove that a payment prior to liquidation was made with the dominant intention of preferring the recipient. The Cork report recommends that in the case of " connected persons " it should be " conclusively presumed " that a transaction was not at arms' length and thus the onus of proving that it was not a fraudulent preference should be shifted to the connected person (paragraph 1258).

Paragraph 1036 defines a company as " connected " with another (although, on the wording, this would exlude the World Bank) as : -

a) where the same person is a substantial shareholder of both, or a person is a substantial shareholder of one and persons connected with him, or he or

persons connected with him are together substantial shareholders of the other ; or

b) where a group of two or more persons are substantial shareholders of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom he is connected.

The Cork Report is the first major review of English insolvency law for more than 100 years. In general, its findings have been well received and implementing legislation can be expected. It is most unlikely that any measures will be initiated within England to change insolvency laws which are not recommended by the Cork Report. The Cork Report proposes no serious threat to the limited liability of an honestly and properly run company.

c) Other English Legislative Proposals

During 1979, in the Committee Stages of the Bill which eventually became the Companies Act 1980, Mr. Stanley Clinton Davis, a Labour MP, proposed an amendment to the Bill to the effect that any company holding at least 20 percent of the share capital of an insolvent company which traded "fraudulently" (*i.e.* when it knew it was insolvent) should be liable to creditors of the insolvent company whether they were aware of its activities or not (*Parliamentary Debates, House of Commons, Standing Committee A, 11th December 1979, col. 715*). Although the amendment wast lost, the Government expressed sympathy with the proposal and promised consideration of legislative reform after receipt of the Cork Report.

Annex II

FEDERAL REPUBLIC OF GERMANY

1. If the WBB would be established as a company limited by shares and if German company law would be applicable to the WBB, the provisions of the German Stock Corporation law should be considered. Pursuant to Section 1 of the German Stock Corporation law, creditors of a limited liability company can satisfy their claims against the company only out of the company's assets. In principle, shareholders of a company are not liable for that company's debts. However, German law makes several exceptions to this principle. In the context of a subsidiary of the Bank, the most significant of these exceptions may be grouped as follows :

A) Statutory exceptions concerning parent corporations' directives to their subsidiaries ; and

B) Judicial disregard of the legal independence of the subsidiary in exceptional circumstances.

A) *Statutory exceptions*

2. The German Stock Corporation law provides for two broad exceptions to the principle of limited liability that are relevant. Both exceptions concern situations in which a parent company has issued directives to its subsidiary. For the purposes of these exceptions, German law defines a parent company as a company that directly or indirectly exercises a dominating influence on another company (subsidiary) ; the law presumes that such dominating influence is present whenever a company holds a majority interest in another company whether in the form of shares or shareholders' votes [1].

3. German law permits a parent company to enter into a contract with its subsidiary pursuant to which the subsidiary is managed by the parent company (management control contract) [2]. Under German law such contracts must be registered in the Commercial Register. The parent corporation is

[1] Sections 16 and 17 of Stock Corporation Law (hereinafter abbreviated as AktG).

[2] Section 291 AktG.

required by law to compensate the subsidiary managed by it under a management control contract for the annual net losses suffered by the subsidiary during the term of the contract[3]. The subsidiary subject to a management control contract remains an enterprise that is legally independent from the parent company.

4. In the absence of a management control contract, the parent company may not use its influence to cause its subsidiary to act contrary to the subsidiary's interest, without compensating the subsidiary for any ensuing "disadvantages" *(Nachteile)*[4]. If, nevertheless a parent company so causes its subsidiary to act or to refrain from acting, to the subsidiary's disadvantage, the parent company will be liable for damages suffered by the subsidiary unless it has in fact compensated the subsidiary before the end of the fiscal year or it has granted the subsidiary a legal claim to compensation; also, the parent company would be liable for damages suffered by other shareholders of the subsidiary[5].

B) *Judicial exceptions*

5. The juridical personality of a company is a creation of the law for the purpose of limiting the liability of financiers of a venture to a certain subscribed capital. The limitation is fair to creditors because, when extending credit to a company, they know that their chance of recovery is limited to its assets. Under the "disregard of the corporate entity doctrine", the privilege of limited liability is denied where its use is inconsistent with its underlying rationale[6]. German courts and doctrine have identified the following situations where this is the case:

a) Undercapitalization[7].

6. Prominent writers advocated holding shareholders liable where a company is "completely inadequately capitalized for its operations". Courts have followed a more restrictive line, requiring knowledge on the part of shareholders[8]. They have, however, affirmed knowledge where shareholders knowingly extended loans to insolvent companies in order to avoid or delay bankruptcy. Thus, the Supreme Court for Civil Affairs held a major share-

[3] Section 302 AktG.

[4] Section 311 AktG.

[5] Section 317 AktG.

[6] See Marcus Lutter, "Die zivilrechtlich Haftung der Untemehmensgruppe", ZGR 2/1982, *loc. cit.* pp. 248, 253-254, 273.

[7] Cf. Lutter, *loc. cit.*, p. 249 *et seq.* with further references.

[8] *E.g.*, Supreme Court for Civil Affairs, 1956, BGHZ 22, pp. 226, 231, invoked remedy was Sec. 826 of the German Civil Code which provides for payment of damages maliciously inflicted upon another person.

holder liable for returning to a bankrupt company payments from the company on loans which he had extended to the company in order to bridge over liquidity problems and avoid filing for bankruptcy.

b) Fusion of Asset ("Vermögensvermischung") [9]

7. Where the single shareholder of a company fails to clearly keep the assets of the company separate from his personal fortunes, he is estopped from invoking the limitation of liability [10].

c) Fusion of Business Spheres ("Shpärenvermischung") [11]

Where a parent company operates a subsidiary under a firm name similar to its own, or shares the same office and staff with its subsidiary, thereby misleading creditors with respect to the legal separation, it is estopped from invoking the separation : the semblance of unity triggers joint liability [12].

d) Unfair Division of Business Risks ("Institutsmissbrauch") [13]

This heading relates to cases where shareholders integrate the company into their overall business operations, but split the operations between themselves and the company in a way that they retain the good risks and assign the poor risks to the company. The Supreme Court for Civil Affairs and some courts of appeal have, in such cases, pierced the corporate veil on a finding of knowledge on the part of the shareholders that the creditors of the company would be defrauded [14]; some writers, referring to decisions of U.S. Courts [15], advocate piercing the corporate veil simply on the ground of the objectively unfair split of risks [16].

e) Detrimental instructions

Controlling shareholders have also been held liable where they caused the company to engage in disadvantageous operations. Yet again, courts have required a showing of knowledge that the operation was disadvantageous [17].

[9] Cf. Lutter, *loc. cit.*, p. 251 with further references.

[10] Prohibition of a *venire contra factum proprium ;* cf. Supreme Court for Civil Affairs, 1956, BGHZ 22, pp. 226, 230.

[11] Cf. Lutter, *loc. cit.*, pp. 251-252, with references to court decisions.

[12] See Müller, « Die Haftung der Muttergesellschaft für die Verbindlichkeiten der Tochtergesellschaft im Aktienrecht », ZGR 1/1977, pp. 1, 30, advocating an extensive application of the rule.

[13] Lutter, *loc. cit.*, pp. 253-254.

[14] BGH WM, p. 463, OLG Nüremberg WM 1955, p. 1566 - cause of action : Civil Code Sec. 826.

[15] *Taxicab* cases, see *Walkowski v. Carlton*, 223 N.E. 2d 6 (1966).

[16] Lutter, *loc. cit.*, p. 253.

[17] Cf. Supreme Court for Civil Affairs 1959, BGHZ 31, p. 258 - remedy was again Sec. 826.

f) Patronage [18]

This category relates to cases where a parent company makes declarations or statements implying that it would support the credit standing of a subsidiary. If such a statement is made vis-à-vis an individual creditor of the subsidiary, it triggers a joint liability of the parent — by implication of either a contract *sui generis* between parent and creditor or a liability in equity for solicited trust.

Whilst it appears to be uncontroversial that liability can ensue from face-to-face declarations, views differ with respect to the consequences of statements made in public or reported in the media. Some authors, referring to U.S. law, derive a general responsibilty of the parent in such cases from the notion that statements made by parent corporations about their subsidiaries are partly self-serving and do therefore increase the scope for liability of the parent corporation for transactions between the subsidiary and third parties who did the transactions on the basis of such statements ("Konzervertrauen") [19]; others argue that such a general rule would practically erode the principle of legal separation between parent and subsidiary [20]. As far as ascertained, the courts have declined to state a principle and fallen back on the specific facts of the case [21].

[18] Lutter, *loc. cit.*, p. 254 *et seq.* and Müller, *loc. cit.*, p. 28 *et seq.* - both with references.

[19] For references, see Lutter, *loc. cit.*, note 38 at p. 256.

[20] Lutter, *loc. cit.*, p. 258.

[21] Cf. Supreme Court for Civil Affairs 1975 in 33 1975, p. 1128.

Annex III

JAPAN

1. Article 200 of the Japanese Commercial Code provides that the liability of a shareholder shall be limited to the value of the stock to which he has subscribed.

2. As an exception to this rule, the concept of "lifting the corporate veil" has been recently developed in Japanese company law; it is often called "the theory of denial of legal personality". Since the Supreme Court case which introduced this theory (dicussed in para. 3 below), there subsequently appeared several lower court decisions which applied this exception; yet, because of the influence of some scholars who stress the importance of prudence in its application, the number of decisions applying the exception has not significantly increased.

3. The first decision which applied the exception involved a land lease of a company that had only one shareholder who carried out his activities through the company. The landlord and the company agreed to terminate the lease. However, the company refused to vacate the rental property on the due date. The landlord sued the shareholder. The latter denied liability for the default of his company.. In its decision of 2/27/68, the Supreme Court held the shareholder liable and decided that a company's legal personality is denied if the legal personality is only a form without substance or the legal personality is used in order to evade the application of relevant laws. The former category would include the cases where the company's activities and those of the sole owner of shares are indistinguishable. The second category would include the cases where a company dissolves itself and establishes a new company in order to delay its discharge of liabilities or to terminate substantially the employment of union members.

4. In a decision which held a parent company liable for payment of salary to the employees of a subsidiary, the Sendai District Court set forth the following conditions for the application of the exception to the relationship between a parent company and its subsidiary (3/26/70):

a) the parent company has shares to enable it to generally control the assets of the subsidiary;

b) the parent company actually and consistently controls the activities of its subsidiary; and

c) except in cases where the subsidiary is used for illegal purposes, the parent company is liable only for claims brought by creditors of the subsidiary that are not based on agreements (such as loan agreements) with the subsidiary.

Annex IV

THE NETHERLANDS

Article 64, paragraph 1, of the Dutch Civil Code, book 2, title 3, concerning limited liabiilty companies, provides :

> " Article 64. — 1. The limited liability company is a corporation with legal personality whose authorized capital is divided in shares ; each of the shareholders shall participate in the company's authorized capital for one or more transferable shares. The shareholders shall not be personally liable for whatever is done in the name of the company and shall not be required to contribute towards the losses of the company over and above the amount that is to be paid in on their shares ".

Apart from some technical exceptions to this principle, notably the requirement to include in the financial statements of a parent corporation detailed information concerning the financial condition of subsidiaries in which it owns more than 50 % of the subscribed shares (Article 319 Civil Code, book 2), the principle of limited liability of parent companies is not subject to general exceptions such as the instrumentality rule in the United States. Although some authors have suggested the introduction of the instrumentality rule, basically under the same conditions as prevail in the United States [22], the Dutch courts have refused to apply such exceptions. It has been argued by at least one author that such discretionary power for the courts would lead to great uncertainty as to the law and that changes in this area of the law should be made by the legislature [23].

Nevertheless, creditors of a subsidiary have some important rights of action against corporate parents.

In cases of asset transfers from a subsidiary to its parent corporation without adequate consideration and with conscious prejudice to the rights of creditors, creditors may apply to the courts for the annulment of the transfers (*Actio Pauliana* - Article 1377 Civil Code).

[22] Notably Uniken Venema and van Schilfgaarde, *loc. cit.* in *J.M.M. Maeyer*, A Modem European Company Law System, Sythoff 1973, at p. 272.

[23] Maeyer, *op. cit.*, at p. 273.

A creditor may apply to the courts for the annulment of a resolution of a company if the resolution would violate:

i) the statutory provisions that govern the authority of the organ of the company that passed the resolution and the procedure leading to such resolutions;

ii) the charter of the company; or

iii) good faith; provided that the creditor has reasonable interest in compliance with the statutory or charter provision or with good faith (article 11, Civil Code, book 2).

The Dutch highest court has held that such resolutions should be tested against principles of reasonableness and good faith; the case involved a management decision of a parent corporation to secure one of its own borrowings with a mortgage on land owned by its wholly owned subsidiary company (Hoge Raad, January 27, NJ 56, 48).

Finally, and most significantly, in fairly recent decision (September 25, 1981, NJ 82, 443) the Hoge Raad held that creditors of a subsidiary company could successfully bring a tort claim against the parent company, in the following circumstances. A Swedish parent corporation was the sole shareholder of a Dutch limited liability company. The subsidiary incurred heavy losses whereas the Swedish parent made hefty profits. The subsidiary was not well capitalized. The parent corporation made loans to the Dutch subsidiary secured by all or nearly all present and future assets of the subsidiary so that none were left for other creditors. The subsidiary went bankrupt and one of the creditors sued the parent company. The Hoge Raad held that if a parent company fails to take into account the interests of new creditors of the subsidiary it may under certain circumstances commit a tort towards such creditors; especially, if the parent company has such knowledge of and control over the operations of the subsidiary that, taking into account the size of its claim and of the security issued therefore, and the state of affairs of the subsidiary, at the time of the transfer of assets, the parent knew or should have known that new creditors would be prejudiced because of lack of assets and it nevertheless failed to ensure that those creditors would receive payment. The Dutch annotator of this decision, Professor Maeijer, pointed out that the Hoge Raad avoided to disregard the legal independence of the subsidiary in favor of its earlier established doctrine of tortuous prejudice of third party creditors.

Annex V

SWITZERLAND

1. Article 620 of the Swiss Code of Obligations defines the stock corporation ("Aktiengesellschaft", Société anonyme) as

> "...a company that has... a capital fixed in advance which is divided into shares of stock and whose liabilities are payable only out of the company's assets.
>
> The shareholders are only obligated to the extent provided in the company's statutes and are not personally liable for the company's liabilities.
>
> ..." (unofficial translation).

2. Swiss courts have generally been fairly conservative in admitting claims that the legal separation between a corporation and its sole or dominant shareholder is to be disregarded. There are no reported Swiss cases where a final judgement to the effect that a shareholder was liable for debts of a corporation was rendered. In a recent case which is reviewed in more detail in paragraph 3 below, such responsibility by the sole owner of a foreign corporate entity was denied, on appeal, by the Swiss Federal Tribunal (*i.e.*, the Swiss supreme court). In rare instances, Swiss courts have accepted the reverse, *i.e.*, they have found that legal obligations of an individual also apply to corporations controlled by such person (*e.g.*, *Hussnigg gegen Plica AG und Rohrfabrik Ruschilkon AG*, BGE 71 II 272, [1945] or held a company liable for debts of its sole shareholder. A prominent example for the latter situation is a case in which the Geneva courts and, on appeal, the Swiss Federal Tribunal permitted the attachment of a property owned by a real estate to whose sole shareholder and creditor was the financial operator Bernard Cornfeld in order to satisfy a creditor's claims against Cornfeld (*Hangartner contre Société immobilière Port Pregny S.A.*, ATF 102 III 165 [1976]. An analysis of these and other judicial precedents where Swiss courts have in one way or another considered the issue of piercing the corporate veil for a particular purpose suggests that a Swiss court is likely to hold a parent company liable for the debts of its subsidiary in certain exceptional circumstances, although there have been no confirmation of this principle in practice so far. The legal

literature has, at least in part, reached the same conclusion[24]. The criteria which can be digested from judicial pronouncements or have been mentioned in the doctrine as relevant factors for possibly establishing such a liability are reviewed in more detail in paragraph 5 and 6 below.

3. As already mentioned, the Swiss Federal Tribunal recently had the opportunity to examine a claim of personal responsibility for corporate debts against the owner of a corporate entity (*Lowe gegen Mazzetta und Mitbeteiligte*, BGE 108 II 213 [1982]). In that case, some real estate developers has originally mandated a real estate agent to sell some condominiums which they were constructing. When, because of a lack of sales, the developers got into financial difficulties, they entered into agreements with, and obtained financing from, a corporate entity (a so-called "Anstalt") established under Liechtenstein law. This entity was owned and controlled by the real estate agent, and he acted on its behalf in establishing the contractual relationship between the entity and the developers. Subsequently, the entity became illiquid and the developers had difficulties in obtaining satisfaction for their financial claims against it. They therefore brought an action against the real estate agent personally who was found liable for the debts of the entity by the court of first instance and partially liable by the cantonal high court. On appeal, the Swiss Federal Tribunal reversed the lower courts decisions, stating in its opinion *inter alia* that

> "...company law quite generally can serve and is indeed meant to serve, for the limitation of liability. This applies, of course, also when a company becomes illiquid. This principle which benefits a plurality of stockholders must be valid also for the sole owner of a corporate entity, in the same way as it is recognized for the sole shareholder of a stock corporation..." (*loc. cit.*, p. 215; unofficial translation from the original German text).

The Tribunal thus made clear that it considered this principle to apply also to stock corporations and their shareholders. It further indicated that only if there was an abuse of rights, an exception from the above-quoted rule in the sense of holding the shareholder personally liable would be warranted. In the case at hand, the Tribunal did find that this condition was not met (*ibid.*).

4. In other leading cases also involving the question of piercing the corporate veil, but in a context other than the liability of a shareholder for the financial obligations of the company, the Swiss Federal Tribunal has stated the following general views on this subject:

[24] Cf. A. v. Planta, Die Haftung des Hauptaktionärs, Basel and Frankfurt a. M. 1981, p. 165; A. Petitpierre-Sauvain, Droit des Sociétés et groupes de sociétés, Geneva 1972, p. 131; and the authors referred to in the decision of the Swiss Federal Tribunal reviewed in paragraph 3 below.

"As is the case for other legal instruments, the instrument of the stock corporation is often used in a manner contrary to its purposes. In particular, it happens that a natural or legal person establishes a legally separate stock corporation for undertaking a business in order to obtain the benefit of limited liability or to avoid, for some special reasons, appearing as the owner of such business in relations with third parties. Cases in point concern especially the creation of so-called one-man or subsidiary companies — using the necessary strawmen for their formal establishment... While this leads to the creation, from the point of view of private law, of a separate legal entity, this is not, economically, an independent entity, but simply an instrument which remains entirely in the hand of its creator and bound to serve its will. This creator is economically identical with the legal person created by it. It is therefore to be presumed in such cases that the legal independence of such a company must be disregarded in certain respects, such as for example in the legal relations of the creator — the sole shareholder (the parent company) — with third parties, if the principle of good faith so requires..." (*Hussnigg gegen Plica AG und Rohrfabrik Ruschlikon AG*, BGE 71 II 272 [1945], at p. 274; unofficial translation from the original German text).

"...because of the economic identity between a company and its sole shareholder, the formal legal independence of the company in this relation to third parties is to be disregarded, if the principles of good faith so requires..." (*Bohi gegen Bindschedler & Co.*, BGE 98 II 96 [1972], at p. 99; unofficial translation from the original German text).

"According to well established judicial precedents... the formal existence of two legally separate persons cannot be accepted without reservation if the entire assets of a stock corporation belong to a single person. Although formally there may be two persons, they do not exist as separate entities, the company being a simple instrument in the hand of its creator who, economically, forms one entity with it. It must therefore be accepted in certain respects that, in accordance with this economic reality, there is an identity of persons and that legal relations binding one of them will also bind the other. This will be the case in each instance where the invocation of the separation between such persons represents an abuse of rights or results in a manifest prejudice to legitimate interests". (*Hangartner contre Société immobilière Port Pregny S.A.*, ATF 102 III 165 [1976], at pp. 169 s.; unofficial translation from the original French text).

5. The statements of the Swiss Federal Tribunal in the cases referred to above and in other opinions mentioned therein suggest that there are two main factors to be taken into account in assessing the likelihood of a Swiss court permitting recourse to a company's shareholder(s) by its creditors :

a) The underlying rationale for all cases where the Swiss Federal Tribunal has ruled that the legal separation between a company and its shareholders may be disregarded is the principle of good faith and the denial of legal protection for abuses of rights (Art. 2 Swiss Civil Code). The sole ownership of dominant control of a company by a single shareholder would thus by itself not appear to be sufficient in Switzerland to establish such a shareholder's liability. Rather, such liability would require, in addition, that the shareholder take advantage of the formal legal separation of the company for some legally or morally[25] questionable purpose. The rather vague reference to undefined " legitimate interests " in the most recent of the opinions quoted in the preceding paragraph may, however, indicate a possible broadening of this standard.

b) A Swiss court is clearly more likely to affirm shareholder responsibility for a company's liabilities if there is just one single shareholder rather than several. The argument of economic identity obviously becomes more tenuous the more diluted the ownership of the shares is. However, here again it will be the substance of the situation, not the form, which will be decisive. Giving some shares to a few strawmen who are only acting on instructions of the real owners will not help much to avoid responsibility. Faced with a contention to pierce the corporate veil, a Swiss court is likely to examine how and by whom the company in question is effectively managed and controlled. Case law suggests that a decision in such a lawsuit would thus not only depend on the formal legal ownership and management structure but rather on a determination by the court as to by whom and how actual control over the company is in effect exercised (cf. the *Hussnigg* case quoted above, BGE 71 II 272 [1945], at pp. 275 s.).

6. The absence of judicial precedents where creditors of a company have successfully sued its shareholder(s) makes it difficult to predict what kind of conduct by a parent company is likely to be considered by a Swiss judge to constitute an abuse of rights or breach of good faith justifying such a remedy. In the literature, one author has raised the question whether the following situations — some of them fairly broad generalizations, other more specific — should not be considered, *inter alia*, as a basis for such shareholder liability[26]. The creation of an impression by the parent that illiquid subsidiaries will not be abandoned to their fate ; action giving creditors good reasons to think that

[25] With respect to action *contra bonos mores* as a basis for legal responsibility under Swiss law, see Art. 41 of the Swiss Code of Obligations.

[26] Petitpierre-Sauvain, *op. cit.*, p. 170.

they are dealing with the overall corporate group composed of parent and subsidiaries, not just a single subsidiary; generally, any situation where the existence of this overall group has been a decisive factor for a counterparty to enter into a legal relationship with a subsidiary; the planning and close supervision of the activities of the subsidiary by the parent; limitations by the parent on the decision-making authority of the directors and managers of the subsidiary; instructions by the parent for the subsidiary to enter into certain contracts with specific parties; the determination of the subsidiary's budget by the parent; and the provision by the parent of services such as the keeping of the accounts of the subsidiary. While this list appears rather extensive and is not supported by any specific court decisions confirming that any or all of these factual situations would indeed lead to parent liability, it serves nevertheless to demonstrate what sort of factors might be taken into account in such a case.

7. Finally, any review of the potential liabilities arising for a parent company in connection with the creation of a subsidiary also has to take into account certain provisions of Swiss law relating to the responsibilities of company organs. Under Art. 754 of the Swiss Code of Obligations, all persons who effectively participate in the management of a stock corporation are liable to its shareholders and creditors for damaging caused by any international or negligent violation of their duties. If the stock corporation is the subsidiary of another company and the persons managing the subsidiary carry out these functions as part of their responsibilities as organs of the parent, their actions in directing the business of the subsidiary are imputed also to the parent company (Art. 55 of the Swiss Civil Code; Art. 718 of the Swiss Code of Obligations).

Annex VI

UNITED STATES

1. Although there is no statutory federal United States law on the issue of the liability of parent corporations for their subsidiaries, there is a well established rule under state law and federal case law that, unless the liability is expressly imposed by constitutional or statutory provisions, or by the charter, or by special agreement of the shareholder, shareholders are not personally liable for debts of their corporation either at law or in equity. The reason is that a corporation is a legal entity or artificial person, distinct from the members who compose it, in their individual capacity; and when it contracts a debt, it is the debt of this legal entity, the corporation, and not the debt of the individual members. It is well settled that the mere ownership by one corporation, whether or not designated as the parent corporation, of stock in another corporation, or even of a controlling interest or of all the stock, does not, of itself, make the stockholding or parent corporation liable for the debts or acts of the corporation in which it holds the stock [27].

2. However, parent corporations have exceptionally been held liable for the debts or acts of a subsidiary because of the existence of facts other than the mere relationship of the former as a stockholder, on the theory of a disregard of the corporate entity of the subsidiary corporation, but no fixed rule can be laid down as to when such liability exists [28]. The court decisions that impute legal liability to a parent corporation in respect of transactions carried out by its subsidiary, distinguish two grounds on which liability of the parent company must be assumed: cases where, due to its capitalization, organization or operation, a subsidiary was regarded as an instrumentality of, without legal independence from, its parent company; and cases in which the subsidiary company was considered to have acted as an agent of its parent corporation.

3. *Instrumentality Rule.* In a growing number of cases, U.S. courts "pierce the corporate veil" and determine that they must disregard the formal legal independence and personality of a corporate entity where it is so organized

[27] W.M. Fletcher, Cyclopedia of the Law of Private Corporations, Vol. 13 A, para. 6213.

[28] Fletcher, *op. cit.*, para. 6222.

and controlled, and its affairs are so conducted, that it is surely an instrumentality, conduit or adjunct of another corporation [29].

4. In applying what has become known as " the instrumentality rule ", the U.S. courts have required that three elements be proved [30] :

a) control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the subsidiary corporation, as to this transaction, had at the time no separate mind, will or existence of its own ; and

b) such control must have been used by the parent corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and injust act in contravention of the legal rights of a third party ; this was held by some courts to include insolvency of the subsidiary resulting from financial mismanagement by the parent corporation ; and

c) the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Among the factors that may be looked for in ascertaining whether a subsidiary is acting as an instrumentality of its parent corporation ; (i) the parent corporation owns all or most of the capital stock of the subsidiary ; (ii) the parent corporation finances the subsidiary ; (iii) the parent corporation and the subsidiary have common directors or officers ; (iv) the parent corporation has established the subsidiary ; (v) the parent corporation pays the salaries and other expenses or losses of the subsidiary ; and (vi) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take orders from the parent corporation in the interest of the latters [31]. The U.S. courts must be expected to apply the instrumentality rule not only in respect of U.S. corporations, but also to transactions of foreign corporations that are governed by U.S. law.

5. *Agency.* Such disregard for the legal independence of a corporate entity pursuant to the instrumentality rule is not the only ground on which a parent corporation may be deemed liable for transactions of its subsidiary. Pursuant to the law of agency, if a subsidiary acts as agent of its parent corporation the latter would become liable for the obligations that the subsidiary assumed

[29] See *e.g. Fish v. East,* 114 F. 2d 177 (10th Cir. 1940) ; *Steven v. Roscoe Turner Aeronautical Corp.,* 324 F 2d 157 (7th Cir. 1963) ; *CM Corp. v. Oberer Development Co.,* 631 F 2d 157 (7th Cir. 1963).

[30] See *e.g. Steven v. Roscoe Turner Aeronautical Corp.,* 324 F. 2d 157 (1963) at 160.

[31] See *e.g. Baker v. Raymond Interm., Inc.,* 656 F. 2d 173 (1981).

as agent [32]. Although, generally, an agency relationship must be established by specific contract between principal and agent, such contracts have been presumed to exist on the basis of the behavior of the parties concerned and the objectives served by such behavior.

6. Thus, for instance, if the WBB would purchase from the IBRD non-recourse participations in IBRD loans to sell them down to investors, a court could conceivably conclude that, even though there existed no formal agency contract between the IBRD and the WBB, the WBB would have to be treated as agent of the IBRD to sell participations in its loans, which it could not do without intermediation by the WBB, *e.g.* to convert the currency pool risk. In such a situation, the IBRD could be held liable as principal for any obligations undertaken by the WBB towards the investor purchasing the loan participations.

7. Most of the United States court decisions that impute a liability to the parent corporation for debts of the subsidiary involve cases of insolvency of the subsidiary company. It should not be expected that this situation would occur in respect of the WBB. More likely would be attempts by members of loan syndicates led or managed by the WBB to recoup their investments directly from the IBRD on the ground that the WBB is an agency or instrumentality of the IBRD and failed to make available to the syndicate members significant confidential information about the borrower that would have led the syndicate member not to participate in the syndicate.

8. Under United States law there is a fiduciary duty for a manager to make available to the members of syndicates managed by it all relevant information available to the manager [33]. The need arose for multiple-service enterprises to shield their syndication departments from the duty to share sensitive information gained elsewhere in the organization, *e.g.* in a department providing consulting services. Pursuant to a rule developed by the SEC such enterprises are permitted to establish for their protection a so-called "Chinese wall" between the staff that has obtained sensitive information and the staff that is responsible for syndication. Thus, such enterprises can protect themselves by ensuring that no person carrying out or supervising syndication activities would be privy to the information concerned. This is accomplished by keeping the information inside the department or unit that gained the information, excluding from access to the information any staff involved in syndication as well as any manager to whom that department or unit and the

[32] See *e.g. Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.* 483 F. 2d 1098 (5th Cir. 1973) ; *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.* 456 F. Suppl. 831 (1978).

[33] See *Slade v. Shearson, Hammill and Co.*, 517 F. 2d 398 (2d Cir. 1974).

syndication department both directly or indirectly report [34]. Would it not be possible to establish a similar Chinese wall between the IBRD and the WBB ? Unfortunately, it would be particularly difficult for the IBRD to construct an effective wall. The reason is that the sensitive information that the IBRD would be unwilling to share and that would be significant for syndicate members to know would primarily be known to IBRD's senior management that controls the entire organization. If the WBB would have to be regarded as an agent or instrumentality of the IBRD, for the purposes of the Chinese wall rule, the WBB would have to be treated as a department of the IBRD whose staff would report to the persons who would be privy to the confidential information

[34] See 17 C.F.R. Sec. 240. 14e-3 ; see further promulgations from the Federal Reserve Board (64 Fed. Res. Bull. 339) and the Comptroller of the Currency (12 C.F.R. Sec. 9.7 (d)).

Annex VII

DRAFT STATUTE FOR EUROPEAN COMPANIES

Before the Council of the European Communities lies a draft Council Regulation on the Statute for European Companies. The European Parliament has approved the draft in 1974. For several political and technical reasons it is unlikely that the Regulation will be adopted in the near future.

A "European Company" would be a company established pursuant to and in accordance with the provisions of the Statute; these requirements include registration of the company in the European Commercial Register at the Court of Justice of the European Communities. A European company would be a limited liability company whose capital would be divided into shares; it would have legal personality and in each member state, subject to the express provisions of the Statute, it would have in all respects the same rights and powers as a company limited by shares incorporated under national law (Article 1 of the draft Statute).

Article 239 of the draft Statute provides:

> "1. The controlling undertaking of a group shall be liable for the debts and liabilities of dependent group companies.
>
> 2. Nevertheless, proceedings may be brought against the controlling undertaking of a group only where the creditor has first made a written demand for payment from the dependent group company and failed to obtain satisfaction".

According to Article 223 of the draft Statute:

> "1. A controlling undertaking and one or more companies dependent on it shall constitute a group within the meaning of this Statute if all of them are under the unified management of the controlling undertaking and of one of them is an SE (Societas Europaea).
>
> Each undertaking within the group is known as a group undertaking.
>
> 2. If a company is controlled by another undertaking within the meaning of Article 6, there shall be a presumption that the controlling undertaking and the controlled company constitute a group".

Article 6 of the draft Statute contains the following definitions :

> " 1. For the purpose of this Statute, a dependent undertaking is one which has separate legal personality and over which another undertaking (hereinafter referred to as the 'controlling company'), is able, directly or indirectly, to exercise a controlling influence, one of the two being an SE.
>
> 2. An undertaking shall be conclusively presumer to be dependent on another, when that other has the power, directly or indirectly in relation to the first :
>
> *a)* to control more than half the votes exercisable in respect of the whole of the issued share capital ;
>
> *b)* to appoint more than half of the Board of Management or of the supervisory body of the first undertaking ".

The term " unified management " is not defined, and it may be difficult in practice to determine if a subsidiary is under unified management of its parent. The text of Article 223 appears to point to the conclusion that control by a parent company over a subsidiary within the terms of Article 6 creates a (rebuttable) presumption of unified management. Article 225 of the draft Statute would permit companies shareholders and creditors to apply to the Court of Justice of the European Communities for a judgment whether the company concerned belongs to a group within the meaning of the Statute.

The report of the drafting committee (chaired by Mr. P. Sanders) explains that the term " unified management " was left undefined on purpose " in order to permit the judiciary greater freedom of interpretation ". This line of reasoning has been severely criticized in the Netherlands because it would raise doubts about the status of many companies ; Dutch scholars [35] have argued that the presumption of control of Article 223 (2) cannot provide the necessary certainty because it would be rebuttable ; the procedure for obtaining a declaratory judgment from the European Court of Justice would be expensive and time consuming ; moreover, in order to ensure consistency in its decisions, the Court would have to develop objective criteria to determine where " uniform management " would obtain, criteria that could and should have been developed by the drafting committee.

In its report, the drafting committee admits that the proposed liability rule of Article 239 of the draft Statute represents a " somewhat excessive guarantee for the creditor " ; the committee justifies its proposal on the ground that, " in any event, the controlling undertaking can have so much influence on the dependent undertaking that economically speaking it is directly responsible ". Consistently with this (not very well articulated) opinion, Article 240 of the draft Statute permits controlling companies to issue instructions to the Board of Management of a dependent group company.

[35] *E.g.* Uniken Venema, De N.V. 49 (1971/72) p. 42, at p. 44.

Annex VIII

RELEVANT DEVELOPING COUNTRY CASES

The *Swift* case[36] involved an Argentinian meat packer and exporter of meat products, which in 1969 was acquired by a Bahamas-based Canadian group of companies (Deltec International Ltd.). In order to mitigate the grave financial crisis through which Swift was struggling, Deltec made cash advances and structured other financial arrangements for Swift. These attempts, however, proved futile. Swift tried to avoid its bankruptcy by proposing a corporate reorganization, but the trial court rejected this proposal on charges of fraud. Swift was declared bankrupt and the bankruptcy was extended to Deltec and the other companies of the Deltec corporate group. In effect, the judge found that the Deltec group constituted an economic unity (on grounds, *inter alia*, that the transfer pricing scheme among the companies evidenced lower prices than those charged in transactions with non-related companies). The judgement was appealed by Deltec and the group's companies. The Court of Appeals confirmed the order declaring Swift's bankruptcy, but reversed the order extending the bankruptcy to the other companies on procedural grounds (deprivation of due process guarantees).

The case finally reached the Argentinian Supreme Court by Swift's plea. Swift's bankruptcy decree was reconfirmed, but the Court of Appeals decision of not extending bankruptcy to the group was reversed. The Supreme Court based the extension of bankruptcy on grounds that the members of the group constituted a "socio-economic unity". Interestingly enough, the liability was extended to affiliated companies that did not operate in the meat business and had no direct economic involvement with Swift.

According to this case verification that the Deltec Group and Swift constituted a socio-economic unity, that Swift was a subservient of Deltec, and that Deltec had formally controlled Swift through its close organization is enough to extend bankruptcy liability to the members of the group; the

[36] *Frigorifico Swift de La Plata*, 151 *L.L.* 516 (1973). This case has been referred to as the "only one notable attempt to hold a multinational financially responsible for the obligations of its subsidiaries", Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 Tex. Int'l L. J. 321, 325 (1985).

holding of the case does not require proof of fraud or misuse of the corporate structure. Following those findings, the Argentinian Supreme Court ordered a trial court to render an order specifically identifying and naming the companies comprised in the Deltec group. *La Esperanza Company* was included in such list. *La Esperanza* [37] appealed the decision alleging that any such extension to related companies could only be feasible if the companies reached had in some way engaged in fraudulent behavior. Upon review, the Supreme Court excluded *La Esperanza* from the group of companies. In a somewhat inconsistent decision, the Supreme Court recognized that mere linkage to a bankrupt economic group does not necessarily imply the performance of fraudulent maneuvers. Accordingly, the Supreme Court enumerated the situations in which the corporate group behavior can be extended to the particular entity ; situations of fraud, situations in which the subsidiary is an agent or instrumentality of the parent, and situations in which the subsidiary has engaged in commercial conduct damaging to the enterprise as a whole and which worsens the bankruptcy.

The *Bhopal* case (recently settled) could have opened new grounds in this area. The American parent owned 50,9 percent stock of the Indian company, well over the 40 percent limit on foreign ownership set by India. Suits were filed in American federal courts (later consolidated in a complaint filed with the Court for the Southern District of New York) on grounds that U.S. Union Carbide had control in the design and construction of the fatal plant. The engineering department of the American parent corporation was responsible for the conceptualization and design work of the plant ; it monitored the engineering and construction and pushed to store the highly volatile chemical in large bulk tanks, and imposed that procedure over the objections of Union Carbide India Ltd. [38].

[37] *Ingenio La Esperanza*, 69 *E.D.* 427 (1976).

[38] According to the testimony of Ms Esther Peterson, representative of the International Organization of Consumer Unions to the United Nations, at the Hearings on the status of the Code negotiations, held on 7 May 1987 by the Subcommittee of Human Rights and International Organizations of the Committee of Foreign Affairs of the United States House of Representatives :

" The Bhopal tragedy, for example, might have been prevented or at least mitigated if the disclosure and environmental standards mandated by the Code had been in effect. These standards would require TNCs not only to conduct their operations in accordance with the laws and regulations of the Govemment of the host country relating to preservation of the environment, but also, in conducting their activities, to take steps to protect the environment. The Code would also require TNCs to supply the authorities of the Govemment of the host country with information on the possible environmental impact of their products and production processes. Moreover, the Code's rules on jurisdiction over TNCs would have clarified and helped to resolve the ensuing legal disputes ".

After the disaster, Union Carbide promptly emphasized that the Indian company was managed by Indians and operated as a totally separate company. Yet the American company had an executive vice president on the Indian corporation. Budgets, major capital expenditures, policy decisions and the corporation's report had also to be cleared with the headquarters in Connecticut.

Before settlement, the case was remitted to the Indian courts on grounds of *forum non conveniens*[39]. One may speculate about the legal implications that could have developed if the case had been tried in American courts, applying American indemnification standards, under the novel "multinational enterprise liability theory" introduced in the complaint.

[39] *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842 (S.D.N.Y. 1986).

2. *Réponse de M. B. Goldman*

November 5, 1990

Dear Confrère,

Would you mind finding attached hereto my comments on the very substantial Questionnaire you kindly prepared ?

.....

1. D'accord avec la question, ainsi qu'avec l'hypothèse formulée par le rapporteur.

2. D'accord avec la question et les explications qui l'accompagnent, sous le bénéfice des deux observations suivantes :

a) Je me demande si l'on ne devrait pas prendre en compte, pour les définitions de la propriété et du contrôle, les dispositions du droit des Communautés européennes qui fournissent de telles définitions, savoir :

— la décision de la Haute Autorité de la C.E.C.A. (J.O.C.E.C.A. du 11 mai 1954) prise pour l'application de l'article 66 du Traité de la C.E.C.A., dont l'article premier énumère divers droits et contrats qui constituent les éléments du contrôle « *lorsqu'ils confèrent, seuls ou conjointement et compte tenu des circonstances de fait et de droit, la possibilité de déterminer l'action d'une entreprise dans le domaine de la production, des prix, des investissements, des approvisionnements, des ventes ou de l'affectation des bénéfices* » ;

— les paragraphes 3 et 4 de l'article 3 du Règlement C.E.E. n° 4064/89 relatif au contrôle des opérations de concentration entre entreprises (J.O.C.E. n° L 257 du 21 septembre 1990), qui s'expriment comme suit :

> Article 3
>
> « 3. *Aux fins de l'application du présent règlement, le contrôle découle des droits, contrats ou autres moyens qui confèrent, seuls ou conjointement et compte tenu des circonstances de fait ou de droit, la possibilité d'exercer une influence déterminante sur l'activité d'une entreprise, et notamment :*
>
> a) *des droits de propriété ou de jouissance sur tout ou partie des biens d'une entreprise ;*
>
> b) *des droits ou des contrats qui confèrent une influence déterminante sur la composition, les délibérations ou les décisions des organes d'une entreprise.*
>
> 4. *Le contrôle est acquis par la ou les personnes ou entreprises :*
>
> a) *qui sont titulaires de ces droits ou bénéficiaires de ces contrats,*

ou

b) *qui, n'étant pas titulaires de ces droits ou bénéficiaires de ces contrats, ont le pouvoir d'exercer les droits qui en découlent* ».

Je ne suggère naturellement pas que ces dispositions dussent être textuellement introduites dans la résolution ; mais il serait, me semble-t-il, utile que notre Commission les étudie, et éventuellement s'en inspire.

b) Je pense, comme le rapporteur, qu'il faudrait poser une question (ou une sous-question) séparée au sujet des *joint-ventures*.

Peut-être faudrait-il, dans une telle question, distinguer entre les *joint-ventures* « institutionnelles », qui agissent à travers une personne morale nouvelle, juridiquement distincte des entreprises qui y participent, et sans qu'il y ait fusion entre celles-ci, et les *joint-ventures* purement contractuelles, qui se forment par un contrat, sans création de personne morale nouvelle, et agissent en vertu de ce contrat.

Dans les premières, il existe une personne morale débitrice, et la question est de savoir si les partenaires de la *joint-venture* qui (par hypothèse) l'ont créée, sont personnellement tenus de ses obligations : un matériau d'étude de cette situation paraît être fourni par le Groupement d'intérêt économique de la loi française (Ordonnance n° 67-821 du 23 sept. 1967, en particulier, art. 4) et le Groupement européen d'intérêt économique (Règlement du Conseil (CEE) n° 2137/85 du 25 juill. 1985 : J.O.C.E. n° L. 199, en particulier art. 24 et loi française n° 89-377 du 13 juin 1989).

En revanche, dans les *joint-ventures* contractuelles, les partenaires encourraient une responsabilité directe et solidaire.

3. La question peut être posée.

Je voudrais cependant présenter deux observations :

a) Je ne suis pas sûr que l'on doive distinguer entre les deux types d'obligations dont des exemples sont donnés.

Certes, pour le premier type (dont l'exemple est l'obligation née d'un contrat de vente ou de prestation de services), le créancier (c'est-à-dire le vendeur ou le fournisseur de services) peut demander des garanties à une autre société du groupe ou à un tiers, ce qui ne serait pas possible avec le second type (où le créancier serait, par exemple, le riverain subissant un préjudice du fait d'une « marée noire » : *Torrey Canion, Amoco Cadix, Exxon Valdez*).

Mais cela revient, en définitive, à distinguer entre les obligations contractuelles et délictuelles, et éventuellement à n'admettre la responsabilité des sociétés du groupe que pour les premières ; le champ d'application de l'extension de responsabilité serait ainsi considérablement restreint, et je ne suis pas sûr qu'il faille l'admettre.

Quant à la question finale sous 3 (" *quaere* "), je ne vois pas comment un membre du groupe pourrait échapper à ses obligations par une faillite, alors que d'autres membres du groupe, ou le groupe dans son ensemble, continueraient à « opérer avec profit ». La responsabilité du groupe ne jouerait-elle pas, précisément, lorsque l'un de ses membres est défaillant, ce que sa faillite montrerait à l'évidence ?

4. Je veux bien que la question soit posée, mais pour l'instant, je ne vois pas de raison de distinguer.

5. Je pense que la question doit être posée, mais je présente les observations suivantes :

a) Je ne vois pas, pour l'instant, pourquoi on éliminerait le problème de la production de documents ou autres informations par des banques ou autres établissements financiers agissant comme intermédiaires, en supposant, bien entendu, que ces établissements fassent partie d'un groupe avec la société débitrice « en première ligne » (note bas de page, p. 3) [1].

b) Je ne pense pas, en revanche, que l'on devrait entrer dans le domaine fiscal, où il ne s'agit pas de relations entre des entreprises.

c) Je pense que l'obligation de produire devrait être admise également au cas où la production serait demandée par un tribunal arbitral, sauf à tenir éventuellement compte de l'observation sous *(d)* ci-dessous.

d) La question sous 5 pourrait soulever un problème relatif à la loi de procédure applicable par le tribunal étatique ou arbitral qui serait appelé à ordonner la production de documents ou d'informations : pour qu'elle puisse être imposée, cette production ne devrait-elle pas être admise par cette loi ?

On pourrait sans doute suggérer une règle matérielle transnationale, indépendante de la loi de procédure applicable. Personnellement, je serais favorable à cette solution, mais je crains qu'elle se heurte à de sérieuses résistances.

6. La question doit, à mon avis, être posée.

Lorsqu'il s'agit d'investissements dans des pays en développement, un traitement particulier pourrait être envisagé dans certains cas, comme par exemple celui d'une responsabilité de l'investisseur pour actes de corruption (si une responsabilité du fait de tels actes est admise en principe par la loi du pays d'accueil).

.....

J'ajoute que sous réserve de l'observation présentée sous le point 5 (production de documents et d'informations), on devrait manifestement concevoir la résolution comme proposant des règles transnationales, indépendantes

[1] V. *supra*, p. 194.

de la loi applicable à la source de la responsabilité — contrat ou délit civil — à moins que nous envisagions de faire des suggestions aux législateurs nationaux, tendant à faire adopter les solutions suggérées par chacun d'eux, dans sa propre loi.

Peut-être une question pourrait-elle être posée sur ce point ; je pense qu'elle devrait figurer en tête du Questionnaire, car elle concernerait la conception et l'objet de la résolution.

3. *Answer of Mr Rigaux*

November 14, 1990

Dear Confrère,

.....

First of all I want to congratulate your for your excellent and thorough questionnaire to which I want to add, among a general adhesion, some suggestion.

1 and 2. Some definition of a transnational group of companies, even if it is a difficult one, will be needed at the treshold of the Fifteenth Commission works.

Since the task is a formidable one I should exclude any contemplation of joint ventures.

3. Some distinctions are necessary.

One could suggest :

a) Contracts with third parties. The interpretation of "letters of intent" can raise difficulties as is indicated by the British decision in the Malaysian case.

b) Contracts within the group : I mean labor contracts of employees who are shifted from one company to the other.

c) Tort law as against third parties.

In most of the cases the liability of the parent company will be sought for when the subsidiary is bankrecept (see for instance the Badger case). But it can occur that the third party has some interest in opposing to another company of the group the contractual obligation assumed by its debtor (for instance a clause of non-competition).

4. This is an important topic. When the state of the parent company prevents it from entering into some contracts, it occurred that the contract was concluded through a subsidiary. See for instance the Fruehauf case in

France or the Siberian Gazoduc litigation. The question is then whether the parent company can be liable under the "public" law of its own country. The so-called "extraterritorial" application of economic law can possibly be reduced, in some instances, to the jurisdiction exercized by the parent company's state on that company and channelled forward to the foreign subsidiary.

5. That topic is very relevant even if it does not entirely fit within the question of liability. The question is whether the parent company has to exercise its control over the subsidiary to bring forward documents located in another country. But there is also the opposite problem : can the parent company rely on a "blocking statute" in force in the subsidiary's country in order to refrain from disclosing such documents ? Moreover one has also to contemplate the situation of a subsidiary which relies on the legislation of the parent company's state in order to avoid such a disclosure.

I should add another problem which has been raised in the U.S. and before the Court of Justice of the European Communities : is the localization of the subsidiary a ground of jurisdiction as against the parent company ? The question of liability is not linked with the merits of the case but with the submission to another state's jurisdiction.

6. The last question brings forth a question of method : what will be the scope of the draft resolution ? Three eventualities can be contemplated :

a) Does it exist a body of international law applicable to the group liability ? My first answer would be negative but the hypothesis needs some exploration.

b) There exist "soft law" rules embodied in guidelines or codes of conduct adopted by various governmental and non governmental organizations. Do they offer some body of "transnational" material law ?

c) A third way is the conflict of laws method : what is the law applicable to group liability ? My first reaction is that this would be the most useful scope of an Institute resolution.

With my best wishes for the furtherance of your task.

P.S. — The reference to the hinted at decisions can be found in vol. 213 of the Recueil des cours, pp. 335-363.

4. *Answer of Mr S. Sucharitkul*

November 17, 1990

Cher Confrère,

.....

I shall endeavour to answer the questions raised in your questionnaire relating to "the liability of members of a group of affiliated companies for the obligations incurred by members of the group".

.....

1. A corporate group may, as the Rapporteur suggests, be defined by reference to the existing link through common ownership, directorship, management or control of its members, whether or not the enterprises forming part of the group consist of single or multiple investors, private, public or mixed.

2. Ownership, directorship, management or control may be defined on the basis of the criteria suggested by the Rapporteur.

Further rules or sub-rules may be desirable to cover cases of "joint"-ventures of various categories of investors.

3. It is possible, as indeed desirable, to distinguish among different sources or origins of obligation, the breach of which has given rise to international or transnational civil liability.

Oil spill cases or marine pollution from tankers are governed by a number of international conventions and in respect of the transnational injurious consequences of such accidents at sea international as well as civil liability transcends not only the boundaries among the enterprises but also engage the responsibility of the flag State or the State under whose law the enterprise incurring primary liability was created, or in whose territory the enterprise has its principal seat of business or operation.

A member of a group may in good faith avoid its obligations through bankruptcy, only if bankruptcy or dissolution of the enterprise has no direct effect on the satisfaction that the group as a whole and the remaining member of the group are bound to provide to redress the injury sustained by the complainant. In short, bankruptcy should not be permitted as an escape path for the wrongdoing enterprise to exonerate its own liability or that of any of its sister enterprises.

4. The liability incurred by a subsidiary or affiliate is in principle shared by the parent enterprise, whether or not such activity is forbiden to the parent. Otherwise the parent enterprise could find a convenient way to escape liability for the performance of an illegal or internationally wrongful act forbidden to it, simply by the fact of its creation of a wholly-owned or substantially owned enterprise precisely to undertake the forbidden task or to perform the activities prohibited by international custom or considered wrongful by its own articles of association.

5. This involves a delicate matter of the extraterritorial application of jurisdiction of a national authority, if purely prescriptive, voluntary compliance is possible when permitted by the law of the situs of the document or data centre. However, if the disclosure is ordered as a discovery process in execution of an enforcement jurisdiction it can have no effect whatsoever within the territory of the State of the situs particularly if it violates the secrecy or security laws of the State of the situs or the locus of the information centre. The national authority ordering disclosure may impose some penal sanction on the enterprise within its jurisdiction. Application of such a sanction may add further pressure on the enterprise to violate the laws of another sovereign State and, as such, should not be encouraged. It is in this particular field that judicial restraint and propriety need to be emphasized.

The suggestion of the Rapporteur regarding intra-group arrangements which should not be permitted to frustrate needed disclosure is indeed welcomed, on the assumption that the intra-group agreements concern members of the group within the same territorial confines a State, whether a federal union or a larger collectivity of integrated States, where federal or community supervisory jurisdiction exists. If, however, the group covers areas beyond a single national jurisdiction then the best solution is to seek the cooperation of the equally sovereign State concerned, rather than attempting to enforce unilaterally its own discovery process in violation of the *lex situs*.

6. The general proposition advanced by the Rapporteur is commendable. The developing countries do not deserve to be treated in a less advantageous way. Liability of a group should not be barred by the mere fact that the plaintiff or injured party happens to be from, or part of, a country in the process of national economic development, or that the *locus delicti commissi* or place of performance of the contract happens to be in its territory. This is so, especially as liability attributable to an enterprise of a developing country has never been questioned. Non-discrimination or equality before the law, national and international alike, should in each case be respected.

With best wishes and kind regards.

5. *Answer of Mr G. van Hecke*

23 November 1990

Dear Professor Lowenfeld,

The reading of your preliminary questionnaire has caused me to raise a fundamental question as to the purpose of the work of the commission.

I have up to now been of the opinion that, as an Institute of International Law, our task is to contribute to the formulation or conflict rules that will be susceptible of wide acceptance.

Your questionnaire indicates that you are moving towards the formulation of principles of uniform substantive law.

Since I do not consider that to be the task of our Commission I would rather suggest that before going further you take a look at the Geneva Colloquim of 1973 on « le droit international privé des groupes de sociétés » to see whether you could not reorientate our endeavours in that direction.

If you persist in tackling issues of substantive law, I think the subject should be severely limited by excluding problems of tax law and procedure (discovery of documents). Liability in tort (*e.g.* pollution) or labour relations would amply suffice to keep us busy.

I hope this first reaction will not sound too negative.

Final Report

Introduction

The history of the corporation as a juridical person runs back in various analogous forms to the law of the Roman empire, and to both secular and canon law of the Middle Ages. The essence of the concept of corporation seems to have been the separateness of the fictitious entity from the natural persons who were its members. Both in England and on the European continent the ability to organize in corporate form seems to have been viewed as a privilege, to be bestowed by the sovereign in the form of a charter or franchise, often associated with a fee or tax payable to the state [1]. The joint stock company — *i.e.*, an enterprise in which persons made permanent contributions of capital to the enterprise, as contrasted with sharing a single voyage or venture — grew up in the seventeenth century, without, so far as appears, any clear focus on the liability of the shareholders [2]. The concept of limited liability — *i.e.*, that shareholders are not obligated for more than the capital that they have contributed or agreed to contribute — came later, and not at the same rate in all states. Over time it became clear that corporations may make contracts, sue and be sued in their own name, hold and convey property, and carry on the business described in their charter, all beyond the lifetime of their organizers or owners. Somewhat later still, it became clear that corporations were liable for the acts of their officers and agents acting within (and sometimes even beyond) the scope of

[1] See, generally, Felipe de Sola Canizares, *Tratado de Sociedades por Acciones en Derecho Comparado*, Vol. 3, c. 57 (1957); Arthur K. Kuhn, *A Comparative Study of the Law of Corporations* (1912).

[2] In fact the word "stock" was used in the sense of "stock in trade", not in the modern sense of shares of stock. See L.C.B. Gower, *Modern Company Law*, p. 25 (4th ed. 1979).

their office or employment. By the latter part of the nineteenth century it had become clear that limited liability was a significant element of the organization of business activity in corporate form, and that the corporation or limited liability company was becoming the dominant form of commercial organization [3]. One other innovation — accepted today without even pause for reflection — came relatively late in the development of the corporate form: Corporations were authorized to own shares of other corporations. From that time on, both within the major industrial capitalist states and across national frontiers, the legal doctrine of individual entity and the economic reality of multi-member and often multinational enterprise began to diverge. Larger business ceased to be conducted by a single corporation owned by the ultimate investors, and major enterprises developed complex structures with subsidiaries performing distinct functions — by product, by geography, or by history. The relation between parent and subsidiary no longer corresponded to the relation between corporation and ultimate investor on which the law of corporations had been founded [4].

[3] But the development did not proceed in all jurisdictions at the same rate. In the United States, the first general limited liability law for corporations was adopted in Massachusetts in 1830. California, which became a state in 1849, imposed liability on shareholders *pro rata* for the debts and obligations of corporations incurred while they were shareholders until 1931.

In England the first general company law of 1833, sponsored by William Gladstone, provided for unlimited liability of shareholders for up to three years after they had transferred their shares; limited liability did not win acceptance until 1855, and the use of the word "Limited" to designate a company whose debts were not those of the shareholders, was not required until 1856.

The French Code de Commerce of 1807 provided, in Article 33, that « Les associés ne sont passibles que de la perte du montant de leur intérêt dans la société »; and the substance of that provision spread throughout the German and Italian states of Europe, as well as to Spain, in the course of the Nineteenth Century. The first developed corporation law in France was adopted in 1867, and the unified German state adopted a corporation law in 1871. The Swiss Code of Obligations, containing a special title on corporations, was adopted in 1874. All of these laws adopted the principle of limited liability.

[4] See, generally, Phillip I. Blumberg, *The Law of Corporate Groups*, Procedural Law (1983); Bankruptcy Law (1985); Substantive Law (1987); Statutory Law: General (1989), Little Brown & Co., Boston, Toronto, London.

There is, of course, an enormous body of discussion in all industrial countries of the nature, character, and governance of corporation, and of the distinctions between corporations and other entities [5]. The solutions developed by the law to the many questions arising from organization of business activity in corporate form have not always been the same, as is apparent both from the continuing search for corporate "havens" and from the major task of harmonization of company law under way for more than two decades in the European Community [6]. Much of this discussion is only marginally relevant to, and in any event well beyond the scope of, this Report. Two aspects of the development of company law in nearly all countries are worth remarking on at the outset. (1) Nearly all such law was developed in a private law context, before the wave of regulation, taxation, labor law, environmental controls, and other forms of governmental intervention familiar today; and (2) nearly all such law was developed with a view to a single firm operating out of a single state, owned by shareholders who might or might not also be managers but were not other corporations. In brief, the modern multi-layered, multinational enterprise, in which dozens or even hundreds of firms are linked through common ownership or control, has not been the focus of company law in any state. The question, then, is whether, or to what extent, the law limiting the liability of shareholders in a company to capital contributed (or agreed to be contributed) has been or should be modified to apply to situations where there is a single shareholder (or a group of affiliated shareholders) of the corporation that has incurred liability, and where that shareholder (or group) is itself another corporation.

Ideally, the answer to this question would be decided uniformly in all states. The *Institut* cannot, of course, accomplish such a result, but it may be able to make at least some contribution to uniformity, both by some substantive suggestions and by responding

[5] For convenient summary with bibliography from all major states, see *Int'l Encyclopedia of Comparative Law*, Vol. XIII, esp. Ch. 3, "The Formation of Marketable Share Companies", (Buxbaum); Ch. 4, "Management and Control of Marketable Share Companies", (Grossfeld).

[6] See, *e.g.*, *Compendium of EC Company Law*, (Butterworths 1990); M. Lutter, *Europäisches Gesellschaftsrecht*, Texte und Materialien zur Rechtsangleichung, (2d ed. 1984).

to the contention that a given proposal for imposing liability on a parent company or group would (or would not) violate international law. In the absence of uniformity, the question arises which law should govern the question of liability of the parent or group — the law applicable at the seat of the parent corporation, the law applicable at the seat of the corporation primarily liable for the obligation in question, the law applicable where the obligation was incurred, the law of the forum, or more than one of the above. This Report undertakes to propose some suggestions for solution to this problem of conflict of laws, in the gray area between public and private international law.

Scope of the Report

Part I of this Report addresses the substantive liability of multinational enterprises for obligations of member companies imposed by national laws. The chain of liability may flow either up or down, depending upon whether it is the state of the parent that seeks to regulate an activity of the subsidiary, or the state where the subsidiary is organized or transacts business that seeks to impose liability on the parent. The liability here addressed may be purely civil — *i.e.*, in contract or tort; it may be public, such as embargoes, prohibitions against corruption, and taxation; and it may have aspects of both public and private law, such as obligations arising out of labor law, bankruptcy, or requirements for publication of consolidated financial reports.

Part II of the Report addresses what may be called the procedural liability of multinational enterprises, but focuses only on the amenability of the parent company (or another member of the group) to judicial jurisdiction at a forum where it is not itself established. The Report does not address the related questions of service of initiating documents on the parent through the subsidiary, or of requirements that the foreign parent or affiliate of a company involved in litigation in a given state furnish documents or evidence for use in such litigation, on the ground that these subjects, though important, depend so much on procedural rules peculiar to each state that generally applicable statements are not justified at this stage of the development of international law.

Some Definitions and Illustrations

1. *The Multinational Corporation.*

The typical multinational corporation is well know. It comprises a group of companies operating under common ownership or control, usually (though not always) for a common purpose or in related economic sectors, usually (though again not always) employing a common trade mark or trade name, sometimes with local variations. The great bulk of economic activity in the non-communist world since World War II, and indeed throughout the Twentieth Century, has been conducted by multinational corporations, and their names are known the world over — Shell and Exxon (Esso), Nestlé and Philip Morris, General Electric and Siemens, Mercedes-Benz and Ford, Fiat and General Motors, Mitsubishi and Mitsui, Philips and Unilever, and so on. Dean Blumberg reports that in 1982, the 1000 largest American industrial corporations had an average of 48 subsidiaries each. Mobil Oil Corporation, perhaps an extreme example, operated in 62 different countries through 525 subsidiaries. British Petroleum operated through more than 1000 subsidiaries, and Unilever (British/Dutch) through more than 800. Nestlé, based in Switzerland, operated in more than 60 countries with 600 subsidiaries [7].

In some instances the subsidiaries conduct truly separate businesses, and outsiders may not even know that they belong to a particular group ; in most instances, however, the subsidiary is a part of an integrated activity conducted under direction of common management.

Usually the parent company is identified with a single country — Siemens with Germany, Philips with the Netherlands, Ford with the United States, and so on ; in some insance, notably Royal Dutch/ Shell and Unilever, the top of the pyramid is located in more than one country. It is no longer as typical as it was formerly that top management will come from the same country, or even share the

[7] Blumberg, *The Law of Corporate Groups*, Vol. IV, p. xli (1989). See, also, *e.g.*, Hadden, " Inside Corporate Groups ", 12 J. Soc. L. 271 (1984), reporting on a study of five large corporate groups with headquarters in Great Britain.

same mother tongue. In some multinational corporations, management is rotated among the members of the group, and a member of the parent company's board of directors sits on the board of important subsidiaries; in other multi-national corporations, senior management and boards of directors of subsidiaries are kept separate. The one defining element of a multinational enterprise is that the investing public relates to the large group of companies — through shares purchased and sold, capital contributed and dividends received, management supported or replaced — at one level only, *i.e.*, at the level of the parent company. All the other relationships among members of group, even though they may cross frontiers and time zones and language changes, are essentially internal, within the enterprise as a whole.

2. *The Parent Company.*

The parent company is the company that owns directly or indirectly the shares (or other evidence of ownership or control) of other companies within the group. The parent company may itself be an operating enterprise engaged in producing and supplying goods and services, or it may be a holding company not itself engaged in the principal activities of the group. Typically the shares of the parent company are held by the public and traded in one or more securities markets; a parent company may, however, also be closely held, without publicly traded shares. The essential assumption, maintained throughout this Report, is that the owners of the parent company are insulated from liability for the obligations of the parent company and of its subsidiaries and affiliates, beyond the capital they have contributed or agreed to contribute.

3. *The Subsidiary.*

A subsidiary company is one that is owned or controlled by another company in the same group. A subsidiary is distinguished from a branch in that it is separately incorporated, usually under the laws of the state where it is established, whereas a branch operates without separate legal form, pursuant to the charter of

another member of the group. Usually, though not always, the subsidiary is engaged in the same industry as the group as a whole and bears the same (or closely connected) name. A subsidiary company may sell products made by other members of the group ; it may make components for use by other members of the group ; it may assemble products using components made by other members of the group ; or it may make the same (or some of the same) products (or provide the same or some of the same services) as other members of the group. A company need not be wholly owned by the parent company in order to be considered a subsidiary ; it is not uncommon for a multinational enterprise to acquire majority ownership in a formerly independent company while the former management retains a minority ownership interest and day-to-day operational direction [8]. If majority ownership or control of a corporation (as defined below) is held by the parent company or by the group, the corporation qualifies for present purposes as a subsidiary.

4. *Group of Companies.*

A group of Companies, for purposes of this Report, is a synonym for the multinational enterprise as a whole. It comprises separately incorporated companies in more than one state linked by ownership or control. Typically, though not inevitably, decision-making for the group is centralized in the parent company [9]. Not all the members

[8] See, for example, the celebrated Affaire Fruehauf of 1964-65, in which the minority French interests were able to secure appointment by the court of a receiver to carry out a contract that the majority (American) owners had ordered to be canceled. See *Soc. Fruehauf Corporation v. Massardy*, Cour d'Appel, Paris, May 22, 1965, [1968] D.S. Jr. 147, [1965] J.C.P. II 14274 bis, [1965] Gaz. Pal. 86.

[9] Compare the following description by Chief Justice Warren Burger, speaking for the U.S. Supreme Court, in a case raising the question whether a parent and its subsidiary could conspire together in violation of U.S. antitrust laws :

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate ; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 at 771 (1984).

of the group need be 100 percent owned, members of the group may themselves both be subsidiaries and have subsidiaries of their own, and more than one member of a group may share in nominal ownership of still another member of the group [10]. In some multinational enterprise, the group is divided into sub-groups — *e.g.*, a European division, a Western Hemisphere division, an Asian division, etc.; in such cases the parent company of the sub-group may be treated as if it were a parent, *i.e.*, it may be held liable (if the other conditions are met) for the obligations of members of the division or sub-group, but not for obligations of members of other sub-groups.

5. *Control.*

Control for purposes of determining whether a given relationship between companies comes within the concept of parent-subsidiary or membership in a group, has been defined in a number of decisions of the Court of the European Communities as well as in regulations of the United States Treasury Department, substantially along the same lines [11]. If the parent (or group) holds 51 percent or more of the voting shares of the corporation in question, control is assumed and no additional evidence need be

[10] Compare the elaborate conditions stated in Article 1 of the Seventh Council Directive of the European Community based on Article 54 (3) (g) of the Treaty of Rome concerning the obligation of "bodies of undertakings" to establish consolidated accounts, (83/349/EEC), 26 O.J. Eur. Comm. No. L 193 (18 July 1983). It may be noted that earlier versions of the Seventh Directive stated, in Article 3, that "...a dominant undertaking and one or more undertakings dependent on it shall constitute a group if the dominant undertaking exercises in practice its dominant influence..." 19 O.J. No. C 121/2 (2 June 1976), 22 O.J. No. C 14/2 17 Jan. 1979). The term "group" was dropped from the final version. See also note 27 *infra*.

[11] See, *e.g.*, *ICI v. Commission* (The Dyestuffs Case), [1972] E.C.R. 619, 662 (14 July 1972); *Istituto Chemoterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission* (Affair Zoja), [1974] E.C.R. 223, 253 (6 March 1974). American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 414, Comment e and Reporters' Notes 3 and 4; *Encyclopedia of Comparative Law*, Vol. XIII, Ch. 7 "Company Systems and Affiliation" Pt. IV (Immenga).

adduced. Lesser share ownership may also constitute effective control, however, for instance if the parent (or the group) holds 30 percent of the voting shares and appoints the majority of directors, while no other person holds a comparable number of shares. Control may also be achieved through a combination of shareholding and debt, through holdings of voting and nonvoting shares, as well as by means of management contracts, technology or trademark licenses, franchises, or other devices, whether through contracts, trust, or similar arrangements. The critical circumstance, with the burden of proof being on the party seeking to establish the fact of control, is that the principal decisions of the firm asserted to be a subsidiary are subject to the direction or approval of the parent company [12]. The relation of parent/subsidiary or membership in a group of companies is not created where only certain of the decisions of the corporation in question are subject to approval of an outsider, for instance where a loan agreement containing a negative covenant prohibits the borrower from making another loan or pledging its assets without the first lender's approval.

Part I - Substantive Issues

A Spectrum of Issues

To survey all the issues and all the authorities relevant to the liability of corporate groups would require a lifetime of work, which would in any event be out of date by the time it was completed [13]. Certain patterns may however, be set out to aid in the analysis.

[12] See also Art. 3(3) of EC Council Regulation No. 4064 of 21 December 1989 on the Control of Concentrations between Undertakings, 32 J.O. No. L 395 (30 Dec. 1989), as amended 33 J.O. No. L 257 (21 Sept. 1990) ; Decision of the High Authority of the European Coal and Steel Community No. 24-54 of 6 May 1954 portant règlement d'application de l'article 66 § 1 du Traité [de Paris] relatif aux éléments qui constituent le contrôle d'une entreprise, 3 J.O. Haute Autorité C.E.C.A. p. 345 (11 May 1954).

[13] See, for instance, the series by Blumberg, note 4 supra, limited to the United States alone ; all of the volumes, completed within the past ten years, already have substantial supplements.

1. *Orders to Parent Companies in Respect of Foreign subsidiaries.*

One recurring pattern involves efforts by the government at the place of the parent company's headquarters to impose requirements in respect of the activities of its subsidiaries in other countries [14]. Examples include requirements for consolidated tax returns and securities filings, rules for uniform accounting and disclosure, and obedience to regimes of trade controls such as economic sanctions or embargoes. Such efforts may be further broken down into *(a)* regulation that places a burden on the enterprise but does not impinge on the interests of states where the subsidiaries are established — for instance a requirement for uniform accounting on the part of all members of a corporate group ; *(b)* regulation that is potentially in conflict with the law of one or more other states where subsidiaries are established, for instance a requirement that subsidiaries repatriate a specified portion of their income when the state where the subsidiary is established has not imposed any restraints on remittances of dividends [15] ; and *(c)* regulation that is in actual conflict with the law of one o rmore states where subsidiaries are established, for instance an order requiring the parent to instruct its subsidiaries not to carry out a contract with country *X* when it is the policy, or the legal requirement of country *X* that such contracts must be carried out [16].

In theory this category could include private litigation as well as government orders ; in practice this type of effort to reach the

[14] For these purposes, the European Community is treated as a state, and its directives as the orders of a government. "Other countries" when applied to the European Community, refers to non-member states of the Community. The relation of the law of the European Community to the law of member states and the relation of federal law in the United States, Canada, Brazil, etc. to the law of individual states, are not here treated separately.

[15] For an example, see the U.S. Foreign Direct Investment Program, 15 C.F.R. Part 1000, as it existed from 1968 to 1974, summarized in A. Lowenfeld, *The International Monetary System*, pp. 84-91 (1st ed. 1977).

[16] See, *e.g.* the *Fruehauf* episode, note 8 supra ; also the Gas Pipeline controversy of 1982, discussed hereafter.

enterprise as a whole and not just entities located in one state seems to be confined to public authorities [17].

2. *Claims Arising from Contracts with Subsidiaries.*

Another recurring pattern involves contract partners of a subsidiary that for one reason or another does not or cannot meet its obligations, is founded with inadequate capital, or becomes insolvent. A typical case may be that of a supplier in Patria to the Patrian subsidiary of a multinational group. When the supplier is not paid by the subsidiary for goods or services it has furnished, it seeks to raise its claim against the parent (or another member of the group), either in Patria or in some other state. In some instances an effort may be made to hold the group as a whole liable for the debts of the subsidiary, notwithstanding the bankruptcy of the subsidiary under the laws of Patria [18]. A variation of this pattern, involving obligations quasi-contractual, quasi-public in character, may arise if a subsidiary seeks to terminate its operations without complying with all local rules for severance and pension payments [19].

3. *Claims Arising from Catastrophic Accidents.*

A third recurring pattern concerns claims arising out of disasters attributable — at least in the first instance — to a subsidiary of a multinational group, where the amount of compensation to be paid to injured parties greatly exceeds the financial resources of the subsidiary, but not of the multinational enterprise as a whole. The claimants may be persons with no prior contact with the multinational enterprise or any of its members, for example coastal

[17] We avoid the use of the term "extraterritorial jurisdiction" in this connection both because it is a loaded term and because the regulation itself is usually directed to the parent company, and thus — at least in the first instance — is intraterritorial.

[18] See the *Deltec* case, discussed below.

[19] See the *Badger* case, discussed below.

property owners damaged by a major oil spill or shipwreck[20]; alternatively, the claimants may have had prior relations with the subsidiary, as tenants or employees[21]; or the claimant may be the state itself. This pattern is distinguished from the prior pattern by the unexpected nature and huge dimension of the losses, against which the injured parties could not reasonably be expected to have protected themselves through guarantees or insurance. Often, though not always, it may be said that the multinational enterprise as a whole benefits from the activity that caused the loss; for instance, if an integrated oil company operates through groups of subsidiaries some of which engage in extraction, others in transportation, refining, and marketing, it may fairly be said that each group depends on and benefits from the activities of the others. Whether this leads to the conclusion that the group as a whole should be responsible for the consequences of an environmental disaster, or alternatively, that enterprise should be permitted to compartmentalize its exposures, remains to be discussed.

***

One need not be too concerned about the limits of the three recurring patterns here set out, nor about further classification or subdivision. As suggested by the title of this section, a spectrum is a better metaphor for the questions addressed in this report than a series of boxes. What needs to be emphasized at this point is that it is neither necessary nor appropriate to arrive at a single answer to the question of liability of corporate groups. Different approaches to the question of enterprise vs. entity liability can be fashioned by different national legal systems within an acceptable regime of international law — public and private — and different solutions may well be reasonable within a given legal system

[20] See, *e.g.*, *The Amoco Cadiz* discussed below. The same issue was might have been raised in the more recent *Exxon Valdez* case, involving an oil spill off the coast of Alaska caused by a vessel owned by a subsidiary of the Exxon Corporation; apparently the parent corporation chose not to avoid its liability by reason of the separate incorporation of the transportation arm of the world-wide Exxon/Esso enterprise.

[21] See *e.g.*, the *Bhopal* case discussed below.

depending on how the question arises and what interests are at stake.

A Brief Dose of Theory

More than twenty years ago in a pioneering article, Professor Detlev Vagts wrote that "the present legal framework has no comfortable, tidy receptacle for [the multinational enterprise] "[22]. Two decades later that conclusion is still true, notwithstanding a vast amount of thinking about the multinational enterprise — in the United Nations, in the Organisation for Economic Cooperation and Development, in the European Community, and in academic and professional circles around the world. The question remains whether, for legal (as contrasted with economic) purposes a multinational enterprise is simply an aggregation of corporations organized under the laws of various states, or wthether a multinational enterprise may or should in some circumstances be treated as having distinct legal characteristics.

The Corporate Entity Theory.

The conceptual basis of the modern business corporation is deceptively simple. Whether created pursuant to a grant from the sovereign or by a contract among the organizers registered with a public authority, a business corporation is in all states a juridical person. Accordingly, it is entitled to hold property, to enter into contracts, to sue and be sued, to enjoy rights and be subject to duties, and to engage in such activities as are covered by its foundation document and not prohibited by law. The rules for management of corporations and for relations among shareholders, officers, directors, and supervisory authorities differ in detail from state to state[23]. But under the law of virtually all countries,

[22] Vagts, "The Multinational Enterprise: A new Challenge for Transnational Law", 83 Harvard L. Rev. 739, 740 (1970).

[23] For instance some states permit and others prohibit bearer shares; some states provide for a single board of directors and others prescribe a two-tiered structure of supervision (*Vorstand* and *Aufsichtsrat*); and some states have active regulatory commissions that require periodic reports while other states provide for only minimal regulation so long as a corporation remains solvent.

corporations organized for commercial purposes are aggregations of capital represented by shares of stock which can be freely transferred and traded, and the corporation may — so long as it remains solvent — continue in existence without limit of time.

The assets of a corporation are separate from those of its shareholders, and the shareholders are not liable for the obligations of the corporation beyond the capital that they have contributed (or agreed to contribute) through purchases of shares. The key question is whether a given firm or association is or is not incorporated. If it is not — for example if it is a "branch" of another corporation — its beneficial owners may be held liable for its debts. If it is, then it has a separate legal identity, and all the attributes of corporate existence, including limited liability [24]. As stated by the British House of Lords in the famous *Salomon* case [25], in which creditors of what was essentially a one person company sought to pursue their claims against the owner of 20,001 of the 20,007 shares,

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon... [I]t is impossible to say at the same time that there is a company and there is not [26].

It has long been understood that the original description of a corporation as an association of a number of persons for a common object no longer fits the reality of industrial or financial corporations, in that the typical public shareholder, though in theory a member of the corporation, is in economic reality a mere supplier of capital on which he hopes for a return, without any effective control over the corporation itself [27]. On the other hand, the passive

[24] As pointed out among others by Cohn and Simitis, note 28 *infra* at 216, the "either/or" formulation is faulty, particularly with regard to partnerships, which in some legal systems are treated for some purposes "as if" they were corporations, and for other purposes "as if" they were merely contractual arrangements. Nevertheless, the either/or formulation does describe the basic theory, as shown by *Salomon's case*, quoted hereafter.

[25] *Salomon v. A. Salomon & Co., Ltd*, [1897] A.C. 22 (H.L. (E)).

[26] *Id.* at 31 (per Halsbury, L.C.).

[27] See, *e.g.*, L.C.B. Gower *et al.*, *Principles of Modern Company Law*, pp. 9-10 (4th ed. 1979). Gower in turn points to the pathbreaking American book by A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (1933).

investor can normally divest himself of relationship with the corporation by the simple act of selling his shares, without thereby removing any capital from the corporation.

The separation between the shareholders and managers strengthens the case for limiting the liability of the investor/shareholder, for it would be unfair to charge him with liability for an obligation incurred by the corporation wholly beyond his control. Moreover, as the raising of capital from the public through sale of shares depends to a significant extent on the transferability of the shares, any potential risk for subsequent purchasers beyond the cost of their investment might well impair the marketability of shares and even the functioning of stock exchanges. Thus the theory of the corporation as a self-contained legal entity and the concept of limited liability for shareholders fit together well with the objective of encouraging economic activity by facilitating the mobilization of capital — the original stated purpose of the law of corporations.

The immunity of shareholders from liability for obligations of corporations has not, of course, been absolute. It is understood in most countries that when the corporate form is used to defraud third parties, or when the corporation in question is a "mere alter ego" or "puppet" of another person or firm, with no independent decision-making authority in its nominal managers, the corporate form may be disregarded and liability may be imposed on the shareholder [28]. But disregard of the corporate form usually depends on a finding of fraud or abuse, and ultimately on a conclusion that the corporation in question is not entitled to the protection of the form of doing business that it has chosen. Such cases are not a rejection of the entity theory of the corporation, though in many instances they illustrate unhappiness with that theory on the part of courts.

[28] See, *e.g.*, Int'l Encyclopedia of Comparative Law, Vol. XIII Ch. 3, Part IV "The Corporate Entity and Its Disregard", (Buxbaum); also L.C.B. Gower *et al.*, *Principles of Modern Company Law*, Ch. 6 "Lifting the Veil", (4th ed. 1979); Phillip Blumberg, *The Law of Corporate Groups: Substantive Law*, Part II "The Limits of Limited Liability" (1987); Cohn and Simitis, "'Lifting the Veil' in the Company Laws of the European Continent", 12 Int'l & Comp. L.Q. 189 (1963); Dobson, "'Lifting the Veil' in Four Countries: The Law of Argentina, England, France and the United States", 35 Int'l & Comp. L.Q. 839 (1986).

The Corporate Enterprise Theory.

It is evident that the theory of the corporate entity, and the description of the typical passive investor/shareholder does not fit the corporate group or multi-tiered enterprise. Whether the group of related corporations is confined to a single state or, as is common, the separate subsidiaries reflect not only different functions within the enterprise but also different areas of operation, it is quite unrealistic to describe the subsidiary corporation as a self-contained entity, to think of the investor/shareholder as if it belonged to the general public, or to be concerned about the marketability of the subsidiary's shares on a stock exchange. An emerging doctrine, not yet fully articulated or universally accepted, rejects the narrow focus on individual corporate entities [29]. Instead it focuses on the enterprise as a whole with respect to a least some of the many aspects of the legal relations among parent and subsidiary corporations and of the relations of units of the enterprise with non-member, public and private [30]. As Blumberg writes in the General Introduction to his multi-volume work on *The Law of Corporate Groups* [31]:

> ...this change reflects a growing unwillingness on the part of courts and legislatures to continue to accept the traditional view of the law of the corporation when it no longer corresponds to the

[29] See, *e.g.*, Hochstetter, "Parent Responsibility for Subsidiary Corporations: Evaluating European Trends", 39 Int'l & Comp. L.Q. 576 (1990).

[30] The only state that has adopted the enterprise doctrine ("Konzernrecht") by statute appears to be the Federal Republic of Germany, in the Aktiengesetz 1965, §§ 15-22, 291-338. A draft along similar lines was introduced into the French National Assembly in 1978 and widely discussed — the so-called « Proposition Cousté », Projet de loi (Assemblée Nationale) No. 236, 17 May 1978, repr. in K. Haupt, ed. *Groups of Companies in European Laws*, Vol. II, p. 296 (1982). The Advance Draft of a Ninth Council Directive concerning Groups of Companies, E.C. Doc. XI/593/75, first released in 1975 and now apparently postponed indefinitely, would build on the concept of corporate enterprise as a whole. See, generally, Immenga, "Abhängige Unternehmen und Konzerne im Europäischen Gemeinschaftsrecht", 48 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 48 (1984).

[31] Note 4 *supra*. The introduction is repeated (with small variations) in each of the four volumes thus far published. The quotation here is taken from the 1987 volume on Substantive Law, pp. xxxiv, xxxvi.

> reality of the modern business enterprise in a complex industrialized international society. Where constituent corporations of a group are collectively conducting a single business of an integrated enterprise,... particularly where issues of substantive liability are not involved [32], entity law is in the process of collapse. Where, however, substantive liability is at stake and the traditional conceptual view of the separate legal personality of the corporation is strengthened by the principle of limited liability of shareholders, as in cases involving the attempted imposition on one affiliate of a corporate group of liability for the torts or contracts of another affiliate of the group, entity law still retains much of its vigor.
>
> .....
>
> Such concern with limited liability greatly strengthens judicial respect for the separate personality of each corporate entity, and judicial disregard of entity occurs only in exceptional circumstances. The occasions for the exceptional disregard of entity typically have been determined on a case-by-case basis, yielding hundreds of irreconcilable decisions and constituting the much criticized jurisprudence of "piercing the corporate veil". Wreathed in metaphor, "piercing the corporate veil" fails to provide a workable framework for analysis, but still largely prevails [33].

The World Court and the Theory of the Multinational Enterprise.

In the well know *Barcelona Traction Case* [34], the International Court of Justice was able to avoid passing on the merits of a claim of expropriation and denial of justice brought by Belgium against Spain, by holding that Belgium, the state of origin of the great majority of the shares of the company in question, lacked standing to bring the claim, because the company itself had been incorporated under the laws of Ontario, Canada. In fact, the principal shareholder of Barcelona Traction Co. was a Belgian corporation, Sidro,

[32] For instance in matters of civil procedure, rights in bankruptcy, and application of national regulatory programs.

[33] "*Piercing* the corporate veil" is the American formulation; "*lifting*" is the more common English usage. Professor Gower suggests that etymologically "mask" might have been a better metaphor than "veil", since "persona" is derived from the name for a mask worn by a player in the Greek theater. Gower, note 2 supra at p. 108, Note 1.

[34] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] I.C.J. Rep. 3.

and the principal shareholder of Sidro was another Belgian corporation, Sofina. Thus the Barcelona Traction Company clearly fit within the definition of a subsidiary within a multinational group, and Belgium was clearly the headquarters of the parent companies.

In its judgment, the Court said :

> Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights... So long as the company is in existence the shareholder has no right to corporate assets... [35].

The Court conceded that " Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders " [36]. But it declined to draw the consequence that the shareholders — here primarily a parent company — could claim compensation for damage done to the subsidiary. It followed that if the shareholders — Belgian companies — had no rights (as contrasted with interests), the Belgian government had no rights either.

One can of course distinguish the *Barcelona Traction Case* from the problem to which this Report is addressed by pointing out that the World Court was concerned with diplomatic protection, with the Belgian government representing the interests of the parent corporation, whereas this Report is addressed to the reverse situation, in which the parent company is sought to be held liable for obligations of the subsidiary [37]. One may also point out that in the more recent *Elsi Case* [38], the majority of a chamber of the

[35] Judgment para. 41.

[36] Judgment para. 44.

[37] Indeed the Court itself discussed the possibility of lifting the corporate veil in certain circumstances or for certain purposes. Judgment para. 56-58.

[38] *Case concerning Elettronica Sicula S.p.A. (Elsi) (United States of America v. Italy)*, [1989] I.C.J. Rep. 15 (Chamber).

World Court, without discussing the point expressly, declined to follow *Barcelona Traction*, and permitted the state of the parent company to challenge the expropriation of an Italian subsidiary company [39]. Nevertheless it is fair to say that the *Barcelona Traction Case* constituted an important reaffirmation of the traditional entity theory, and gives no encouragement to those favoring some form of enterprise theory in looking at the obligations of multinational enterprises. It is also fair to point out that the Court in *Barcelona Traction* itself expressed surprise that the evolution of the law concerning the international activities of multinational corporations had not gone further, "and that no generally accepted rules in the matter have crystallized on the international plane" [40]. While this Report cannot claim that the rules have "crystallized" in the period since *Barcelona Traction* was decided, it may contribute to the evolution that the World Court expected, without fear that rules of international law would thereby be violated.

Six Cases in Search of a Principle

An idea of the range of issues that involve the question of liability of corporate groups, as well as some focus for the overall question of a just solution, may be gained from a look in some detail at the following episodes, each of which was the subject of wide discussion, both within the legal community and among the general public. There is no suggestion at this point that the cases were correctly decided, and indeed several were not "decided" at all. What all of the cases chosen have in common, however, is that they demonstrate that the issues here raised are not only legally complex, but are the subject of wide general concern.

[39] Only Judge Oda, concurring in the result, would have followed *Barcelona Traction* and denied relief to the United States on the ground that the company whose interests it was representing was merely a shareholder. The majority, which denied relief on other grounds, apparently saw no need to comment on the issue.

[40] *Barcelona Traction Case*, Judgment para. 89.

Two Disasters.

1. *Oil Spill in the English Channel*[41].

In the evening of March 16, 1978, the M/V *Amoco Cadiz*, a VLCC ("very large crude carrier") bound fully laden from the Persian Gulf to Rotterdam, ran aground in French territorial waters off the coast of Britanny, some twelve hours after her steering gear failed in a heavy storm. The members of the crew were rescued by helicopter. The ship itself could not be saved, however : its hull ripped open and the vessel broke in two, spilling its entire cargo of about 1.6 million barrels of oil over about 215 kilometers of the northwest coast of France.

It did not take long for the injured parties, including coastal property owners, municipalities, and the French Republic (as well as the insurers of the cargo) to file claims arising out of the oil spill, alleging negligent operation as well as faulty design of the supertanker[42]. Nor was there much doubt that someone would be liable for the damage done. The question was who would be liable, whether various regimes limiting liability would be applicable, and whether the party found liable would have the resources to pay such claims as were allowed.

The *Amoco Cadiz* was a Liberian flag ship with home port Monrovia, though there is no showing that she had ever called at that port. The registered owner was Amoco Transport Co., a Liberian corporation with its principal place of business in Hamilton, Bermuda, which had purchased the ship from Amoco Tankers Company, another Liberian company. Amoco Tankers had contracted for construction of the ship with Astilleros Españoles, S.A., a Spanish corporation with its principal place of business in Madrid and its shipyard in Cadiz[43]. Both Transport and Tankers were

[41] This account is based largely on the opinion of the U.S. District Court in *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 1984 A.M.C. 2123 (N.D. Ill. 1984) ; and Bartlett, "In re Oil Spill by the Amoco Cadiz — Choice of Law and a Pierced Corporate Veil Defeat the 1969 Civil Liability Convention", 10 The Maritime Lawyer 1 (1985).

[42] The *Amoco Cadiz* was indeed a very large ship — 1,095 feet long with a carrying capacity of 230,000 deadweight tons and a draft, when fully laden, of 65 feet.

[43] Not all of these companies were organized for the occasion, or even for the twentieth century oil business. Astilleros, in fact, had built the three ships used by Christopher Columbus on his first voyage — the *Niña*, the *Pinta*, and the *Santa Maria*.

wholly-owned subsidiaries (through intermediate companies) of the Standard Oil Company (Indiana), a corporation organized under the laws of Indiana that had its principal place of business — *i.e.*, group headquarters — in Chicago, Illinois. Still another subsidiary of Standard of Indiana, Amoco International Oil Company ("AIOC"), a corporation organized under the laws of Delaware with its principal office in Chicago, had actually proposed the purchase of the *Amoco Cadiz*, and had worked with Astilleros on the design, construction, and maintenance of the *Amoco Cadiz* and her sister ships. AIOC was in fact the operator of the vessel on the fateful voyage. The voyage was on a time charter to Shell International Petroleum Company Ltd.; two other affiliates of the Shell group were listed as the owners of the crude oil on board and still another affiliate of the Royal Dutch/Shell group, Petroleum Insurance Limited, had insured the cargo and later became a claimant as subrogee after it had paid off the cargo owners. There is no evidence of any relationship of ownership or control between the Amoco parties and the Shell parties, though of course they did business with one another regularly.

The various French parties could, of course, have brought suit in France. Such an action would, however, have come up against the International Convention on Civil Liability for Oil Pollution Damage of 1969[44], which limited recovery to the registered owner of the vessel — *i.e.*, probably to Amoco Transport — and limited recovery to about $ 180 (133 SDRs) per vessel ton, or $ 18.9 million (14 million SDRs) per incident, whichever was less[45]. France and

[44] 973 U.N.T.S. 3, 9 I.L.M. 45 (1970) signed at Brussels Nov. 29, 1969, entered into force June 19, 1975. The figures given here reflect a 1976 Protocol, which converted the former damage limits, expressed in Poincaré francs, to Special Drawing Rights of the International Monetary Fund.

[45] This account is not meant to be an authoritative interpretation of the Civil Liability Convention. In the *Amoco Cadiz* case, the judge said, *obiter*, that the Convention only applied to suits against the vessel's owner, and did not govern suits against parent corporations of the owner. 1984 A.M.C. at 2190-91. He also considered that the Convention only covered strict liability and not liability for negligence or unseaworthiness. It is not clear that these interpretations are correct. Bartlett, in the article cited at note 41, *supra*, concludes that an interpretation that neither brings a parent corporation within the Convention's limits nor excludes parent corporations of a vessel owner from liability renders the limitation provision of the Convention worthless. 10 The Maritime Lawyer at 22.

Liberia, but not the United States, were parties to the Civil Liability Convention. Also, the French parties evidently concluded that their chances of reaching the enterprise as a whole, including the parent company, were substantially better — both procedurally and substantively — in the United States. Accordingly, the French parties all brought suit in the United States, and the various actions (as well as a limitation proceeding brought by Amoco Transport) were consolidated in the Northern District of Illinois. The defendants were Standard, the parent company, AIOC, the operator, Transport, the owner, an employee of AIOC, and Astilleros, the builder of the vessel. The allegations included faulty construction of the vessel, faulty navigation, inadequate maintenance, failure to send a distress signal early enough, and errors in an attempt by a salvage tug to tow the ship to safety.

Interestingly the French parties, including the Republic itself, urged the application of American law, arguing that France was merely the "purely fortuitous" place of injury whereas "the culpable conduct of Standard and AIOC was centered almost exclusively in the United States and specifically in Chicago". Thus, the plaintiffs urged that the "outmoded and obsolete *lex loci* rule" should be rejected. Counsel for the Standard/Amoco parties agreed that United States law was applicable to most of the issues but argued that the Convention should be applied to the question of whether AIOC could be held liable, urging the court to accommodate the relevant policy of the foreign state (*i.e.*, the Convention in France) in its choice of law decision.

Judge McGarr eventually held that French law applied, on the ground that the damages were sustained in French territorial waters or on the coast of France:

> [T]he substantive law applicable to such claims would therefore have been French law if it had been proved different from that of the United States. However, it was not proved different. Claimants Côtes du Nord, in open court, stipulated that United States law applied, and claimants Bretagne-Angleterre-Irlande, *et al.* made no objection [46].

In the result, the court applied U.S. law.

[46] 1984 A.M.C. at 2189.

In general, the old English rule that foreign law is deemed to be like the law of the forum [47] is not followed in the United States ; here, however, it had the effect of a kind of *post hoc* party autonomy, strengthened by the irony of the French government opting for United States law and in effect rejecting the convention that it had recently adopted [48].

With the interesting but in the end not dispositive choice of law question put aside, the real question, for present purposes, was whether Standard, the parent company, could be held liable. The court first held AIOC, the ship's operator [but not registered owner] liable on several counts of negligence, failure to assure construction of a seaworthy vessel, and failure to have a redundant steering system or other means of controlling the rudder if the hydraulic system failed [49]. Second, the court held Transport, the nominal owner, liable for failure to carry out a series of non-delegable duties relating to seaworthiness, crew training, and operating the vessel. " Transport presented no evidence which would tend to establish its freedom from privity or knowledge of AIOC's negligence and of the conditions which resulted in the grounding of the vessel " [50].

The critical question, for present purposes, concerned Standard, the parent company and " deep pocket " — which at the time ranked No. 12 on the Fortune List of the World's Largest Industrial Corporations. In significant part the court regarded the question as a factual one. To summarize many pages of findings, none of the defects in design, construction, maintenance, crew training, or operation could be attributed directly to Standard : AIOC was in fact the " parent " which actually arranged for and conducted these activities even when they were nominally conducted by Transport or Tankers. The decision to purchase the vessel, however, was made by Standard's board of directors on recommendation of AIOC ; most

[47] See Dicey and Morris, *The Conflict of Laws*, Rule 18(2) (11th ed. 1987).

[48] One may wonder which law the court would have applied if the tanker had been owned, controlled, and operated by the Total/Compagnie Française des Pétroles group and the accident had occurred off the coast of Maine.

[49] 1984 A.M.C. at 2191-93.

[50] Id. at. 2193-94. This holding was affirmed by the Court of Appeals in *Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F. 2d 1279, 1303 (7th Cir. 1992).

of the legal documents concerning the *Amoco Cadiz* were drafted by an attorney in Standard's legal department; the decision as to which company in the Standard family would own the vessel, including the sale from Tankers to Transport, was apparently made by Standard on the basis of reports of its accounting, tax, and legal departments; and the president of AIOC was a member of Standard's board of directors and reported to Standard's president and chairman. No single fact, it seems, was decisive. Taken together, however, the court concluded:

> As an integrated multinational corporation..., Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities, AIOC and Transport.
>
> Standard exercised such control over its subsidiaries AIOC and Transport that those entities would be considered to be mere instrumentalities of Standard. Furthermore, Standard itself was initially involved in and controlled the design, construction, operation and management of the *Amoco Cadiz* and treated that vessel as if it were its own [51].

Accordingly, Standard was held liable to the full extent of recoverable damages, along with (*i.e.*, jointly and severally with) the companies that had owned and operated the vessel, Transport and AIOC [52].

2. *Poison Gas Leak in India.*

Early in the morning of December 3, 1984, nearly 40 tons of methyl isocyanate (MIC), a deadly gas, leaked from a chemical pesticide plant in Bhopal, India belonging to Union Carbide of

[51] *Id.* at 2194.

[52] Some six years and many hearings and inquiries later, the court issued its final damage award. The sum was approximately $ 160 million, far below the $ 1 billion originally claimed, but still about 12 times the amount that could have been awarded under the Civil Liability Convention and probably substantially more than the assets of Amoco Transport Co. Of the sum awarded, approximately $ 100 million went to the French government for cleanup costs, $ 30 million to the Shell interests for the value of the crude oil, and the remainder to the private French interests, including hotel keepers and oyster growers.

India Limited (UCIL). As the gas drifted over the surrounding slums toward the center of Bhopal, a city of some 900,000 people, over 2,000 persons suffered agonizing deaths in the first few days and between 30,000 and 40,000 persons suffered serious injuries in the accident. The final death toll may never be known : estimates ranged from 2,500 to 10,000. Eventually about 200,000 claims for injuries were filed in respect of the disaster, probably the worst peacetime industrial accident in history.

The exact cause of the accident was never determined, but as is nearly always the case with accidents, several failures appear to have come together. It seems that somehow substantial amounts of water entered into storage tank containing MIC, and a "run-away reaction" occurred. The temperature and pressure rose, the relief valve lifted and MIC vapor was discharged into the atmosphere. The protective equipment which should have prevented or minimized the discharge was out of action or not in full working order : the refrigeration system which should have cooled the storage tank was shut down, the scrubbing system which should have absorbed the vapor was not immediately available, and the flare system, which should have burned any vapor which got past the scrubbing system, was out of use [53].

Whether this event was caused by sabotage, negligence, or faulty design — or some combination of these factors — remains unclear. But from the outset the disaster raised the question of whether liability would be limited to UCIL, the subsidiary, or could be imputed to the Union Carbide Corporation, a multinational corporation with headquarters in the United States.

Unlike the web of wholly-owned subsidiaries in the Standard/ Amoco group, Union Carbide of India Limited was only 50.9 percent owned by Union Carbide. The Government of India owned or controlled about 22 percent of UCIL's shares, and the remaining shares were dispersed among 23,500 individuals and traded on the Bombay Stock Exchange. There was substantial controversy about the extent of Union Carbide's control over UCIL. All of UCIL's management and operations employees were nationals of India, some of whom had been trained by Union Carbide in the United States.

[53] See Trevor Kletz, *Learning from Accidents*, p. 83 (1988).

The last American employee of UCIL had left in 1982, four years after Carbide's shareholding in UCIL had been reduced from 60 to 50.9 percent. There is no doubt that in practical terms the parent company control was much less than is true in the typical multinational. Before the accident, the value of UCIL stood between $ 40 and $ 60 million. Union Carbide (US) including its worldwide subsidiaries, had unemcumbered assets in excess of $ 6,5 billion.

One might suggest that the responsibility of the parent corporation would depend on the cause of the accident. Since the design of the Bhopal plant originated with Union Carbide (in fact a twin plant existed in Institute, West Virginia), if the cause of the disaster was defective design, it would make sense to attribute the consequences to the parent company. If, on the other hand, the disaster was caused by inadequate maintenance or failure by local management to follow prescribed safety procedures, imputing liability to the parent corporation might seem more problematical. Conceivably, an inquiry might be appropriate into the actual control exercised by the parent company over the operations at the plant, and in particular over personnel practices.

In the event neither the public nor the litigation following the disaster focused on the distinctions suggested above. In the days just after the accident, a horde of American lawyers descended on Bhopal, and the first suit on behalf of a Bhopal victim was filed in the United States within four days after the accident. Within two months of the accident, 145 lawsuits had been filed in American courts. In February 1985, these suits were ordered consolidated in the U.S. District Court for the Southern District of New York. In April the Government of India itself filed a complaint, pursuant to the Bhopal Gas Leak Disaster (Processing of Claims) Act[54] and eventually the Union of India became the principal litigant for

[54] India, Law 21 of 1985, reproduced in 25 I.L.M. 884 (1986); The Act provided in s. 3 (1) :

> [T]he Central Government shall, and shall have the exclusive right to, represent and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.

plaintiffs. In the American actions, Union Carbide was the only defendant ; no attempt was made to join UCIL. In the course of the litigation, counsel for India asserted that it was necessary to bring the action in the United States because the courts of India did not have jurisdiction over Union Carbide.

The complaint filed in the U.S. District Court on behalf of the Union of India alleged, inter alia [55] :

> 20. Multinational corporations by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultrahazardous or inherently dangerous.
>
> 21. Key management personnel of multinationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law. The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worlwide, acting through a forged network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. In this manner, the multinational carries out its global purpose through thousands of daily actions, by a multitude of employees and agents. Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.
>
> 22. A multinational corporation has a primary, absolute and non-delegable duty to the persons and country in which it has in any manner caused to be undertaken any ultrahazardous or inherently

[55] *The Union of India v. Union Carbide Corporation*, (S.D.N.Y) Misc. No. 21-38 (JFK) Complaint dated April 8, 1985.

> dangerous activity. This includes a duty to provide that all ultra-hazardous or inherently dangerous activities are conducted with the highest standards of safety and to provide all necessary information and warnings regarding the activity involved.

No American case is known in which the theory of "multinational enterprise liability" has been accepted by an appellate court, though the concept of "enterprise liability" for mass disasters has been gaining ground, both as a way around the burdens of proof imposed on tort victims of asbestos, "Agent Orange", and similar hazardous products, and as a way to impose liability on the firm with adequate resources to pay compensation[56]. In the peculiar twist taken in the Bhopal litigation, with the Government of India seeking a United States forum and application of United States law while the big American corporation sought an Indian forum and application of Indian law, much of what plaintiffs sought was in fact accomplished. Union Carbide moved for dismissal of the suit in New York, on the basis of the doctrine of *forum non conveniens*. The District Judge granted the motion, subject to three conditions[57]: (1) that Carbide agree to submit to the jurisdiction of the courts of India and not raise any defense of time-bar; (2) that Carbide agree to satisfy any judgment against it by an Indian court, provided that judgment comports with the "minimal requirements of due process"; and (3) that Carbide agree to be subject to discovery under the model of the U.S. Federal Rules of Civil Procedure. The Court of Appeals upheld the dismissal and the first condition, but struck out the second and third conditions[58].

The effect of upholding the motion to dismiss subject to the first condition was that, at least in a procedural sense, the corporate veil had been lifted (in the British usage) or pierced (in the

[56] See, *e.g.*, Note: "Liability of Parent Corporations for Hazardous Waste Cleanup and Damages", 99 Harvard L. Rev. 986 (1986); Phillip I. Blumberg, *The Law of Corporate Groups, Substantive Law*, ch. 13 (1987), *Statutory Law*, ch. 18 (1989) and sources there cited. See also American Law Institute, *Enterprise Responsibility for Personal Injury*, Reporter's Study (1991).

[57] In re *Union Carbide Corporation Gas Plant Disaster at Bhopal India in December 1984* 634 F. Supp. 842 (S.D.N.Y. 1986).

[58] In re *Union Carbide Corporation Gas Plant Disaster at Bhopal in December 1984*, 809 F. 2d 195 (2d Cir. 1987), cert. denied, 484 U.S. 871 (1987).

American usage). As to the substance of its liability, one could foresee that it would now be difficult for Carbide to argue to Indian courts that it was insulated from liability by the separate incorporation and management of UCIL — more difficult, it seems, than if the first suit to be decided had been in an Indian court. Moreover, while the second condition of the district court was lifted by the Court of Appeals, if a final judgment were to be entered against Carbide in an Indian court, it would be very difficult indeed for Carbide to resist recognition and enforcement in the United States after its experts had testified at length about the capacity and fairness of the Indian legal system [59].

As it turned out, no final judgment of liability was issued by the Indian courts. But shortly after the case returned to India, the District Judge in Bhopal ordered Union Carbide to make an interim payment of $ 350 million for benefit of the victims of the disaster, even before there had been a determination of liability. Union Carbide appealed the order to the High Court of Madya Pradesh, and that court, in a 103-page opinion, upheld the order directed to Union Carbide, though it reduced the amount of the interim payment to $ 250 million. The High Court acknowledged the traditional view that the corporate veil may not be lifted or pierced except when the [subsidiary] corporation has been set up to perpetuate any fraud or improper conduct. But

> In the opinion of this Court, much water has flown down the Ganges since it was first held in *Salomon v. Salomon and Co.* [60] as an absolute principle that a corporation or company has a legal and separate entity of its own... As a result of the impact of the complexity of the economic effect, judicial decisions have sometimes recognized exceptions to the rule... It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

[59] See opinion of U.S. District Court, 634 F. Supp. at 847-52, 867. In lifting the second condition, the Court of Appeals pointed out that the Uniform Foreign Country Money-Judgments Recognition Act, in force in New York and numerous other states in the United States, provided adequate safeguards both against non-recognition and against recognition of a judgment not rendered in conformance with due process. 809 F. 2d at 204.

> .....
>
> [T]here is no reason why when the corporate veil can be lifted in the cases of tax evasions, [and] enforcement of welfare measures relating to industrial workmen... it cannot be lifted on purely equitable consideration in a case which has resulted in a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of a multitude of disaster victims...
>
> .....
>
> ...[T]his Court is more than satisfied that but for the formal proof of the relevant documents yet to be done it is writ large on the face of the Bhopal suit that it was the defendant-UCC which had real control over the enterprise which was engaged in carrying on the hazardous and inherently dangerous industry at the Bhopal plant.
>
> ...If, as alleged by the defendant-UCC, it chose to follow the policy of keeping itself at arm's length from the Indian company in certain respects, it was entirely its choice and such a policy could not absolve it from its liability[61].

No final judgment was ever rendered either on the substantive issue of liability or on the attribution of liability to the parent company. After both sides appealed the grant of interim relief, the Supreme Court of India suggested in February 1989 in open court that the case be settled for $ 470 million to be paid by Carbide within six weeks, and that offer was accepted[62]. The amount was far short of the $ 3 billion sought by plaintiffs, but is was roughly ten times the value of UCIL and twenty times Carbide's equity in

[60] See p. 18 *supra*.

[61] *Union Carbide Corporation v. Union of India*, No. 26/88 Madya Pradesh High Court, Judgment and Order of April 4, 1988, pp. 90-95.

[62] *Union Carbide Corporation v. Union of India*, (1989) 1 SCC [Supreme Court Cases] 674, [1989] 1 S.C.R. [Supreme Court Reports] 730 (Feb. 14-15, 1989). The statement in the text reflects the official record; for the suggestion that the government of India and Union Carbide had in effect reached an out-of-court settlement but needed the Supreme Court to give it political cover, see, *e.g.*, Cameron Barr, "Carbide's Escape", The American Lawyer, May 1989, p. 99. It was estimated that the settlement provided approximately 200 000 rupees per seriously injured victim or survivor, or about $ 14 000. For a further explanation by the Supreme Court of its approval of the settlement, see *Union Carbide Corporation v. Union of India*, AIR 1990 S.C. 273 (Order of May 4, 1989).

UCIL. Doubtless, some uncertainty as to how the Indian courts would hold on the issues of liability and lifting the veil, as well as about the delays, costs and risks of an enforcement proceeding in the United States, had something to do with the settlement. For Union Carbide, admitting, in effect, the liability of the parent company enabled it to put the catastrophe behind it [63].

Two Insolvencies.

1. *Swift/Deltec in Argentina* [64].

Compañía Swift de la Plata S.A. Frigorifíca was the largest meatpacking firm in Argentina and a major exporter from that country. Cía Swift was the largest of a number of Argentine subsidiaries of the Chicago-based Swift & Co., which since the last quarter of the nineteenth century had been a leader in packing and shipping meat in refrigerated ships and rail cars. Swift & Co. had been acquired in the 1960's by the Deltec group based in Canada. Cía Swift was a wholly-owned subsidiary of Deltec Argentina, S.A., which in turn was a subsidiary of Deltec Banking Corporation Ltd., a Canadian corporation wholly owned by Deltec International Corporation Ltd., a corporation organized under the laws of Canada with its headquarters in the Bahamas.

In 1970, when the events here described began, Cía Swift had been unprofitable for many years : it had ceased paying dividends in 1962, and had ceased paying interest on intra-group debt in 1967. By 1970 *Deltec* sought to sell Cía Swift to Argentine purchasers, and apparently in order to make itself more marketable Cía Swift petitioned the Commercial Court of Buenos Aires for a *convocatoria, i.e.*, for a summoning of creditors with a view to working out a

[63] As part of the settlement, all other claims against Union Carbide and UCIL, including pending criminal charges, were dismissed. Carbide's stock rose $ 2 on the day of the announcement to $ 31 1/8 per share.

[64] This account it based on M. Gordon, "Argentine Jurisprudence : The Parke Davis and Deltec Cases", 6 Lawyer of the Americas 320 (1974) ; M. Gordon, "Argentine Jurisprudence : Deltec Update", 11 Lawyer of the Americas 43 (1979) ; Phillip Blumberg, *The Law of Corporate Groups : Bankruptcy Law* § 17.16 (1985) ; and the judicial decisions cited.

court-approved reorganization or *concordato*. After a court-appointed referee found Cía Swift to have assets of 566 million pesos and debts of 143 million pesos, 86 percent of the creditors concurred in a proposed *concordato*, which would have provided for payment in full of all of Cía Swift's debts over a four-year period, with interest at 12 percent per annum. However, a creditor with a claim for U.S. $ 4,000 opposed the *concordato*, and the court rejected it. More significant, the court decreed Cía Swift to be in bankruptcy, rejected all claims of other members of the Deltec group, and declared that the liabilities of Cía Swift extended to all other members of the Deltec group world-wide, on the basis of a "unified structure" of the organism which makes one of the prolongations of a multinational enterprise. The federal government was designated as receiver/liquidator.

On appeal by Deltec International and other members of the group, the Court of Commercial Appeals affirmed the order of bankruptcy, but set aside the ruling extending liability to the group, essentially on the ground that the other members of the group had not had their day in court [65].

Cía Swift appealed the bankruptcy decree to the Argentine Supreme Court; the government of Argentina [since 1973 under Peronista control] opposed the appeal and sought reinstatement of the first court's ruling. The Supreme Court did reinstate the Commercial Court's decision, on the basis that "the companies forming the so-called 'Deltec Group' comprise, insofar as the bankruptcy is concerned, a unified socio-economic entity with the bankrupt company..." [66].

> It is of no interest... to delve into history nor to analyze in detail the interrelationship to which the Referee refers. It is sufficient to point to the existence of a group of companies with their seat in this country and abroad whose shares — practically in their totality — remain the property of the entities which form the group, and to their direct and indirect linkages, ultimately resulting in control by Deltec International. This is clearly evident... in the Prospectus of Deltec International to its shareholders and in [International's] Report

[65] 15 J.A. 368, 146 La Ley 612 (June 6, 1972).

[66] *Compañía Swift de la Plata, S.A. Frigorifica s/convocatoria de acreedores*, 286 Fallos de la Corte Suprema 257 at 273, 151 La Ley 516 at 520 (1973).

> and Balance Sheet... It is also evident in Deltec International's communication to its shareholders relative to the *convocatoria*, in which that company refers to the fact that the financial arrangements of "our" company Swift de la Plata in Argentina failed and that "we" are forthwith addressing ourselves to the pertinent Argentine tribunal to seek a *convocatoria* — Deltec repeatedly refers to "its" subsidiaries, "to" our property", etc. Swift, 99 % of whose shares Deltec International owns, is listed as one of the above; also listed are many other companies in Argentina and abroad, owned either directly or indirectly through other subsidiaries. By way of example... Swift is one of the subsidiaries which, directly or indirectly, controls [four other named Argentine companies] ...Also, *e.g.*, more than 80 % of Swift's sales have been to entities of the "group", including the totality of the sales of cooked and frozen meats; and [various shifts of debts, credits and guaranties among members of the group].
>
> .....
>
> [T]he varied legal forms used by different fractions of the group... should not produce a result in which only one of the fractions (Swift) ...should be the only entity affected by the judicial decision under review. The [Supreme] Court has declared "that excessive reliance on juridical traditionalism is one of the most serious obstacles to economic expansion and social justice". Accordingly, the rationale of the law must not be confused with formal juridical ritualism so as to replace substantive justice.
>
> .....
>
> These principles gain in importance when the economic interests of the nation, seriously threatened by the interests and activities set forth in [the decisions of the lower courts]... The legal structures which the laws of Argentina provide for lawful activities cannot legitimate economic and financial policies contrary to the needs of our society, effectively recognized by the judiciary of the country[67].

Postponing for the end of this part a critique of this decision, it may be pointed out that the concern that the needs of "our" society are submerged to the needs of a far-away conglomerate is a common one, not only in Latin America, but in Canada, in Western Europe, and recently even in the United States. The Argentine Supreme Court did not, however, point to any specific ways in which the Deltec group had sacrified the interests of Argentina to its global interests. Moreover, the *Deltec* case was not one in which

[67] 151 La Ley at 518-519. The translation follows Gordon, note 61 *supra*, with some slight modifications.

the debtor sought bankruptcy in order to walk away from its obligations; indeed Swift had sought only a composition of creditors, and it was an adversary who had caused failure of the *concordato*, with everything that followed. It should be noted further that following the decision quoted, another member of the Deltec group, which was not engaged in the meat industry and which had minority shareholders whose shares were listed on the Buenos Aires Stock Exchange, succeeded in 1976 (in a differently composed Supreme Court) in reversing its inclusion in the earlier judgment, pending an inquiry into whether it was engaged in commercial conduct affecting the conduct of Cía Swift or whether it had acted in the interests of and as a representative of Cía Swift or Deltec[68].

It is of interest that not long after the decision of the Argentine Supreme Court the acceptability of that decision came before an American court. Deltec Banking Corporation, a Canadian member of the Deltec group, brought suit against an unrelated Argentine company on a promissory note calling for payment in New York[69]. The Argentine company moved to dismiss the action on the ground that the plaintiff company had been declared bankrupt in Argentina, so that the defendant could not legally make payment to it in New York, or if it did that the payment would not discharge the debt in favor of the receiver in Buenos Aires. The New York court rejected the motion to dismiss, saying:

> It is well-settled that New York courts are not required to recognize foreign judgments which come in conflict with prevailing concepts of justice and fairness. The determination that plaintiff is bankrupt because it is one segment of a chain of corporations, one of which is insolvent, may under our laws amount under certain circumstances to confiscation of property...

2. *Badger in Belgium*[70].

Badger Belgium N.V. was a unit of a world-wide construction and engineering firm, engaged in building plants for the chemical,

[68] Compañía Swift de La Plata s/quiebra-incidente *(La Esperanza)*. See Gordon, "...Update", n. 61 *supra* at 50-55.

[69] *Deltec Banking Corporation v. Compañía Italo-Argentina de Electricidad, S.A.*, 171 N.Y.L.J. p. 18, col. 1 (Sup. Ct. N.Y. Cty. April 3, 1974) aff'd mem. 46 A.D. 2d 847, 362 N.Y.S. 2d 391 (1st Dept. 1974), 68 Am. J. Int'l L. 741 (1974).

[70] Much of this account is drawn from R. Blanpain, *The Badger Case and the OECD Guidelines for Multinational Enterprises* (1977).

petroleum, pharmaceutical, fertilizer, and similar industries. At the head of the group was The Badger Company, Inc. founded in 1949 with headquarters in Cambridge, Massachusetts. Badger, U.S.A. in turn, was owned by the Raytheon Corporation, a major company specializing in electronics and defense-related equipment [71], which had become a conglomerate by acquiring not only Badger, but companies engaged in such disparate activities as manufacturing home appliances and publishing textbooks. At the relevant time, in the mid-1970's, Badger had establishments in three states of the United States and twelve nations outside the United States, and about 2 000 employees word-wide. About half of the Badger group's earnings came from its foreign operations.

Badger came to Belgium when Esso expanded its refinery in Antwerp in 1956. The business gradually expanded, and by 1976 Badger Belgium had just under 250 employees, primarily white collar workers and professionals, based in Antwerp. The shares of Badger Belgium were almost 100 percent owned by Badger U.S.A.; its chairman was an Englishman, and important decisions, such as whether to bid on a given project and how much, were usually made for Badger Belgium by B.V. Badger in The Hague, which in turn received instructions from the parent company in the United States.

Thus far the story is typical of many medium-sized multinational enterprises, though perhaps because of the proximity of its sister company in the Netherlands the management of Badger Belgium had somewhat less authority than usual. However, at some time in 1976 it was decided — probably at group headquarters in Massachusetts but in any event at multinational level — that the Belgian operation of Badger was not sufficiently successful to be kept going. Throughout the summer and fall of 1976, discussions were held about a possible merger with another Belgian company, but no solution materialized. Badger U.S.A. confirmed that it would not supply additional capital; on December 23, 1976 the employees were told that efforts to sell the company had failed and that the plant would be closed in the near future.

[71] Raytheon produced, *inter alia,* the Patriot anti-missile that became famous in the Gulf War of 1991 for its ability to destroy Iraqi "Scud" missiles.

On January 12, 1977, Badger Belgium filed a petition with the Antwerp Commercial Court seeking a composition of creditors. Two days later, on Friday, January 14, 1977, some 250 employees of Badger Belgium received registered letters stating that their services were no longer needed, effective immediately. Employees would be paid through the end of the month, plus accumulated leave time.

Badger Belgium's notice to its employees, however, was inconsistent with Belgian labor law, which made elaborate provision for laid off workers. The Belgian law required advance notice prior to any termination, and in principle consultation [72]. The term of notice varied according to a complicated formula, depending on the employee's salary, years of employment, age, and skills, with a minimum of three months and a maximum as long as two years. If the employee was not permitted to work during the statutory term of the notice, he or she was nevertheless entitled to be paid at full salary plus benefits. In addition, severance pay was due in two categories, one based on years of employment, the other on the employee's age. These payments were due even if the employee found other work immediately. Badger estimated that the payments would amount to an average of 16 months' pay or $ 23,000 per employee.

Altogether, Badger Belgium N.V. was liable for about BFr. 250 million (about $ 6.25 million) in employee compensation and benefits. But on February 17, 1977, just over a month after the notices had gone out, Badger Belgium was declared bankrupt, with net worth of no more than BFr. 108 million or about $ 2.8 million. Badger B.V., its sister company in The Hague, an hour and a half away, was not bankrupt; neither was its parent, Badger U.S.A., let alone its grandparent Raytheon. Moreover, Badger Belgium was not in arrears in payments to ordinary trade creditors or to other Badger companies. In brief, the bankruptcy was essentially a function of the lay-off and severance obligations imposed by Belgian law. But Badger U.S.A. announced that it did not regard itself liable for the debts of Badger Belgium, and that it would not make the required severance payments.

[72] Loi relative à l'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises, 28 June 1966, [1966] Pasinomie p. 351.

Belgian trade unions, as well as the press and the Belgian government, took the position that these obligations should be imputed to the Badger group as a whole, which had made its investment in Belgium subject to all aspects of Belgian law — concerning exit as well as entry. Badger, on the other hand, took the position that the severance obligations were solely obligations of Badger Belgium, and should be treated in the same way as debts of all other firms whose liabilities exceeded their assets. The spokesman of the Badger group pointed out that in none of the other bankruptcies of Belgian companies in recent years had pressure been put on the shareholders to pay the debts of the insolvent companies; indeed Belgium maintained a national fund, financed by payroll taxes, to pay the severance obligations of closed companies (up to a stated maximum) when the employer failed to do so. " Is it, " Badger asked, " because the major shareholder of Badger Belgium is a multinational company that it is being attacked... ? ".

The answer of course was yes. The attack took the form not only of a law suit in Belgium against Badger Belgium, Badger Netherlands, Badger U.S.A. and Raytheon, but of mailings to shareholders of the parent companies, and representations to the American Ambassadors in Belgium and the Netherlands, asserting that " this action of one multinational American company... will harm not only Badger's and Raytheon's reputation, but also affect the so far good reputation of other American multinational companies established in the Benelux ". For both sides, the issue was one of principle.

The decisive forum turned out to be the OECD, and in particular the Committee on International Investment and Multinational Enterprises created to oversee the Guidelines for Multinational Enterprises attached to the OECD's 1976 Declaration on International Investment and Multinational Enterprises. The OECD guidelines are not, of course, a treaty, nor a code subscribed to by either states or companies. Still, the Declaration and Guidelines reflect an effort by the Western industrial states to come to terms with the phenomenon of multinational enterprises ; perhaps they could be described as " soft law " [73]. The Badger case was to be the first test of the guidelines.

[73] See, *e.g.*, I. Seidl-Hohenveldern, " International Economic ' Soft Law ' ", 163 Recueil des Cours 165, 180 (Hague Academy Int'l Law 1979).

Though a suggested provision calling for review by the Committee of individual cases had been rejected when the Declaration and Guidelines were being drafted, the Committee agreed to place the issue raised by the Badger case on its agenda, and to permit the Belgian Secretary of State for Regional Economy to make an oral presentation at a meeting on March 31, 1977. The Committee responded to the Minister's presentation that it was not a tribunal and had no mandate to reach conclusions on the conduct of individual enterprises. Thus it did not deal with the merits of the Badger case, and indeed the company's name was hardly mentioned in the day-long meeting. But the Committee accepted the facts as submitted by Belgium "as an illustration which could help to clarify the meaning of a text the Committee itself had negotiated some months ago".

In fact, the text of the guidelines was not clear. On the one hand, paragraph 6 of the Guidelines on Employment and Industrial Relations read :

> Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices in each of the countries in which they operate.
>
> .....
>
> (6) in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes... and cooperate with the employee representative and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects...

This text suggested that Badger had not done all it should have done in terms of discussion and notice, but did not adress the issue of holding a parent liable for severance obligations in the case of bankruptcy of the subsidiary[74]. For its part Badger could point to Preambular Paragraph 9 of the Guidelines, which says :

> The guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; wherever

[74] Moreover, of course, the Guideline on Employment and Industrial Relations like all the Guidelines, is written as a recommendation — "Enterprises should..." and Preambular Paragraph 6 specifically states that observance of the Guiedlines "is voluntary and not legally enforceable".

> relevant they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the guidelines are relevant to both.

While Badger should have given more notice, as local firms would have done, the national treatment principle reflected in paragraph 9 also might be understood to suggest there should be no imposition of liability on foreign shareholders that would not be imposed on domestic shareholders. On the one hand there appeared to have been no instance in Belgium of imposition of liability on shareholders of a bankrupt corporation ; on the other hand, the Belgian government asserted that there had been no case of a bankruptcy to avoid severance pay as prescribed by law[75]. Moreover, the principle of limited liability, in Belgium's view, could only be accepted in situation where the company in question had the capacity to make independent decisions. It would be wrong to apply the principle to shield a company whose decisions were not its own but were made elsewhere.

The official publication of the OECD, in reporting on the meeting of the Committee said only :

> The discussion within OECD permitted all interested parties — governments, the unions and the companies involved — to cooperate and to pursue their discussions with a clearer understanding of what each is expected to do according to recognized international standards.

Within a week of the OECD meeting, senior officials of the Badger group were meeting with Belgian government officials and union leaders. For the Badger group, it turned out that the principle of limited liability receded in importance if a financial settlement could be worked out ; for the Belgian parties, if the principle of responsibility of the multinational enterprise for plant closings could be

[75] Professor Pierre van Ommeslaghe suggests (without citation to precedent or written law) that Belgian courts would probably permit recourse to a foreign parent company's resources when that company had abandoned its Belgian subsidiary to « une faillite sans gloire », but doubts whether a judgment along these lines would be enforceable abroad, particularly in the United States. Van Ommeslaghe, « Les groupes de sociétés et l'expérience du droit belge », in *Groups of Companies in European Laws*, Klaus Haupt ed. p. 59 at 91 (1982).

established, one could negotiate about the amounts due to the employees. Agreement was eventually reached on a formula under which all the assets of Badger Belgium were applied to the severance payments, and Badger U.S.A. contributed an additional sum of BFr. 20 million (roughly $ 500,000) — about 15 percent of the initial claims. It was understood that the employees of Badger Belgium had priority over all other claimants, and that the parent company assumed no liability for other debts of Badger Belgium. One point on which Badger insisted and the Belgian parties agreed was that those employees who had been transferred to Badger companies in other countries were removed from the list of employees eligible for payments under the Belgian law.

Two Boycotts

1. *United Nations Sanctions against Rhodesia.*

On November 11, 1965, the government of Southern Rhodesia, until then a self-governing colony within the British Empire, issued a Unilateral Declaration of Independence. Since the government represented only the white settlers — some 4 percent of the population — the British Parliament immediately passed a law declaring that "Southern Rhodesia continues to be a part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it."[76]. Both the General Assembly and the Security Council of the United Nations condemned UDI[77], and not a single country recognized Rhodesia (as it now called itself) as an independent state.

Great Britain promptly initiated a program of economic sanctions, designed to bring down the government by denying export markets for the products of Rhodesia and depriving Rhodesia of assorted supplies. Within a year, the United Nations Security Council adopted "Selective Mandatory Sanctions"[78], and by 1968 the

[76] UK, Southern Rhodesia Act 1965, L. 1965 c. 76, s.1.

[77] G.A. Res. 2024, Nov. 11, 1965, 20 U.N. G.A.O.R. Supp. 14 p. 55, U.N. Doc. A/6014 (1966); S.C. Res. 216, Nov. 12, 1965, 20 U.N. S.C.O.R. Res. & Dec. 1965 p. 8.

[78] S.C. Res. 232, Dec. 16, 1966, 21 U.N. S.C.O.R. Res. & Dec. 1966 p. 7 (1966).

Security Council adopted comprehensive Mandatory Sanctions [79], designed to stop all trade in and out of Rhodesia.

In some ways, Rhodesia was well equipped to withstand an economic boycott. Rhodesia had the most diversified economy in Africa apart from South Africa, and its principal exports, non-ferrous metals, wheat, sugar, and tobacco, were in world-wide demand and could be disguised as to place of origin, if buyers did not inquire too closely. Rhodesia had plentiful supplies of hydro-electric power and coal; its one economic vulnerability was that it had no indigenous sources of oil, and neither did its friendly neighbor, the Republic of South Africa. From the beginning, the principal focus of the program of sanctions against Rhodesia, both by Britain and by the United Nations, was to deny to Rhodesia its supplies of petroleum and petroleum products [80].

Prime Minister Wilson predicted in January 1966 that the measures taken by the British government (even before mandatory U.N. sanctions were in place) would bring an end to the rebellion "within a matter of weeks rather than months" [81]. In fact the white minority government of Rhodesia held out for more than fourteen years. It finally gave in not because its supplies of oil ran out, but because an increasingly violent guerilla war sapped the will of the government leaders to continue the struggle. Indeed, fuel rationing, which had been imposed by the Rhodesian government just after UDI, was repealed in 1971, and consumption of petroleum products in Rhodesia almost doubled from its pre-UDI level in the decade and a half of UDI [82].

Prior to UDI, five companies had supplied Rhodesia's needs for petroleum products — Shell Rhodesia (39.1 %), BP Rhodesia

[79] S.C. Res. 253, May 29, 1968, 23 U.N. S.C.O.R. Res. & Dec. p. 5.

[80] See S.C. Res. 217, Nov. 20, 1965 para. 8, 20 U.N. S.C.O.R. Res. & Dec. 1965 p. 8; S.C. Res. 221, April 9, 1966, 21 U.N. S.C.O.R. Res. & Dec. p. 5; S.C. Res. 232 Dec. 16, 1966, para. 2(f); UK: The Southern Rhodesia (Petroleum) Order 1965, Stat. Instr. 1965 No. 2140, Dec. 17, 1965, amended Stat. Instr. No. 2168, Dec. 24, 1965.

[81] Commonwealth Prime Ministers' Meeting in Lagos, Nigeria January 1966, Final Communiqué. Cmnd. 2890 p. 5 (1966).

[82] See the Bingham Report cited at note 86 *infra*, p. 217, para. 14.4 (xxxiii).

(12.9 %), Mobil Oil Southern Rhodesia (39.1 %), Caltex Oil Rhodesia (20 %), and Total Rhodesia (8 %) [83]. Each of these companies was incorporated under the laws of Southern Rhodesia and each was 100 percent owned, via intermediate entities, by the major international oil company whose name it bore. Different subsidiaries of the same multinational companies supplied more than 90 percent of the petroleum supplies of South Africa. Early in 1966 the major international oil companies, at parent company level, entered into an understanding with the British and American governments that they would not supply oil to the breakaway colony, and a recently built pipeline from Beira in Mozambique to a jointly-owned refinery in Rhodesia ceased to operate at the close of 1965. But shortly after UDI the Rhodesian government created a new semi-secret state purchasing agency GENTA, and GENTA constructed several distribution centers in South Africa, for overland supplies to Rhodesia. Apparently oil for Rhodesia was supplied by Shell (Middle East) through the Shell/BP refinery in Durban, South Africa to Shell/BP Marketing (South Africa), a company owned by Royal Dutch-Shell and British Petroleum but controlled by local (South African) directors. Marketing, in turn, sold refined products to numerous customers in South Africa, including GENTA, which transported the products to Rhodesia by truck or rail. Once in Rhodesia, the products were sold by GENTA to Shell/BP Marketing (Rhodesia) a company now under Rhodesian control, which distributed the gasoline and other products at retail. The Mobil, Caltex, and Total groups also furnished supplies in similar transactions, so that the pre-UDI proportions in the Rhodesian market were maintained, but no direct link could be established between crude supplies in South Africa and product sales in Rhodesia [84].

[83] Shell and BP conducted many operations in Southern Africa jointly, and their respective subsidiaries were owned through a jointly-owned holding company, the Consolidated Petroleum Company incorporated in the United Kingdom.

[84] The description here is based on reports in the Sunday Times, London, Aug. 27, 1967, p. 9, Col. 1-8; Sept. 3, 1967, p. 2, col. 3-8. Similar reports appeared in the press and academic studies throughout the decade 1966-76, as well as in reports of the UN Committee on Sanctions established pursuant to Security Council Resolution 253.

For some years this chain of supplies, though disclosed in the press and official reports [85], went on without attracting much public attention. In the mid-1970's, however, a series of exposés, Congressional hearings in the United States, and eventually a major independent inquiry — the Bingham Commission — ordered by the British foreign secretary, brought out the facts in elaborate detail [86], to the considerable embarrassment of the British government [87].

At parent company level, in London, New York, San Francisco and Paris, management maintained that it knew nothing of the activities in question. The officers of Shell, Mobil, etc. said that they had no contact with or control over Shell Rhodesia, Mobil Oil Rhodesia, etc., and that their subsidiaries in South Africa, though wholly owned, had no control over the destination of their products once these products had been sold to independant purchasers in South Africa. A growing number of critics believed corporate headquarters must know what was going on, had probably planned it (possibly even in advance of UDI), and in any event were responsible for the activities of their subsidiaries and subordinates. In England, the maverick British multinational company Lonrho, which had

[85] See note 84 *supra*.

[86] U.K. Foreign and Commonwealth Office, *Report on the Supply of Petroleum Products to Rhodesia*, 296 pages (London 1978). The inquiry was conducted by T.H. Bingham, Q.C. (now Lord Justice Bingham) and S.M. Gray, a chartered accountant, on appointment from Dr. David Owen, Secretary of State for Foreign and Commonwealth Affairs.

[87] For instance, when Prime Minister Callaghan traveled to Zambia early in 1977 to enlist the support of that country's leader in a proposed settlement of the Rhodesia crisis, he was met by a sharp attack from President Kenneth Kaunda about the breach of sanctions, questioning whether Zambia could continue to maintain diplomatic relations with Great Britain. Callaghan replied in a handwritten letter to "Dear Kenneth":

> I am shocked and astonished that you should not only say but apparently believe that I have been cheating you for years... over the matter of oil sanctions... Kenneth, you must understand, if I have evidence about sanctions-breaking then that evidence will be followed up and, if it is possible to bring the culprits to book, then that will happen.

Quoted in Martin Balley, *Oilgate, The Sanctions Scandal* at p. 66 (1979).

owned the Beira-Umtali pipeline that operated for less than a year, brought suit against Shell and BP, alleging conspiracy to breach the British sanctions orders and otherwise to supply or agree to supply petroleum to Rhodesia.

As the failure of the oil embargo became apparent, anti-UDI and anti-apartheid groups in Great Britain, the United States and at the United Nations spoke of massive conspiracy [88]. For the governments and their legal advisers, the issue was more complicated, involving both the relation among parent companies and subsidiaries and the question of extraterritorial jurisdiction.

The United Kingdom initially made its embargoes applicable to

(a) citizens of the United Kingdom ordinarily resident in the United Kingdom ;

(b) citizens of Southern Rhodesia ;

(c) corporations incorporated or constituted under the law of the United Kingdom or the law of Southern Rhodesia,

wherever the contravention takes place [89]. Later, the scope of the prohibitions was changed to apply also to British citizens or subjects who were not ordinarily resident in the United Kingdom. Consistently with the British tradition, corporations not organized under the laws of the United Kingdom or Southern Rhodesia, including subsidiaries of companies organized under the laws of the United Kingdom, were clearly not covered. The United States, whose typical sanctions and embargo orders, including the Foreign Assets Control Regulations (directed to mainland China, North Korea and North

[88] See, *e.g.*, Center for Social Action of the United Church of Christ, *The Oil Conspiracy* 11979) ; M. Bailey, *Oilgate, The Sanctions Scandal*, (1979) as well as successive Reports of the UN Security Council Committee established in Pursuance of Res. 253 (1968) Concerning the Question of Southern Rhodesia, 32 U.N. S.C.O.R. Spec. Supp. No. 2, Vol. II, p. 299 (1977), 33 U.N. S.C.O.R. Spec. Supp. No. 2, Vol. I, p. 294 (1978) et seq.

[89] See, *e.g.*, The Southern Rhodesia (Petroleum) Order 1965, s.1(2) (Dec. 17, 1965, amended Dec. 24, 1965. The Southern Rhodesia (Prohibited Exports and Imports) Order 1966, s.1(4) (20 Janv. 1966) ; The Southern Rhodesia (Prohibited Trade and Dealings) Order 1966, ss. 2(6), 4(2), 6(6), 23 Dec. 1966).

Vietnam) [90], Cuban Assets Control Regulations [91], and later the Iranian Assets Control Regulations [92] all applied (with minor changes in wording) to

(1) Any citizen or resident of the United States ;

(2) Any person actually within the United States ;

(3) Any corporation organized under the laws of the United States or any state of the United States ; *and*

(4) Any partnership, association, corporation or other organization, *wheresoever organized or doing business* which is owned or controlled by persons specified in (1), (2), or (3) [93].

here followed the lead of the British and replaced the underlined text in its regulations implementing sanctions against Rhodesia by the words "...organized under the laws of, or having its principal place of business *in Southern Rhodesia*".

Of course regulations of this kind are difficult to understand, even for lawyers. What the public understood was pictures of Shell and Mobil service stations in Rhodesia pumping fuel, and memoranda that began to be leaked by disgruntled employees disclosing communications between officers and different companies in the respective groups, sometimes speaking openly about supplies to Rhodesia, sometimes speaking in codes that suggested an effort to conceal but were not difficult to place in context.

The critics had two avenues of attack against "sanctions busting". As to the multinational enterprises, even if it was true that only the American and British members of the group could be made subject to the jurisdiction of the United States and the United Kingdom, it was inconceivable that corporate headquarters, including citizens of the United States and the United Kingdom, did not have it in their power to find out about the supply of oil to Rhodesia by their subsidiaries and to put a stop to it. For instance, a brochure

[90] 31 C.F.R. Part 500.
[91] 31 C.F.R. Part 515.
[92] 31 C.F.R. Part 535.
[93] See 31 C.F.R. § 500.329 ; § 515.329 ; § 535.329.

put out by an activist group that was reproduced both in Congressional and United Nations documents said :

> It is hard to imagine that the sanctions breaking activities of Mobil (South Africa) were unknown to its board ; after all, they involved business worth tens of millions of dollars, which would normally be reported on and evaluated at board meetings. And with three U.S. citizens who are or have been directors of Mobil (South Africa) and very senior executives within Mobil (U.S.A.), it is difficult to see how Mobil (U.S.A.) could be said not to know of the sanctions-breaking activities of its subsidiary [94].

Mobil responded at a Congressional hearing that there had been no violations of U.S. law either by Mobil Rhodesia, which was not prohibited from marketing inside Rhodesia products it purchased from GENTA, or by Mobil South Africa, which was not prohibited from selling non-U.S. origin products to anyone, including persons in Rhodesia. Moreover, Mobil's efforts to find out more about what its South African affiliates might have known about the destination of their products were frustrated by South African law, which made it a crime to transmit outside of the country information which would prejudice the security interests of South Africa. " It seems clear there is nothing further which Mobil can do to resolve the matter, which involves matters of national policy required to be handled on a government-to-government basis [95] ".

The other avenue of attack, heard both in Britain and in the United States, as well as in the sanctions committees of the United Nations, was to question the policies of the governments directly. If it was true that Mobil and Shell and BP were not technically liable, should not the laws and regulations be changed ? Should the United States regulations, for instance, have been drafted as its other economic sanctions regulations had been to include the phrase " ...and any... corporation or other organization wheresoever organized or doing business, which is owned or controlled by [U.S. corporations] " ? Should the regulations have required parent companies,

[94] *The Oil Conspiracy*, note 88 *supra*, p. 31.

[95] *South Africa-U.S. Policy and the Role of U.S. Corporations*, Hearings before Subcomm. on Africa of Senate Comm. on Foreign Relations 94th Cong. 2d Sess. pp. 357-77, (Sept. 17, 1976).

as controlling shareholders and overall managers, to direct their subsidiaries to obey the embargoes ?[96]. Should some kind of duty of inquiry be imposed on top level management, so that the parent company could not say, as Shell and Mobil did, that it could do nothing about their subsidiaries' policies of non-disclosure ?

On the one hand, the resolutions of the United Nations Security Council had not spoken to the issue : the requirements ran to " any activities by [member states'] nationals or in their territories... "[97]. On the other hand, since the sanctions had been implemented pursuant to " decisions " taken by the Security Council under Article 41 of the U.N. Charter binding on all states pursuant to Article 25 of the Charter, there ought not — at least in theory — to be the kind of conflicts that had arisen when the United States had sought to apply its embargoes against China and Cuba to foreign subsidiaries of American companies, contrary to the policies of Canada, Great Britain, France, and other countries[98].

Most fundamentally, had the failure in the Rhodesia crisis of the oil embargo — and of sanctions generally — demonstrated that major multinational enterprises had slipped their moorings from national control ?

No final decisions came out of the investigations into the failure of the oil embargo. The Bingham Report was critical of Shell and BP, and also of the British government, but it did not recommend either prosecution or revision of the sanctions regulations. In the United States, the Treasury Department also conducted an investigation and issued a report, which did not quite exonerate Mobil but did not accuse it either of breach of the regulations or of having known of breaches by its subsidiaries[99].

No changes were made in either country — or in the resolutions of the Security Council — as a result of the various inquiries and disclosures.

[96] Compare the *Fruehauf* case, discussed at note 8 *supra*.

[97] See, *e.g.*, S.C. Res. 253 of May 29, 1968, para. 3.

[98] See, *e.g.*, Corcoran, " The Trading with the Enemy Act and the Controlled Canadian Corporation ", 14 McGill L.J. 174 (1968). See also the discussion of the Gas Pipeline case in the next section.

[99] U.S. Treasury, *Treasury Investigation of Charges Made Against the Mobil Oil Corporation*. (Mimeograph released May 12, 1977).

2. *United States Sanctions against the USSR: The Gas Pipeline Case.*

At midnight Saturday, December 12, 1981, tanks of the Polish army ringed Warsaw, soldiers manned checkpoints on all major roads, and guards were posted outside all major buildings. At 6 o'clock the next morning, General Wojciech Jaruzelski, the Premier and First Secretary of the Polish United Workers (Communist), Party, declared a national emergency and proclaimed martial law, to forestall "the extremists... planning to destroy Poland's statehood". The emergency had been caused by the rise over the preceding sixteen months of Solidarity, a democratic and anti-communist movement that had originated among workers in the Baltic shipyards but by now had some ten million members and was calling for a nationwide referendum on establishing a non-communist government and defining Poland's relationship with the Soviet Union. Solidarity's leaders, along with journalists, academics, and government officials believed sympathetic to Solidarity, were immediately arrested and placed in "preventive internment" at undisclosed locations; all public gatherings, demonstrations and strikes were forbidden; a total blackout of news was imposed; and all telephone lines, international as well as internal, were cut.

Though all of these actions were taken by Polish military and police forces, it seemed to the United States government that the imposition of martial law must have been undertaken at the urging if not the command, of the Soviet Union. "It would be naive", President Reagan told his news conference, "to think this could happen without the full knowledge and the support of the Soviet Union. We're not naive. We view the current situation in Poland in the gravest of terms" [100].

Whether or not President Reagan was correct in attributing the repression in Poland to the Soviet government [101], he was convinced

[100] President Reagan's News Conference of December 17, 1981, Opening Statement, 17 Weekly Comp. Pres. Docs. 1379 (1981).

[101] In fact, General Victor Kulikov, the Commander in Chief of the forces of the Warsaw Pact, was present in Warsaw as martial law was planned and then proclaimed. An alternative interpretation to that of President Reagan was that Jaruzelski acted to forestall the kind of intervention that the Soviet Union had undertaken in Budapest in 1956 and Prague in 1968.

that a firm response was called for. "No", he said, "we're not letting them get away with it" [102].

In contrast to the countries of Western Europe, which issued statements of regret but took no action, the U.S. government soon backed up President Reagan's words with a series of economic sanctions, directed both to Poland and to the Soviet Union. Agricultural sales were reduced, airline and fishing privileges were suspended, negotiations of several economic and cultural agreements were broken off, and enforcement of export controls was tightened. Many of these measures had been applied by the United States, on and off over the thirty-plus years of Cold War and Détente. The United States now looked for an additional, non-violent way it could get its message across, and hit upon the project then getting started, to construct a large diameter pipeline to transport natural gas from the Siberian Arctic to Western Europe.

In brief, the pipeline project involved credits from West European countries to the Soviet Union of some 10 to 15 billion dollars to cover the entire external cost of construction of the pipeline, in return for a commitment by the Soviet Union to supply 40-70 billion cubic meters of gas every year when the project was completed, equal to 700,000 - 1,2 million barrels/day of oil. The credits would be paid back out of the proceeds of the sale of the gas. Much of the construction of the pipeline and related equipment would be carried out by West European firms, and for many of these firms, especially in the distressed steel industry, the project was a very important one. To France, the Federal Republic of Germany, and other participating countries, the pipeline project looked like an attractive way to diversify their sources of energy away from the volatile Middle East ; the United States, under both the Carter and Reagan administrations, had been opposed to the project, because it regarded the credit terms as too favorable and because it feared the political power that the Soviet Union might gain by controlling a significant share of the West's supply of energy. But the United States had not placed any impediment in the way of participation by American companies in the project.

[102] President's News Conference of December 17, 1981, 17 Weekly Comp. Pres. Docs. at 1381.

That participation was desirable because of the experience gained and equipment developed in the recently completed Trans-Alaska pipeline over similar terrain. American companies had licensed technology and sold equipment to West European firms for use in the pipeline project, and European subsidiaries of American companies had become important contractors in the project. For the most part, the U.S. government had not restricted exports of either equipment or technology relevant to the pipeline project; where export licenses were required for so-called "dual use products", they had usually been issued.

After imposition of martial law in Poland, the American attitude toward the pipeline changed. Export licenses that had been issued by the U.S. Department of Commerce were revoked; products and technical data destined for the pipeline that had not previously been controlled were now placed under requirement of "validated license", and it was announced that such licenses would not be granted [103].

The reaction in Western Europe to these measures at first was quiet, though it was quickly understood that firms in Great Britain, France, Italy, and Germany were all exposed on contracts to construct compressor stations for the pipeline that counted on equipment made in the United States by General Electric and other American companies. The foreign ministers of the European Community stated that they "utterly disapprove of the situation in Poland", and "noted with concern and disapproval the serious external pressure and the campaign directed by the U.S.S.R. and the other East European countries against the efforts for renewal in Poland", thus by implication supporting the conclusion of the U.S. government about the authorship of the repression in Poland. As to the American sanctions, "The Ten have taken note of the economic measures taken by the United States government with regard to the U.S.S.R. The Ten will undertake in this context

[103] See *Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R.*, U.S. Dept. of Commerce Regulations, 47 Fed. Reg. 141 (Jan. 5, 1982). These and the regulations discussed at note 106 *infra* are conveniently reproduced in 21 International Legal Materials 855-866 (1982).

close and positive consultation with the United States government... "[104]. While this meant only that the Community would not undermine the United States sanctions but would not adopt similar measures of their own, there was no suggestion that the Community regarded the United States as having in any sense violated international law. To the extent there were differences between the members of the Community and the United States, they were political, not legal.

In Poland, however, the situation got worse, not better. President Reagan decided that the sanctions directed to the pipeline project should be intensified. From now on, restraints on exports in connection with the pipeline project would apply not only to goods and technology exported from the United States, but also to exports or reexports of equipment:

> 1) produced abroad by companies owned or controlled by companies organized in the United States;
>
> 2) produced abroad by companies under license agreements with companies organized in the United States, even if the license had been granted prior to December 1981; and
>
> 3) produced abroad by companies under license agreements that contained provision for compliance with U.S. export regulations[105].

The sanction for violation of these regulations could be denial of "export privileges" to the violator, *i.e.*, the right of a firm, wherever it was established or did business, to participate — whether as exporter, importer, or intermediary — in a transaction involving exports from the United States. Clearly such a sanction would have a severe impact on any firm engaged in oil- or high technology-related activity.

In contrast to the reaction in December 1981, this time the reaction from the countries of Western Europe was loud and quick, and all negative. Even before the implementing regulations were

[104] Communiqué on Poland issued by the Foreign Ministers of the European Economic Community January 4, 1982.

[105] Statement of President Reagan on Extension of U.S. Sanctions, June 18, 1982, 18 Weekly Comp. Pres. Docs. 820 (1982).

published [106], the Foreign Ministers of the European Community declared :

> This action, taken without consultation with the Community, implies an extraterritorial extension of U.S. jurisdiction, which in the circumstances is contrary to international law [107].

Within two weeks the Community submitted a formal Aide-Mémoire " to express its strongest reservations " with regard to the expanded sanctions regulations, making both political and legal arguments. As to the latter, the second and third bases for applying United States controls — the link of technology licenses and references to U.S. law in private agreements — were unprecedented, and as the Community pointed out, " find no support in public international law ". The first basis for applying U.S. controls — ownership or control of subsidiaries — was not, of course, unprecedented, though it had always been controversial [108]. The Community now asserted that such extension of U.S. legal control to companies which are incorporated in the EEC " is not warranted by public international law ". In a legal brief submitted by the Community a few weeks later, this contention was spelled out in more detail [109].

> ...The American measures clearly infringe the principle of territoriality, since they purport to regulate the activities of companies in the E.C., not under the territorial competence of the U.S.
>
> .....
>
> The [measures]... cannot be justified under the nationality principle because they ignore the two traditional criteria for determining the nationality of companies [i.e., the place of incorporation and the place of the registered office of the company concerned, as declared by the International Court of Justice in the *Barcelona Traction Case*].

[106] *Amendment of Oil and Gas Controls to the U.S.S.R.*, 47 Fed. Reg. 27250 (June 24, 1952).

[107] Statement of the Foreign Ministers of the European Community, June 23, 1982.

[108] See, *e.g.*, the controversy surrounding the *Fruehauf* affair in 1965, note 8 *supra*.

[109] *Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations*, COM (82) Aug. 11, 1982, repr. in 21 International Legal Materials 981 (1982).

The Community's brief acknowledged that the *Barcelona Traction* case [110] had dealt with diplomatic protection, not with assertion of jurisdiction to prescribe, but argued that it reflected a "general principle of international law". Of course the fact that the United States measures asserting control over subsidiaries were combined with measures asserting control over unrelated foreign companies linked to the United States only by prior contract, made the Community's argument more compelling. And the underlying source of the conflict was put clearly in the Community's brief :

> The practical impact of the Amendments to the Export Administration Regulations is that EC Companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office within the Community which has its own trade policy towards the U.S.S.R.

The conflict then, was not just about legal principle, though legal principle played an important part in the conflict. In the Netherlands, the subsidiary of an American company notified its French contract partner that it would not be able to perform its contract to deliver geological sensing equipment to be used in construction of the pipeline, because of the orders of the U.S. government. When the French company brought suit, the District Court in The Hague ordered the contract performed, on the ground that the United States had no jurisdiction over the contract [111]. The court said that the protective principle of U.S. jurisdiction did not apply because the goods exported from the Netherlands to the Soviet Union could not lead to direct or illegal consequences for the United States ; as for the nationality principle of jurisdiction, it was not applicable to a company organized under Dutch law and carrying on business in the Netherlands, regardless of the identity or nationality of the shareholders.

[110] [1970] I.C.J. Rep. 3, discussed at pp. 260-262 *supra*.

[111] *Compagnie Européenne des Pétroles, S.A. v. Sensor Nederland, B.V.*, 36 Rechtspraak van de Week-Kort Geding 157, 72 Rev. Critique de Droit Int'l Privé 473 (Dist. Ct. The Hague, Sept. 17, 1982). For analysis of this case, as well as discussion of the Pipeline affair generally, see Audit, « Extra-territorialité et commerce international : L'Affaire du gazoduc Sibérien », 72 Rev. Critique de Droit Int'l Privé 401 (1983).

In Great Britain, the Secretary of State for Trade invoked the Protection of Trading Interests Act, 1980, to order four British companies to deliver gas turbines to the Soviet Union for use in the pipeline project, notwithstanding the U.S. regulations [112]. In France, the Minister of Research and Industry issued an *Ordre de Réquisition de Services*, directing Société Dresser France, S.A., the wholly-owned French subsidiary of the American company Dresser Industries, Inc., to complete the manufacture and delivery of all compressors and other equipment provided for in two contracts with the Soviet entity V/O Machinoimport, subject to criminal penalties for failure to comply. In the Federal Republic of Germany and Italy, the supplying companies also announced, with the support of their governments (though apparently not under direct command), that they would continue to carry out their pipeline-related contracts.

For its part, the U.S. Departement of Commerce took steps to enforce the regulations, by issuing administrative orders denying "export privileges" to firms that had violated the orders [113]. Just as the European governments and courts had rejected the defense of orders of the United States government, so the U.S. Department of Commerce rejected the contention that the orders of the territorial sovereign should take precedence over orders of the United States. Dresser, a major multinational corporation engaged in various phases of the oil industry, mounted a serious challenge to the validity of the regulation and denial order, to no avail [114]. On appeal from the administrative order, the Assistant Secretary of Commerce for Trade Administration concluded that Dresser (France) had violated the regulations, that the regulations had been issued in compliance with the U.S. statute, and that the statute did not violate

[112] *The Protection of Trading Interests (US Reexport Control) Order* 30 June, 1982, [1982] Stat. Inst. Part II, p. 2465.

[113] Among the well known firms made subject to such denial orders were Dresser (France) S.A., Creusot-Loire, S.A. (France), AEG-Kanis, and Mannesmann (Germany), Nuovo Pignone (Italy), and John Brown Engineering (U.K.). Of this list, only Dresser fit the category of subsidiary of a U.S. firm, but it led the legal challenge to the regulation.

[114] For a detailed account of the various proceedings, see A. Lowenfeld, *Trade Controls for Political Ends*, pp. 296-300 and sources there cited. (2d ed. 1983).

the U.S. Constitution. As to the contention that the regulations were contrary to international law, he wrote, "such a challenge is not within the purview of my jurisdiction" [115].

It is not clear how this conflict would have gone on, had external events, including the death of President Brezhnev and the release from detention of Lech Walesa, not intervened. But by November 1982, it had become clear to the United States administration, and particularly to the new U.S. Secretary of State, that the conflict was costing the United States more than it was worth. Whenever the Secretary sought to communicate on any subject with the United States' principal allies, whether in Washington, at the United Nations, or in the capitals of Europe, the first topic raised was the extended pipeline sanctions. Instead of focusing the world's attention on repression in Poland, the pipeline regulations had turned the issue into conflict among the western democracies. And far from having a united country behind him, President Reagan was faced on this issue with a revolt in the business community and resolutions in both Houses of Congress calling for repeal of the regulations. In short, the extension of U.S. sanctions as introduced in June 1982 had become untenable.

In mid-November 1982, President Reagan announced the lifting of the sanctions, in the context, he said, of agreement with the nations of Western Europe on an "enduring realistic and security-minded economic policy toward the Soviet Union... a victory for all the allies" [116]. The regulations were promptly repealed, and all the denial orders for violations of the regulations in the period June to November were immediately revoked.

[115] *Dresser (France) S.A.*, Decision and Order of Assistant Secretary for Trade Administration of November 1, 1982, 47 Fed. Reg. 51463 (Nov. 15, 1982). Dresser sought an injunction against enforcement of the denial order from the district court, but failed. Although the judge had some doubt about the lawfulness of the denial order and about the defense of foreign government compulsion, he was unwilling to grant the extraordinary remedy of a preliminary injunction, one that "would deny to the President one means by which to influence the actions of the Soviet Union [with respect to Poland]". *Dresser Industries, Inc. v. Baldrige,* Civ. Action No. 72-2385 (D.D.C. Nov. 4, 1982, Flannery, J.).

[116] Radio address of President Reagan of November 13, 1982, 18 Weekly Comp. Pres. Docs. 1475.

The Six Cases Considered Together.

It may be suggested that the six cases here set out present a distorted picture, in that all involved situations that received wide public attention reaching well beyond legal doctrine. At a minimum, however, the cases here presented demonstrate that no one principle satisfies a general concept of natural justice, whether viewed by sophisticated jurists or by a concerned general public. If this is true for the "high profile" cases, one may infer that it is true for less well known cases as well.

A rough judgment on the six cases might read something like this:

The Amoco Cadiz: While there is no suggestion of fraud in the way Standard Oil/Amoco organized its global production/shipping/marketing operations, there is no justification for limiting the liability in tort of the enterprise as a whole toward parties that in no way had a prior relationship with the enterprise or any of its units [117]. A different result might be correct in regard to claims by parties to contracts with the shipping company or by holders of a ship mortgage, who are able to protect themselves by proper risk analysis, insurance, or guarantees from the parent company or another unit of the multinational enterprise.

Union Carbide/Bhopal: This case in more problematical, because the parent company owned only a bare majority of the shares of the Indian subsidiary, and because there was no clear determination of the basis of liability for the disaster. If liability were based on fault in the design of the plant, attributing liability to the parent company would not be difficult, and would not involve piercing the corporate veil of the subsidiary at all; if liability were based on fault in maintaining plant security, with the effect that a single disgruntled employee was able to cause a major catastrophe, one might wish to inquire closely into the degree of control that

[117] The statement in the text, it is understood, relates to company law. Whether the so-called Civil Liability Convention, notes 44-45 *supra*, makes sense or was properly applied in the *Amoco Cadiz* falls outside the scope of this Report.

the parent company had been able to exercise over the plant's operations. If the basis of liability — presumably under the law of India — were some form of responsibility regardless of fault, attributing such responsibility to the enterprise as a whole would seem to be appealing, if not compelling. Evidently, doubts about the basis of liability, as well as about the principle of limited liability generally and the prospect of lengthy litigation, led to a settlement that, at least by Western standards, was a modest one. Overall, the result that a parent company (or the multinational group) was held liable in tort to persons with no prior relation to the group seems correct; conversely, it would have been wrong — unfair and unjustified — to limit liability to the worth after the disaster of an undercapitalized subsidiary of the solvent multinational enterprise.

Swift/Deltec: When a contractual obligation is entered into by a company with adequate disclosure of its corporate form and capital structure, the argument for looking through the corporate form is much reduced. One can understand the frustration of a court that sees one part of a corporate group seeking to avoid its debts while other parts remain solvent, particularly when the creditors are local and the group is centered elsewhere. One may also sympathize with a court that gives priority to claims of outsiders as compared to claims by affiliates. In the actual case, however, it was not the debtor who sought relief in bankruptcy, and the inclusion of a large group of companies having no connection with or obligations to Argentine parties cannot be supported. If Cía Swift de la Plata had put into circulation tainted meat that had caused a massive outbreak of botulism among consumers in Argentina, one could support an effort of the Argentine courts to see that compensation to the victims were made available, if necessary from affiliates abroad. In the commercial context of the *Swift/Deltec* case, however, the decision of the Argentine courts seems unjustified, and the decision of the New York court not to recognize the judgment of the Argentine court seems correct.

Badger: The claims for severance pay by employees of the subsidiary fall somewhere between the claims of disaster victims, as in Bhopal (or in the hypothetical outbreak of botulism in Argentina) and the commercial claims in *Swift/Deltec.* On the one hand

the claimants had a prior relationship with the corporation, and presumably had access to information about the capital structure and financial condition of their employees. On the other hand it was not unreasonable for the employees in accepting their employment with a member firm of an international group (as well as for the government in permitting establishment of the subsidiary in the first place) to expect the enterprise to be committed to comply with local law, including labor law. One cannot fault the Belgian government for taking the side of the employees, and for urging the United States government to put pressure on Badger U.S.A./ Raytheon to resolve the matter. Surely the American parent company was wise to reach a settlement, rather than standing on a principle that in the actual case had little appeal. It is worth repeating, however, that Badger U.S.A. assumed no liability for any other obligations of Badger Belgium ; ordinary trade obligations, presumably, would be processed through the local bankruptcy court, without recourse to the parent corporation.

Sanctions against Rhodesia : The last two cases presented differ from the first four in that the liability sought to be imposed is governmental, and indeed political and penal in nature ; moreover, while courts are not entirely absent, the forum is essentially a political one. Both cases raised the question whether it is acceptable for a state where the parent is incorporated to impose obligations with respect to embargoes and comparable trade controls on subsidiaries established in a foreign state. From a public international law viewpoint, the Rhodesia case would seem to present no problem. The sanctions were based on a unanimous decision of the United Nations Security Council, binding on all member states under Article 25 of the UN Charter, so that the legal argument in the Rhodesia case in favor of deference due to the state where the subsidiaries were established — here South Africa — would seem to be very weak. Thus it seems that private commercial law — *i.e.*, respect for the formalities of corporate organization — prevailed, to the mystification of the general public and charges of hypocrisy from civil rights groups and African states opposed to UDI. Particularly with respect to actions of the United States, with its long record of asserting jurisdiction over foreign subsidiaries of American

companies, it was difficult to escape the view that the government was not prepared to throw all of its weight behind the enforcement program.

An additional question raised in the Rhodesia context was whether a duty of inquiry and control may or should be imposed on senior management of a multilateral enterprise, so that the officers and directors of the parent corporation cannot wash their hands of responsibility for misconduct by subsidiaries. The public, seeing pictures of Rhodesian automobiles filling up at Shell and Mobil stations, thought the answer was yes. Governments thought not [118]. Particularly in Great Britain, principles of company law that had long been taken for granted now came under question.

The Pipeline Case : The attempt by the United States to impose its partial embargo against the Soviet Union on unwilling nations in Western Europe was seen as unreasonable, and therefore unlawful [119], the more so as the assertion of jurisdiction on the basis of corporate links with U.S. parent companies was accompanied by assertion of jurisdiction over foreign firms on the basis of even weaker links based on license and contract. The reason that the American regulation was untenable was that it constituted an attempt to impose a significant foreign policy decision on states that had considered the same objective facts — repression in Poland — but had reached a different decision on how to respond.

From the American point of view, seeing Dresser compressor stations being loaded on Soviet freighters on nightly news broadcasts was just as galling as seeing Shell and Mobil stations supplying fuel in Rhodesia. From the European point of view, however, the assertion of jurisdiction over their companies by the United States, coupled with the threat of quite severe sanctions for noncompliance, negated a fundamental principle not only of local incorporation but

[118] It is pertinent in this context to note that when the U.S. Congress addressed a series of scandals involving bribery of foreign government officials by U.S. corporations or their affiliates, it did not make the prohibitions applicable to subsidiaries incorporated abroad, but imposed a duty of care and supervision, including accurate record keeping on parent corporations and their principal officers. U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd1-2.

[119] Compare American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, §§ 402-403 (1987).

of national sovereignty. No such conflict would have arisen had the United States imposed a tax or reporting requirement on Dresser (France), S.A., or otherwise asserted jurisdiction over activity of the subsidiary not in direct conflict with the law and policy of the state where the subsidiary was incorporated. The pipeline episode is thus an important event in demonstrating the limits of jurisdiction over foreign subsidiaries by the state where the parent company is established. It should be understood, however, in the context of a direct conflict between national wills. It is not a necessary precedent — thought it may be a reminder to exercise caution — in the context of overlapping or differing jurisdiction that does not result in direct conflict. Just as there was no national U.S. interest in shielding the parent companies in the Badger of Bhopal cases, it need not be supposed that there is a national interest in shielding local subsidiaries whenever the state of the parent company seeks to assert its jurisdiction.

Some Conclusions

It is evident that no single generally acceptable rule of public international law emerges either from the theoretical foundations of company law or from the cases here discussed. Nor is it possible to find refuge in a universal rule of private international law, such as a rule that would look always to the law applicable at the place of the challenged activity, or one that would look always to the law applicable at the place of incorporation of the parent company. It is possible, however, to make some statements of a normative character, formulated in terms of presumptions and principles of preference.

1. The starting point for analysis of the liability for obligations of a corporation is the presumption that the shareholders are not liable beyond the capital that they have contributed (or undertaken to contribute). This presumption can virtually never be overcome with regard to shareholders from the general public [120]; it can be

[120] Exceptions are cases of fraud and special laws in some states concerning the organization of banks and insurance companies that provide for calls on the shareholders for additional capital in certain situations of insolvency.

overcome when the shareholder is another corporation holding all or substantialy all the stock of the corporation in question, or the stock is distributed among members of the same corporate family.

2. The more a person dealing with a corporation can be expected to inquire about the organization and capitalization of the corporation in question, the weaker is the claim to penetrate beyond that corporation to engage the responsibility of a parent or affiliate. Thus, generally, the presumption of limited liability should not be overcome with respect to claims arising out of commercial relationships. Conversely the presumption of limited liability is weakest with respect to claims arising out of torts — and in particular out of mass disasters.

3. There is no necessary additional presumption against attributing liability to members of a corporate group because the source of the asserted obligation is in public or administrative law. Thus obligations of a public law character, such as requirements that issuers of securities or operators of financial institutions make disclosure regarding their worldwide activities and assets, may ordinarily be imposed both by the state of establishment of a subsidiary and by the state of the parent corporation. Both the state of the parent corporation and states where a subsidiary is established may impose taxes on the activity of the subsidiary, though ordinarily the effect of such overlapping jurisdiction is ameliorated by double tax conventions or provision in national law for foreign tax credits [121].

4. Regulation by one state in respect of the activity of a corporate parent, subsidiary, or other member of a multinational group is often not in the first instance extraterritorial, because enforcement is typically directed to the member of the group established in the territory of the regulating state [122]. However, the effect of

[121] The reverse situation, in which a state where the subsidiary is established seeks to collect taxes based on its formula for allocating world-wide income of a corporate group, remains highly controversial.

[122] The U.S. pipeline sanctions discussed above were an exception, in that the foreign subsidiary was held directly liable, in respect of " export privileges " with the acting state.

national regulation of a multinational enterprise may well be multinational — *i.e.*, extraterritorial, and states are required to consider the potential or actual effect on other states of their exercise of regulatory jurisdiction.

5. The fact that imposition of liability on one member of a corporate group for the activity of another member of the group has effect in another state with a different substantive rule concerning the activity in question does not *a priori* render it unlawful. In the event of direct conflict between the laws of two states each of which has jurisdiction to prescribe with respect to the activity in question, each state is required to consider and respect the interests of the other state, and to limit the exercise of its jurisdiction when the interests of the other state are clearly dominant [123]. In assessing the respective interests of two or more states, the territorial principle of jurisdiction generally has greater weight than the nationality principle or the extension of that principle through exercise of jurisdiction on the basis of the link of corporate affiliation. As applied to members of a multinational corporate enterprise, this usually means that preference should be given to the law and policy of the state of incorporation of the subsidiary, at

[123] Note that this formulation is similar to § 403(3) of the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* (1987), but it goes a half step further. The Restatement (not limited to the topic of multinational corporations) speaks of an *obligation* on the state to evaluate its own as well as the other state's interest, but says only that a state *should* defer to the other state if that state's interest is clearly greater. The text here would regard both evaluation and deference to the law of the state with the dominant interest as obligations. Accord: OECD, "General Considerations and Practical Approaches concerning Conflicting Requirement Imposer on Multinational Enterprises", adopted by OECD Ministers in 1984 and subsequently incorporated into the Declaration on International Investment and Multinational Enterprises of 21 June 1976. In discussions concerning this topic, OECD delegates were divided on whether the approach of moderation and restraint was derived from mandatory rules of international law or from a discretionary political doctrine "similar to or encompassing the concept of international comity". See *The OECD Declaration and Decisions on International Investment and Multinational Enterprises, 1991 Review*, Chapter IV and Annex 2 (1992). Again, the formulation in the present text supports the former view.

least if the activity sought to be regulated is centered in that state. The case for deference to the law and policy of the state of incorporation is stronger (*i.e.*, the interest necessary to overcome the presumption against imposing liability must be greater) when the state of incorporation is also the state of activity at issue, as contrasted with a "flag of convenience" state of incorporation.

Part. II - Procedural Issues

Focus on Jurisdiction of Courts.

Many aspects of civil procedure are so closely related to the rules of litigation of individual states that it is not possible to construct a generally applicable rule with sufficient precision to be useful. Accordingly, this Report makes no effort to address such questions as service of process, the duty in a law suit to supply information or evidence, the scope of business and attorney/client privileges, the reach of laws concerning bank secrecy and confidentiality of documents, or the enforcement of judgments, though all of these subjects may well be relevant in connection with litigation involving multinational corporations and corporate groups. The rules of adjudicatory jurisdiction, however, are sufficiently similar among the states that participate in the international economy that some discussion of applicability of those rules in the context of liability of corporate groups seems justified.

A Point of Departure.

As a point of departure one might begin with a presumption that when a parent company, or a member of a group of affiliated companies, is substantively responsible for the consequences of a given obligation or activity under the law of a particular state, it should be subject to adjudicatory jurisdiction in that state as well. On reflection, however, such a presumption is unsatisfactory on two principal grounds.

First, considerations concerning allocation of judicial competence — both general and specific — are not the same as those concerning

ultimate responsibility. There may well be instances in which adjudicatory jurisdiction over a parent company is available to a state, but prescriptive jurisdiction over an activity in another state ought not to be exercised, and other situations in which prescriptive jurisdiction may be exercised — for instance through embargoes or blacklists — while judicial jurisdiction is not available. Thus any suggestion that jurisdiction to adjudicate and jurisdiction to prescribe are coterminous could well lead to serious misunderstanding.

Second, in a litigation context, the issue of jurisdiction to adjudicate needs to be decided early in the controversy, while the question of jurisdiction to prescribe, *i.e.*, to hold a parent or affiliated company liable, can often be decided only after lengthy inquiry. Neither decision should be viewed as preempting or determining decision of the other issue, though some of the same factors — for instance degree of control over a subsidiary by a parent, and representations by the entity to the outside world — may well be applicable to both issues. In addition, as the *Amoco Cadiz* case illustrates, while lifting the corporate veil for purposes of ultimate responsibility may well be appropriate, the most suitable forum for reaching that decision may be a court at the parent company's principal place of business, which has the best opportunity of probing the intra-enterprise relationships.

In short, while the considerations determining substantive liability and judicial jurisdiction over multinational corporations are similar and may in some instances be overlapping, the two issues should be separately examined and separate guidelines need to be developed for each.

Judicial Jurisdiction over Parent Corporation not Established in the State of the Forum: A Brief Survey.

The issue of jurisdiction over member companies of a multinational corporation or over its parent company arises in several typical situations. If a special basis for jurisdiction is provided for in the forum state, then the fact that the defendant corporation does not engage in business or is not established in that state will not deprive the courts of the state of jurisdiction. For instance, in

many states parties to a contract, wherever made, may be sued at the place of performance (or breach) of the contract. See, *e.g.*, Brussels Convention, Art. 5(1) [124], U.K. Rules of the Supreme Court Order 11, r. 1(e). If a contract is entered into by or on behalf of the parent corporation or by a unit of the multinational corporation, jurisdiction over the parent corporation may be asserted on this basis, in an action arising out of the contract [125]. Similarly, an action in tort at the place where the harmful event occurred may subject a parent corporation to suit there if substantive liability may be asserted against it as manufacturer or distributor [126], though the parent corporation has no agent or establishment in the forum state. See, *e.g.*, Brussels Convention Art. 5(3), U.K. Order 11, r. 1(f) ; N.Y. Civil Practice Law and Rules § 302(a) (3) [127]. Other illustrations of specific jurisdiction that may involve multinational corporations not established in the forum state include claims based on insurance

[124] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of Sept. 27, 1968, as amended. References to the Brussels Convention also apply to the Lugano Convention of September 16, 1988, bringing the member states of the European Free Trade Area into the Brussels system.

[125] For a variation on this theme, see *SAR Schotte GmbH v. Parfums Rothschild SARL*, [1987] ECR 4905 (Eur. Ct. Justice 9 Dec. 1987), sustaining jurisdiction under Art. 5(5) of the Brussels Convention over the German parent company in a suit arising out of a contract made by plaintiff with a French subsidiary.

[126] See, *e.g.*, Art. 1 of EC Council Directive of July 25, 1985 Concerning Liability for Defective Products, 28 EC O.J. No. L 210/29, Aug. 7, 1985.

[127] For a well known American case of this type, see *Oswalt v. Scripto, Inc.* 616 F.2d 191 (5th Cir. 1980), in which a Japanese corporation that had manufactured an allegedly defective cigarette lighter was held subject to jurisdiction of a federal court in Texas, though the lighter had been acquired via a national distributor, wholesaler, and local retailer, all independent of the manufacturer. See also *Poyner v. Erma Werke GmbH*, 618 F.2d 1186 (6th Cir. 1980), cert. denied, 449 U.S. 841 (1980). Whether manufacturers of components could be subjected to suit on this basis under current American practice is in doubt. Compare *Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498 (Sup. Ct. Alaska), sustaining jurisdiction over German seat belt manufacturer, with *Humble v. Toyota Motor Company, Ltd.*, 727 F.2d 709 (8th Cir. 1984), rejecting jurisdiction over Japanese car seat manufacturer. In the *Asahi* case referred to in the following footnote, four Justices of the U.S. Supreme Court approved, and four criticized the *Toyota* case.

policies at the domicile of the policy holder or the situs of the insured property, or — in the case of liability insurance — at the place where the insured is sued. See Brussels Convention Art. 7-10. These situations are not really instances of lifting the corporate veil, but rather illustration of the fact that a multinational enterprise cannot, in many circumstances, shield itself from amenability to suit, either by operating through separately incorporated affiliates or by distributing its products through unaffiliated middlemen [128].

The more difficult problem arises if a claim is sought to be asserted against a parent corporation that does not fall into any of the categories of special jurisdiction. The Brussels Convention provides, in Art. 5(5), that a corporation may be sued in a state where it maintains a branch, agency, or other establishment in respect of a dispute arising out of the operations of the branch, agency or other establishment (Art. 5(5), and there is no impediment to comparable legislation in other states. In Anglo-American law, maintenance of a branch by a foreign corporation would generally be regarded as constituting "presence" or doing business [129], thus supporting general jurisdiction [130]. The same conclusion would not follow — at least not without detailed inquiry — if the multinational corporation were represented in the forum state by a subsidiary locally incorporated.

The inquiry has been characterized in different terms by different courts and writers. Some American courts have looked at a multinational corporation as an integrated enterprise, and have concluded that if one unit of the enterprise is present or doing

[128] Note also that this situation frequently arises in a product liability context in efforts by defendant distributor to bring a third party action against the foreign manufacturer. See, *e.g., Castree v. E.R. Squibb & Sons Ltd.*, U.K. Ct. of Appeal, [1980] 1 W.L.R. 1248, 2 All E.R. 589; *Asahi Metal Industry Co., Ltd. v. Superior Court*, U.S. Sup. Ct., 480 U.S. 102 (1987). See also Brussels Convention Art. 6(2) (not applied in Germany and some of the EFTA states).

[129] See for U.K., Dicey and Morris on the Conflict of Laws, pp. 288-299 (11th ed. 1987); for U.S., American Law Institute, Restatement (Second) of Conflict of Laws § 47 (1971).

[130] The availability of general, as contrasted with specific jurisdiction is however tempered by the doctrine of *forum non conveniens*, which will lead to dismissal of an action unrelated to activity or effect in the forum state if another, more suitable forum is available.

business in the forum state, judicial jurisdiction may be exercised over the multinational enterprise as a whole [131]. Other American decisions have, upon evidence presented, concluded that the subsidiary was in fact an agent of the parent corporation or multilateral group, and have on that basis sustained judicial jurisdiction over the parent corporation. Still other decisions have focused on the functional relationship between parent and subsidiary, in some instances holding that even ownership by the parent of 100 percent of the shares of the local subsidiary is insufficient to support jurisdiction over the parent on a claim unrelated to the forum, but upholding jurisdiction upon a showing that the subsidiary lacks all independence of decision-making and is *de facto* a mere department or "alter ego" of the parent [132].

The issue of jurisdiction over multinational corporations or members of a corporate group rarely arises in the context of arbitration, since jurisdiction of the arbitral tribunal is nearly always based on consent. It is not uncommon, however, that a contract is signed by an officer of one member of a group of affiliated companies after negotiations in which several members of the group, or the parent company itself, participated, or in which the interests of several members of the group are involved. If such a contract contains an arbitration clause, other members of the group or the parent company may be admitted as parties to an arbitration arising out of the contract, whether as claimant or as respondent [133].

[131] See, *e.g.*, *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y 1981) ; *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 402 F. Supp., 262, 327-28 (E.D. Pa. 1975) ; Phillip Blumberg, *The Law of Corporate Groups : Procedural Law*, p. 23-25 (1983) ; E. Scoles and P. Hay, Conflict of Laws, ch. 9 "Jurisdiction over Business Associations", (2d ed. 1992).

[132] See, *e.g.*, *Taca International Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965) ; *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972).

[133] See, *e.g.*, *Soc. Dow Chemical France et al. v. Soc. Isover-Saint-Gobain*, ICC Case No. 4131, Provisional Award of 23 Sept. 1982, [1984] Rev. de l'Arbitrage 137, IX I.C.C.A. Yb. 131 (1984), Petition for Annulment rejected, Cour d'Appel Paris 21 Oct. 1983, [1984] Rev. de l'Arbitrage 98 (1984) ; *Roussel-Uclaf v. G.D. Searle & Co. Ltd (U.K.) and G.D. Searle & Co (U.S.)*, [1978] 1 Lloyd's L. Rep. 225 (U.K. High Ct. 1977), IV I.C.C.A. Yb. 317 (1979). For discussion of these and other cases going both ways on the issue, see Craig, Park, and Paulsson, International Chamber of Commerce Arbitration, § 11.05 (2d Ed. 1990).

An Effort at Synthesis.

The approaches to judicial jurisdiction among the developed legal systems turn out in the last decade of the Twentieth Century to have more in common than might have been expected. Every state provides, at minimum, for general jurisdiction over a natural person at his or her domicile (or habitual residence), and over a corporation or other juridical person at its place of incorporation or principal place of business (siège social). Nearly every state also provides for additional bases of judicial jurisdiction, some special, *i.e.*, limited to specified activity or effect in the forum state, others general, in circumstances where the defendant has a permanent presence in the forum state or it is not unfair to impute permanent presence to the defendant on the basis of the presence of a close affiliate.

There appears to be a general consensus that a state may exercise judicial jurisdiction over a foreign corporation where that corporation has such a relation to the forum state that it is reasonable for the state to exercise such jurisdiction [134], though at the margin this principle is not interpreted in the same way in all states. The following conclusions may be proposed with respect to judicial jurisdiction over multinational corporations or corporate groups, as fitting within the general consensus :

It is consistent with international law for a state to provide (whether by statute or rule of court) that a parent company or other member of a multinational enterprise shall be amenable to suit in that state in the following circumstances :

1. On the basis of generally recognized bases of specific jurisdiction, including (by way of illustration) the place of injury in actions in tort ; the place of performance or breach in actions in contract ; the domicile of the insured or situs of the insured property in actions on insurances policies ; and the situs of immovable property in actions concerning that property.

[134] Compare American Law Institute, Restatement (Second) of Conflict of Laws § 52 (1971).

2. On claims arising out of the activities of a branch or subsidiary carried out in the forum state in furtherance of the business of the multinational corporation.

3. On claims not arising out of activities in the forum state, (i) if the multinational corporation has a sustained and permanent presence in the state through presence of a branch or comparable establishment ; (ii) if the multinational corporation has a sustained and permanent presence in the state through presence of a subsidiary so closely linked to the multinational enterprise though common ownership, personnel, management or activity as to be fairly regarded as a mere department or alter ego of the parent or the multinational corporation.

Of course no group of rules, preferences, or presumptions can make substantive conflicts go away, whether the conflicts are between private persons only, between governments, or as in all of the cases here singled out for discussion, whether they have both private and public elements.

Reduction of conflict in areas relevant to multinational enterprises will come — indeed has already come in considerable measure — upon adoption of uniform (or compatible) rules on such subjects as adequate capitalization for financial institutions, standards concerning product safety and environmental impact, prohibition of insider trading and stock manipulation, and jurisdiction of courts and enforcement of judgments.

Where genuine differences remain, as in decisions about economic sanctions, admissibility and security of foreign investments, and damages for injury to persons and property, multinational enterprises are bound to be involved — sometimes able to avoid liability where it should be imposed, at other times exposed too heavily or caught in conflicts not of their making. But the end of the Cold War may be seen *(inter alia)* as the triumph of the multinational enterprise — the dominant form of economic activity of the prevailing side. As deregulation, privatization, and transnational investment open up vast areas previously closed to corporate enterprise, multinational corporations will certainly extend their activities, and one may expect new types of problems to arise.

The hope is that the principles, presumptions and preferences here set out may help to clear away some of the confusion that has entered the law of many states, disguised in metaphors about "corporate veils", "alter egos", "dummies", "puppets", and the like, clothed in supposed rules of international law that were not realistic when they were announced [135], and cannot be reconciled either with the facts of economic life or with the perceptions and values of the public today.

The proposed resolution is set out in the form of Guidelines, rather than mandatory rules. "Guidelines" in this context should be understood in the sense that states — whether acting through courts, legislatures, or officials — may exercise jurisdiction over multinational corporations in accordance with the conclusions here set out without transgressing the constraints of international law. Correspondingly, multinational corporations cannot reasonably expect to limit their exposure to regulation or adjudication through separate incorporation in the circumstances set out in the Guidelines. States are not required to exercise jurisdiction to the full extent permitted by the guidelines, but they may not, generally, exercise jurisdiction in circumstances going beyond the scope of the guidelines without stepping outside the contemporary norms of international law as understood by the *Institut*.

[135] See, *e.g.*, the *Barcelona Traction Case*, discussed at pp. 260-262 above.

Draft Resolution

The Institute of International Law,

Recognizing that the regulation of enterprises operating in corporate form is a necessary attribute of national sovereignty;

Recognizing that the principles of company law, as developed in the states of Western Europe and the Americas in the nineteenth century, do not address the modern phenomenon of large groups of companies incorporated in different states but operating under common ownership, common or related trade names, and common management or control;

Aware that different states have adopted different and sometimes inconsistent laws in regard to the exercise of jurisdiction over groups of companies;

Persuaded that no single rule can cover all situations in which multinational enterprises are sought to be held responsible for the acts of member firms established under the law of a given state,

Propose the following

Guidelines Concerning the Responsibility of Multinational Corporations:

1. As a general rule consistent with the domestic law of virtually every state, shareholders of a corporation or similar entity are presumed not to be liable for the obligations of the corporation whose shares they hold. However, states may, in limited circumstances as illustrated in the following paragraphs, impose liability for the obligations of a corporation on an entity that alone (or as part of a group of affiliated entities) holds all or substantially all of the shares of the corporation in question or that exercises effective control over it.

2. Liability for claims arising out of [contractual] [commercial] relations betwen a corporation and a third party may be imputed

to the controlling entity of a group of affiliated companies, only when (i) the controlling entity has taken part in the negotiation, performance, or termination of the contract on which the claim is based, or (ii) either the corporation in question or the controlling entity has engaged in fraud or deceptive practice in respect of responsibility for the obligation on which the claim is based. Liability for claims arising out of torts, and in particular out of mass disasters, may in appropriate circumstances be imputed to the controlling entity or other members of a corporate group, in addition to the member of the corporate group directly responsible.

3. A state may provide that a multinational corporation not domiciled or established in the state is subject to the jurisdiction of its courts in respect of claims based on injury sustained or contracts to be performed or actually breached in the state; insurance policies issued to persons domiciled in the state; immovable property situated in the state; and other activities or effects in the state attributable to the multinational corporation. A state may also provide for jurisdiction over a multinational corporation on the basis of the permanent presence in the state of a branch or comparable establishment of the multinational corporation, and on the basis of the presence of a subsidiary so closely linked to the multinational corporation by common ownership, control, personnel, management, or activity as to be fairly regarded as a mere department or alter ego of the multinational corporation [with respect to transactions or occurences that arise from or a closely related to the activities of the branch or the subsidiary].

4. A judgment duly rendered in the state seeking to impose liability consistently with these guidelines against the corporate group or a member of the group should — if otherwise entitled to recognition and enforcement — not be refused recognition and enforcement in the state where the controlling entity or the multinational corporation is established.

5. A state may impose reasonable requirements on a multinational enterprise to disclose information, submit tax returns, and comply with economic regulations having direct effect on the regulating state if a subsidiary corporation is established in that state and regularly maintains economic relations with the parent corporation or other members of the group.

6. A state may impose reasonable regulations on a multinational enterprise whose parent corporation is established in that state with regard to the activity of its subsidiaries established in other states, provided such regulations are part of a regulatory program of general application and provided such regulations do not result in

conflict with the law or regulations of the states in which the subsidiaries are established.

7. In the event of a conflict between regulations imposed by two or more states on a multinational enterprise or its component units, each state is required to evaluate the interests of the other state in the regulation in conflict : where accommodation between or among the conflicting regulations is not possible, the greatest weight is normally to be given to the law of the state where the activity to be regulated takes place or the member of the corporate group whose activity is sought to be regulated is incorporated and established.

December 1992

Observations of the Members of the Fifteenth Commission

1. *Observations of Mr A. von Mehren*

September 29, 1992

Dear Colleague,

Thank you for your letter of September 15, 1992, and the Revised Draft (September 1992) of the Report for the Fifteenth Commission on *Liability of Multinational Corporations for Obligations of Subsidiaries*

I read the Draft Report with interest. The six controversies that raise in dramatic terms the problem with which the Fifteenth Commission is charged are presented in a lively and instructive fashion. The distinction that you draw for purposes of imposing liability between the position of corporate shareholders in general and corporations that hold "all or substantially all of the shares" of another corporation (Para. 1 of the Proposed Guidelines Concerning the Responsibility of Corporate Groups) is useful and sensible as is the distinction between "claims arising out of commercial relations between a corporation and a third party" and "claims arising out of torts" (*id.*, Para. 2). And much of your discussion is wise and helpful.

I have some reservations, however, with respect to the general style of the report and to some of the propositions contained in the Guidelines.

The Report is perhaps too impressionistic and conclusory in style. You do not discuss in any depth and detail the practical and theoretical arguments against several controversial positions taken by the Guidelines. Indeed, the same observation applies, though to a lesser extent, to the arguments that support these positions.

Certain of the draft Guideline provisions raise questions for me:

(1) For purposes of imposing liability "for the obligations of the corporation whose shares they hold", your first Guideline equates a corporation or entity "that alone (or as part of a group of affiliated entities) holds all or substantially all the shares of the corporation in question" and a corporation or entity "that exercises effective control over the corporation in question". The case for imposing liability in the latter situation seems to me considerably stronger than in the former.

(2) In Guideline 2 you suggest that "claims arising out of commercial relations between a corporation and a third party may", in cases of "fraud or deceptive practice", "be imputed to the controlling entity". Unless the "fraud or deception" occurs within an area of corporate activities that is

actively supervised and controlled by the "controlling entity", the propriety of imputation is debatable.

(3) The further proposition announced in Guideline 2 — that "claims arising out of torts, and in particular out of mass disasters, may be imputed to the controlling entity or other members of a corporate group, when the law of the state seeking to impose the liability so provides or permits" — also gives me pause.

Imposing liability in the case of mass disasters exposes multinationals to risks that may be unacceptably high. To the extent that such is perceived to be the case, the utility and use of multinationals will decline. This raises the issue whether multinationals contribute significantly to the global economy that has been developing in recent decades. If they do, will imposing liability on them for mass torts have adverse consequences? And how significant are these consequences when set off against the arguments that can be advanced for the position taken by the proposed Guideline?

(4) Nor is it clear that "the law of the state seeking to impose the liability" should control. Here a distinction can be drawn between the state in which the controlling entity is incorporated and the state in which the mass disaster (or other tort) occurred. One could accept liability imposed by the former but have reservations when the latter imposes liability.

(5) More broadly speaking, it may well be that the problems addressed in paragraph 2 of the Guidelines can be effectively dealt with only through international arrangements that might combine regulation of entity responsibility with ceilings on the total liability that the entity could be required to bear.

(6) Paragraph 3 of the draft Guidelines deals with jurisdiction to adjudicate. The propositions contained in the first sentence are generally acceptable though the last phrase is perhaps too broadly and loosely drawn. However, in my judgment the propositions in the second sentence go too far. Your language contemplates *general* adjudicatory jurisdiction based on "the permanent presence in the state of a [multinational corporation] branch or comparable establishment" or "of the presence of a subsidiary" that is "fairly regarded as a mere department or alter ego of the multinational corporation". This is, of course, an invitation to forum shopping. In my view, the presence of such a branch or subsidiary should only establish jurisdiction over the multinational corporation *with respect to transactions or occurrences that arise from the branch's or subsidiary's activities.*

(7) The fourth paragraph of the Guidelines treats recognition and enforcement of foreign judgments. Its language — "otherwise entitled to recognition and enforcement" — contemplates a full assimilation of judgments rendered under the Guidelines to foreign judgments in general. In view of the dimensions of the problems raised and the early stage of development of this area of the law ,it may be appropriate to allow the state addressed to

impose restrictions — *e.g.*, a choice-of-law test and a more thorough review of at least the procedural aspects of the original proceeding — that are not permitted under the state's general law respecting recognition and enforcement. Furthermore, it is not clear why this Guideline applies only to the state "where the shareholder corporation or the multinational enterprise is established".

It is, I think, desirable for the Report to analyze in fairly specific terms at least some of the issues that the above comments suggest. In my judgment, both doctrine and policy deserve more extensive and specific discussion than the Draft Report now gives.

.....

With best regards and all good wishes.

2. *Observations of Mr G. van Hecke*

30 September 1992

Dear Professor Lowenfeld,

I have read with great interest your revised Report for the Fifteenth Commission.

On the new part concerned with jurisdiction I have only one remark.

While I am in agreement with paragraph 3 of the proposed resolution, which provides for jurisdiction based on the presence of a subsidiary only when this subsidiary can be regarded as a mere department or alter ego, I note that on p. 91 you would accept jurisdiction based on the activities of a subsidiary "whether or not be... subsidiary is formally acting as agent". The text at p. 91 seems to go further than the resolution and, indeed, in my view too far.

Apart from that I have no other remark and I am convinced that your report will form the basis of a very interesting and fruitful discussion in the *Institut*.

With kind regards.

3. *Observations of Mr I. Shihata*

October 14, 1992

Dear Professor Lowenfeld,

Thank you very much for sending me your revised draft (September 1992) of your report on "Liability of Multinational Corporations for Obligations of Subsidiaries".

In finalizing the draft you may consider the following points :

(1) In defining the multinational corporation at the beginning of the report, although the concept of effective control is mentioned, it is not adequately highlighted, compared to the concept of ownership (although the report explains that they are not always coexistent). The same remark applies to the guidelines at the end of the report and to the preamble to the proposed resolution where " common control " may be inserted after " common management ".

(2) The definition of " Group of Companies " in terms of ownership or control (p. 9) may be inadequate as it does not adequately reflect the role of the parent in decision making for the group as a whole.

(3) While you refer to the OECD Committee in the context of the Badger case in Belgium, no mention is made of the work of that Committee on " conflicting requirements " and the " agreement " reached there in 1984 and 1991. A reference to this work may also be useful in footnote 120. For information on the subject, I refer you to Chapter IV of OECD, *the OECD Declaration and Decisions on International Investment and Multinational Enterprises : 1991 Review*, 1992.

(4) I would start guideline I by the phrase " As a general rule ". This allows for the differentiated treatment mentioned in the report and in the second sentence of the guideline.

(5) In guideline 2, I would amend the words between parentheses (lines 2-3) as follows " (*i.e.*, in the absence of fraud, deceptive practice and other compelling circumstances) ". I also wonder " commercial relations " as mentioned in this guideline should read " contractual and quasi-contractual relationships ".

(6) In guideline 3, you may add the words " or actually breached " after the words " to performed " in line 4. The same guideline may include the word " control " after the word " ownership " in line 13.

(7) While I applaud the " non-conflicting " requirement in guideline 6, I wonder whether the guideline as now stated would be helpful in practice. Do we have to provide so clearly for the right of a state to impose regulations which apply outside its territory ? If so, should we not put in place more precise safeguards ? Is guideline 7 adequate in solving the disputes which would surely arise ?

Once again, I congratulate you for a very fine report and look forward to its discussion in the Institute.

4. *Observations of Mr L. Collins*

28th October, 1992

Dear Andy,

I write to say I thought that your draft report was absolutely fascinating, and I agree with a great deal of what you say in the report. My only disagreement relates to the draft resolution, and to the status or nature of some of the proposed rules.

Paragraph 1

(i) The first sentence states that shareholders of a corporation are presumed not to be liable for the obligations of the corporation whose shares they hold. This, of course, is a proposition with which no one would disagree, and which is based on the corporation law of every country. But it is not a principle of public international law or private international law, and I would suggest that it should be contained in the recitals, along the lines of "recognising that under generally recognised principles of company law, shareholders of a corporation are generally not liable for the obligations of the corporation whose shares they hold".

(ii) The second sentence is not, as presently drafted, limited to foreign parent corporations. Surely it should be? Or are you suggesting that there are limits on the extent to which national law may regulate purely local corporations?

Paragraph 2

(i) First sentence: although it is true that liability for claims arising out of commercial relations between a corporation and a third party are not normally imputed to the controlling entity, I do not think we should be laying down a rule of law to that effect (particularly when it is not even limited to foreign controlling entities). I would suggest that this should be linked with the first sentence in paragraph 1 in the recitals (although I do not think it adds much to it).

(ii) Second sentence: I agree with this, but are you really saying there are no limits in international law to the extent to which liability for torts may be imputed to the controlling entity?

Paragraph 3

(i) In the first sentence you are laying down rules of jurisdiction with regard to foreign corporations of a general nature (not specifically applicable to multinational corporations). It might be possible to argue with specific points, such as the meaning of "injury sustained" or what you mean by claims based on insurance policies, but I think that the most contentious point would

be the scope of the expression "other activities or effects" attributable to the multinational corporation. This is not likely to be acceptable.

(ii) Is the second sentence meant to relate to claims which are wholly unconnected with the local branch or subsidiary? This is probably against the current trend.

Paragraph 4

I think many persons (including myself) do not accept that the fact that a state may exercise jurisdiction in certain circumstances necessarily requires that its judgments in those circumstances be recognised in other countries.

Paragraphs 5 to 7

(i) In paragraph 5, what is "direct effect"?

(ii) I think that the last part of paragraph 6 is probably over-protective of the state of establishment of the subsidiary.

Yours ever.

5. *Observations of Mr F. Rigaux*

8 octobre 1992

My dear Confrère,

Thank you for your letter of September 15th and the annexed report.

Please do accept my congratulations for the clarity of the exposé and the soundness of the draft resolution. I largely agree with your propositions.

Some questions can be raised on the status of the resolution and the vocabulary of the draft resolution.

I. — What do you intend by "guidelines"?

Are they addressed to the corporate groups themselves (as in the OCDE guidelines, for instance) to the courts or to the lawmakers.

II. — As for the vocabulary, I feel rather puzzled.

In the title you speak about "corporate groups".

In resolution 3 and 5 you admit regulations imposing requirements on "a multinational enterprise"? Is it the same as a corporate group and what is the juridical nature of the multinational enterprise as such?

In resolution 2, you provide for the imputation to "the controlling entity" and in resolution 4 to "the shareholder corporation". Are those differences of language intentional and if so what do such differences mean?

With deep admiration for your work and my kindest regards.

6. *Observations de M. B. Goldman*

20 novembre 1992

Mon cher confrère,

Comme je vous l'ai dit la semaine dernière à New York — où j'ai eu grand plaisir à vous rencontrer et à travailler avec vous — j'ai pris connaissance avec le plus vif intérêt de votre projet de rapport sur la responsabilité des sociétés multinationales pour des obligations de leurs filiales. Autorisez-moi à vous dire à nouveau, encore qu'il ne soit pas très convenable que je vous fasse des compliments, que c'est là, à mon avis, un document aussi clair que substantiel, qui fournit une analyse concrète et enrichissante des litiges dans lesquels la question a surgi, et de très fructueuses suggestions pour y répondre. Il devrait nous permettre de poursuivre très utilement et d'achever la discussion au sein de la Quinzième Commission, pour proposer à l'Institut des « directives » (puisque vous ne paraissez pas envisager une résolution) qui feraient progresser de manière très significative l'élaboration d'un régime juridique des sociétés multinationales, sous l'aspect dont l'étude a été confiée à notre Commission.

Je viens présenter ci-dessous quelques observations sur le projet, dont certaines sont relatives à des points particuliers (I) et d'autres, plus générales, s'attachant essentiellement au projet de directives (II).

I. — *Observations concernant des points particuliers du rapport*

1. *Pages 10 et 11*

Vous vous référez ici, au sujet de la définition du contrôle à des arrêts de la Cour de Justice des Communautés européennes et à des règlements du Département du Trésor des Etats-Unis.

Peut-être pourrait-on ajouter, en ce qui concerne les Communautés, des textes où l'on trouve également la définition du contrôle : en particulier, l'article 66, par. 1er et 2 du traité de la C.E.C.A., la Décision d'application de la Haute Autorité du 6 mai 1954 (J.O.C.E.C.A. du 11 mai 1954) et le Règlement C.E.E. 4064/89 relatif au contrôle des opérations de concentration entre entreprises (J.O.C.E. n° 2 395 du 30 décembre 1989 et n° L 257 du 21 septembre 1990), art. 3, par. 1er (1).

2. *Page 14, par. 3*

Vous traitez ici les *"Claims Arising from Catastrophic Accidents"*. C'est bien évidemment l'hypothèse que l'on a rencontrée en pratique. Mais ne pensez-vous pas que le problème peut être posé, de manière générale, dans tous les cas de responsabilité délictuelle civile, quitte à souligner qu'il prend

[1] Les références sont données aux éditions françaises des Journaux Officiels.

des dimensions qui appellent tout particulièrement une solution lorsqu'il s'agit d' « accidents catastrophiques » ?

3. *Page 48* (à propos de l'affaire Badger)

Vous rappelez très exactement la position de Badger USA — ou de l'ensemble du groupe Badger — qui a notamment souligné que dans aucune des autres faillites de sociétés belges, il n'a été fait, au cours des années récentes, pression sur les actionnaires de payer les dettes de la société insolvable.

La description de la thèse du groupe, représenté par Badger USA, est très certainement exacte ; mais sous l'aspect relevé, elle reposait, à mon avis (que vous partagez, je pense) sur une confusion entre la situation de simples actionnaires et celle de la société-mère. Ne serait-il pas utile de le faire observer dans ce passage ? Mais il est vrai que vous seriez fondé à vous en tenir ici à une présentation objective des positions des parties.

4. *Pages 86 s.*

Vous offrez ici un *" Brief survey "* de la *compétence judiciaire à l'égard de la société mère non-établie dans l'Etat du for.*

La question est certainement importante et intéressante, et mérite d'être traitée. Mais j'ai un peu regretté que vous ne mentionniez pas —au moins — l'extension, dans certaines circonstances, de la compétence arbitrale à des sociétés d'un groupe qui n'ont pas signé la clause compromissoire signée par d'autres sociétés du même groupe (v. en particulier sentence *Dow Chemical,* 23 septembre 1982 : *Rev. arb.* 1984.137 et Paris, 21 octobre 1983 : *Rev. arb.* 1984.98, rejetant le recours en nullité).

Compte tenu du fait que les litiges relatifs à des sociétés multinationales sont probablement plus souvent déférés à des tribunaux arbitraux qu'à des juridictions étatiques, peut-être conviendrait-il, à tout le moins, de signaler cette question, quitte à ne pas la traiter dans les directives, car cela soulèverait probablement des discussions longues et difficiles.

II. — *Observations générales - Directives*

1. Je me demande si la matière n'est pas dominée par une *" summa divisio "* entre responsabilité contractuelle et responsabilité délictuelle.

Lorsque c'est la première qui est invoquée, son extension à la société-mère exige bien, à mon avis, que le contrôle de celle-ci sur la filiale soit établi, mais aussi que la société-mère ait participé à la négociation et/ou à l'exécution du contrat litigieux, ce qui autorise sa mise en cause, même si elle n'a pas signé ce contrat.

Lorsqu'il s'agit, au contraire, de responsabilité délictuelle, on doit se demander si le contrôle suffit, ou s'il faut également exiger une participation de la société-mère aux actions incriminées. Indépendamment des exemples que

vous analysez parfaitement dans le projet de rapport, la jurisprudence de la Cour de Justice des Communautés en offre de tout à fait topiques à ce sujet, les solutions n'étant du reste pas absolument concordantes (v. notamment : C.J.C.E. 14 juillet 1972, *Imperial Chemical Industries et a.*, affaire des matières colorantes : *Recueil* 1972.619 ; *Zoja* (Istituto Chemiterapico et Commercial Solvents Corp.), 6 mars 1974 : *Recueil* 1974.223 ; dans la première affaire, l'intervention des sociétés-mères dans les hausses concertées de prix a été constatée, tandis que dans la seconde, le contrôle général exercé par la société-mère américaine sur sa filiale italienne a paru suffisant pour imputer à la première le refus de vente opposé par la seconde à une société cliente, constitutif d'abus de position dominante.

2. Sur les *" Guidelines "*.

Je n'ai ici que trois observations, se référant au paragraphe 2.

i. La première phrase de ce paragraphe envisage les demandes en responsabilité résultant de *" commercial relations "*.

Permettez-moi de vous dire que je trouve cela trop limitatif. En effet, même en donnant au terme « commercial » le sens large de *" economic "* (ce qui inclurait les relations de production), je ne vois pas pourquoi l'on ne viserait pas, plus généralement encore, les *" contractual relations "*. L'affaire Badger illustre cette interrogation : peut-on dire, en effet, que les relations avec des salariés sont des *" commercial relations "* ? Ne sont-elles pas plutôt des *" labour relations "* ? Et que dirait-on des relations issues d'une concession minière ? Sont-elles des *" commercial relations "* lorsqu'elles concernent, par exemple, l'exploration ou la production ?

Concrètement, je suggérerais par conséquent de remplacer dans le texte *" commercial "* par *" contractual "*.

ii. Dans la même phrase, il est prévu que la responsabilité découlant de *" commercial relations "* ne peut pas être imputée *en général*, à l'entité qui contrôle le groupe « c'est-à-dire en l'absence de fraude ou de pratiques trompeuses (ou mensongères : *deceptive practices*) ".

Là encore, je trouve la formule trop limitative, et au surplus, insuffisamment précise. La fraude ou les pratiques trompeuses doivent-elles être le fait de la société-mère, ou suffit-il que la filiale s'y soit livrée ? Je crois pouvoir déduire du projet de rapport que vous penchez vers la première solution. mais de toute manière, exiger la fraude ou des comportements qui en sont proches, pour déclencher la responsabiilté de la société-mère, c'est exclure les hypothèses où celle-ci a participé à la conclusion ou à l'exécution du contrat litigieux, sans l'avoir signé, ou encore dans lesquelles elle l'a connu et expressément ou tacitement approuvé. Or, il me semble que dans tous ces cas, la responsabilité de la société-mère devrait être admise.

Si cette vue était acceptée, la première phrase du paragraphe 2 devrait

être modifiée, tout d'abord en lui donnant une forme positive, et ensuite en y introduisant les hypothèses ci-dessus mentionnées.

Cela donnerait à peu près la formule suivante (sous réserve, bien entendu, de corrections linguistiques) :

> "Liability arising out of contractual relations between a corporation and a third party may be imputed to the controlling entity of the group of affiliated companies of which said corporation is a member, when the controlling entity has taken part in the negotiation and/or the performance of the termination of the contract whose violation is alleged, or when knowing this contract, it has expressly or tacitly approved it".

iii. Quant à la seconde phrase du paragraphe 2 (responsabilité délictuelle de la "*controlling entity*"), j'hésite à admettre qu'elle doive être subordonnée à la loi de l'Etat qui cherche à imposer cette responsabilité.

Il me semble en effet que nos "*guidelines*" doivent concerner les relations internationales, et que s'il en est bien ainsi, l'Institut pourrait suggérer une règle de droit international matériel, indépendante de la teneur d'une loi interne quelle qu'elle soit.

Vous comprendrez, j'en suis persuadé, que les observations qui précèdent ont pour seul objectif d'apporter une modeste contribution au travail considérable que vous avez fourni, et pour lequel je ne voudrais pas terminer cette lettre sans vous remercier et vous féliciter à nouveau.

Je vous prie de croire, mon cher confrère, en l'assurance de mes meilleurs sentiments.

The activities of national judges and the international relations of their State

L'activité du juge interne et les relations internationales de l'Etat

(Ninth Commission) *

Rapporteur : Benedetto Conforti.

* The Commission was composed of Messrs Conforti, *Rapporteur*, Bernhardt, Caportorti, Collins, Gannagé, van Hecke, Lauterpacht, Lowenfeld, Mann, Marotta Rangel, Mbaye, Ni Zhengyu, Palolillo, Sahovic, Seidl-Hohenveldern, De Visscher, Wildhaber.

Preliminary Report

Introduction

In a world where almost every aspect of life is becoming internationalized, national judges can find themselves taking positions that may affect the external relations of their State in a great many cases. This may occur, for example, in applying to aliens rules that are purely domestic and, from the viewpoint of international law, entirely lawful but that are susceptible of creating a less than friendly climate in relations with the national State of the alien. Or it may happen in deciding matters of commercial law that will have considerable repercussions abroad. A choice, therefore, must be made at the outset as to what subject should be examined, in order to remain within the bounds of a homogeneous treatment. We believe that a useful choice — and one that will, moreover, cover the situation indicated as examples in the *Commission des travaux's* comments accompanying the proposal of the topic of this report — is to consider cases in which the national judge is called upon to settle *questions of international law*, to ask what the obstacles are which prevent the judge from settling these questions in the same identical way in which other questions of law are settled, and, lastly, if and when such obstacles are justifiable of whether their elimination would be desirable for a correct and complete application of international law.

Although the *Institut* has never considered the topic of the relations between national law and international law (unless the study we have made has not been accurate), we do not believe that we should be concerned with the traditional aspects of this topic, such as monism and dualism, the choice between "adoption", "incorporation" or " transformation" of international law by domestic law, and so on. For the purposes of our study, it is sufficient, *but also necessary*, to begin from the premise that international law, both customs and treaties, has its validity within the State. Whether

such validity arises from a monistic tradition of the individual domestic legal order, or is guaranteed by explicit constitutional norms, or is assured by legislative norms that are occasionally enacted is not important for our purposes. What is important is that, as occurs in one way or another in all State legal orders, international law can be considered... as part of the law within the national legal system.

The study we are proposing, in so far as it aims to establish *how* the national judge *behaves* in settling questions of international law, is a comparative law study. However, it is not a study that is an end in itself; as we have said, it must, on the contrary, establish the basis for indicating how the judge *should behave* when faced with such questions, that is to say, for indicating the *desired models of behavior from the point of view of the correct and complete application of international law.* Such indication might represent the basis for a resolution by the *Institut,* in so far as it is perfectly adherent with the aim pursued by the *Institut,* which is to further the progress of international law. But it is perhaps premature to speak of this. What is certain, however, is that the indication of behavioral models is very important if we consider that the data available from comparative studies vary greatly from Country to Country and are completely lacking for very many Countries (mainly developing Countries).

In drawing up this preliminary report, it has been difficult for us to distance ourselves from a basic idea which we have been insisting on for some time in our writings and which was also at the basis of our general course in public international law held at the Hague Academy in 1988. The idea is that the role and autonomy of national judges in the settlement of questions of international law — that is, the role and autonomy of organs which within each State are called upon to apply the law and also to have it respected — must be strengthened if we want to assure greater respect for international law. There is the risk that this idea could lead us to take positions that might seem dogmatic; it goes without saying that we will be happy to take into consideration any alteration of course the Commission deems suitable.

On the basis of data that can be obtained from a study of

domestic case law — a study that in no way claims to be exhaustive — we believe that the problems the Commission could be concerned with are the following. First of all, it would be necessary to deal with a certain number of obstacles that may be met by the national judge in applying an international norm, whether it is of general (customary) international law or of treaty law, and that therefore concern the role of the judge with respect to international law on the whole: such obstacles may be grouped together under the categories of "political question", "Act of State" and "the judiciary's" dependence on the executive". Other obstacles could be added (one may think, for example, of the problem of the *forum non conveniens* with regard to international obligations *erga omnes*), and suggestions on this point would be welcome. We should then go on to deal with specific issues involving customary law and treaty law; with regard to the former, we consider very important the question whether, and within what limits, the national judge may refuse to apply a customary norm in order to contribute to its modification or termination, and whether, and within what limits, he may review the conduct of the executive aimed at the same purpose. As far as issues of treaty law are concerned, a series of questions may arise with regard to the role of the judge in regard to both the application and the interpretation of treaties (direct applicability, determination of circumstances involving invalidity or termination, application of the last-in-time rule in relations with national laws, and so on).

We shall now proceed to examine the problems we have mentioned and indicate for each of them the solution we believe is desirable from the viewpoint of the correct and complete application of international law. For some of them (particularly the problems related to the Act of State doctrine or the interpretation, validity and termination of treaties) there might be an overlapping with the works of the fourteenth Commission, which is concerned with "contemporary problems concerning the jurisdictional immunity of States". Such overlapping may occur when we consider the present wording of art. 2 (*a* and *b*) of the draft resolution presented by Mr Brownlie at the Santiago de Compostela session, and concerning the "incompetence *ratione materiae* of the legal system of the State of the forum" [1]. If we consider, however, that such draft is now

[1] *Annuaire de l'Institut*, vol. 63, II, pp. 84-85.

undergoing revision, that some doubts were raised regarding art. 2 (and regarding its relevancy to the subject of the immunity of foreign States) during the discusion in the *Institut's* plenary assembly [2], and, lastly, that the approach and the probing of the problems are in our paper basically different from the ones in Mr Brownlie's interesting reports, the risk of overlapping can be run for the time being.

I. — *National Courts and International Law*

(obstacles of a general nature to the application of international law by the national judge)

1. *The "Political Question" Doctrine.*

National Courts sometimes have recourse to the "political question" (*actes de gouvernement* in French terminology) doctrine, in order to refuse to decide, either as a principal question or an incidental question, whether the conduct of the Executive, of their State is or is not contrary to international law. To mention the most striking example, this is what was done by the United States Courts (including the Supreme Court) at the time of the Vietnam War, when, in several judgments, they refused *in limine litis* to examine whether the United States engagement in that Country was or was not contrary to international law; the problem had been raised as a preliminary question for various purposes, among which the right to conscientious objection by United States citizens [3]. We can also mention the decision of the *Conseil d'Etat* of 11 July 1975 concerning French nuclear experiments in the Pacific Ocean: in this case the *Conseil* refused to open the question of the international legality of

[2] *Ibidem*, vol. 62, II, pp. 256-273 and vol. 63, II, pp. 95-118.

[3] See, for example, the *USA* v. *Valentine* case (1968), The American Jour. of Int. Law, 1969, pp. 345-346. On the case law of the Supreme Court, see GOTTLIEB, "Vietnam and Civil Disobedience", FALK (ed.), *The Vietnam War and International Law*, vol. 3 (Princeton, 1972), p. 597 ff. See also HENKIN, "Is there a Political Question Doctrine?", The Yale Law Journal, 1976, vol. 85, p. 623, note 74; *Idem.* "Vietnam in the Courts of the United States: Political Question?". FALK (ed.), op. cit., vol. 3, pp. 625-630; NORTON-MOORE, "The Justiciability of Challenges to the Use of Military Forces Abroad", *ibidem.*, pp. 631-653.

the decree with which the French Government had created a security zone of 60 nautical miles around the Murrura Atoll in the Pacific, suspending sea navigation throughout the experiments) [4]. Several recent American judgments more or less point in the same direction in maintaining that customary international law would not be applicable when there is a "controlling" Executive Act, or in refusing to decide on presumed violations of human rights by the United States Government and arriving up to the point of imposing sanctions on the plaintiffs' attorneys for having commenced frivolous lawsuits! [5]

As we know, the *actes de gouvernement* doctrine has been for a long time, in various areas of domestic public law, an obstacle to full submission of the public administration to the law. The obstacle has by now been almost completely eliminated with regard to all aspects of executive action except foreign policy. Instead it still stands when the unlawfulness of the conduct of the public administration is invoked in the light of international law!

In our view, one needs to wage the same battle against the political question doctrine applied to the international conduct of the Executive as was waged against its application to the Executive's conduct within the sphere of domestic law. It is necessary that the public administration be subject to law, whether it be national or international, and that judicial review be exercised in order to make such subjection effective.

It is obvious that what we are suggesting cannot and does not mean that any whatsoever international conduct of the Executive is reviewable by the Courts. In order to indicate in this area what we have called the model of behavior of national judges desirable from the viewpoint of correct and complete application of international law, we need to establish what conditions must exist in order

[4] The decision is published in Journal du droit international, 1976, pp. 126-127 with a note by RUZIE where reference is made to the doctrine and to the preceding practice with regard to application of the notion of *actes de gouvernement* to relations governed by international law.

[5] See, for the former, the cases *Fernandez-Roque* v. *Smith* (1985) and *Garcia-Mir* v. *Meese* (1986) cited *infra* at note 19; for the latter, see the *Saltany* v. *Reagan case* (1988-89) commented on by A. D'AMATO, "The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya," The American Jour. of Int. Law, 1990, pp. 705-711.

that the exception of the political question be rejected. We believe that there are essentially two conditions:

(a) the existence of a precise and complete international obligation. If, on the contrary, it is a question of the Executive enjoying discretional power — as, for example, in the case of the negotiation of a treaty, of the accrediting of diplomatic representative, etc. — *nulla questio.*

(b) the non-existence of an authorization on the part of the legislative branch. It is not, in fact, conceivable that the judge may review Legislative decisions. It is necessary of course that the Executive action does not exceed the authorization it has received: for example, in the above-mentioned case of the Vietnam War, the actions aiming at having the war declared contrary to international law were based, among other things, also on the fact that the Congressional authorization (the famous 1964 Tonkin Gulf Joint Resolution) did not include the subsequent actions in Vietnam [6].

To conclude, we can say that the exception based on the political question is not capable of preventing the national judge from reviewing the conduct of the Executive when there exists a precise international obligation to be respected and when the Executive's conduct has not been validly authorized by the Legislative branch.

2. *The Act of State Doctrine*

Keeping in mind the fundamental choice we made as to the subject to be dealt with, the Act of State doctrine — which, after all, constitutes the corollary of the political question doctrine, with the difference that it tends to protect foreign States instead of the forum State — is of interest here only for the part in which it is utilized to sanction the impossibility for the courts to sit in judgment of the validity or legality of foreign sovereign acts from the

[6] See "Congress, the President and the Power to Commit Forces to Combat." FALK (ed.), op. cit. (*supra*, note 3) vol. 2, Princeton, 1969, pp. 616-650, esp. p. 648, 650. The situation was different in the case of the 1991 "Gulf War", since Congressional Resolution no. 77 of 12 January 1991, adopted with regard to both art. 51 of the United Nations Charter and Security Council Resolution no. 678 of 28 November 1990, contains broad authorization to use United States forces against Iraq.

point of view of their conformity to international law. And this is true whether such impossibility is interpreted as the *direct* preclusion to judging a foreign act in the light of international law or whether it is seen, indirectly, as the impossibility of having recourse to the principles of public order of the forum State.

We need not dwell in detail on such a well-known doctrine. We should, however, note two things. First of all, it is not a doctrine that is exclusive to common law Countries: on the contrary, it is applied also in continental systems, as can be seen, for example, from a series of decisions of the Italian Court of Cassation [7]. Secondly, such doctrine reveals uncertain bounds even in the common law Countries, as has been proven by the fact that today in some Countries it is being eroded, while, instead, in other, it is expanding: one might mention, with regard to the former, the practice (begun in American courts) of admitting the so-called "treaty exception", or the "Second Hickenlooper Amendment" (1964) of the United States Congress, which admits reviewability when dealing with foreign acts of expropriation contrary to principles of international law [8]; for the latter, we can mention Great Britain and the very well-known decision of the House of Lords in the *Buttes Gas and Oil Co. v. Hammer* case, which in substance extended the Act of State doctrine to transactions between sovereign States.

In our view, the Act of State doctrine, and any other practice tending to limit the power of the judge in refusing to apply laws, decisions or foreign acts contrary to international law, either directly or via the public order of the forum State, is to be disapproved. As we know, the rationale of this doctrine is that domestic courts must avoid causing embarassment for their government in its rela-

[7] See *Cassazione* (*Sezioni Unite*) 14 nov. 1972, n. 3368, 10 Nov. 1976, n. 4116, and 26 May 1979, n. 3062, in PICONE and CONFORTI, "La giurisprudenza italiana di diritto internazionale pubblico (Repertorio 1960-1987)", Naples, 1988, p. 625, n. 2, p. 626, n. 3 and p. 626, n. 4.

[8] The recent *W.S. Kirkpatrich & Co., Inc. et al.* v. *Environmental Tectonis Corp., International* case cannot exactly be considered as a manifestation of further erosion of the Act of State doctrine but rather as a clarification of it. Indeed, the Supreme Court has declared the doctrine may be applied *only* when the validity or legality of an act of foreign sovereignty is in question (for the text of the decision, see International Legal Materials, 1990, pp. 182-191).

tions with foreign States. Can it really be held that a State must feel itself embarassed if its courts in good faith apply the legal norms which regulate those relations? If, then, we take into consideration that there are Countries, for example, the Netherlands, whose judges are not at all concerned about causing such embarassment [9], it is natural to conclude that this rationale does not correspond to any objective need. Nor can we share, at least in its entirety, the reasoning of the House of Lords in the *Buttes Gas* case, which traces the Act of State Doctrine to a general principle of "judicial restraint or abstention" owing to the lack of "judicial or manageable standards" to apply and therefore to the presence of a kind of "judicial no-mans's land." The reasoning of the House of Lords is not acceptable if and as long as there are international norms applicable to the specific case.

In conclusion, the behavioral model of the national judge, which we consider desirable on this matter, is the model of judicial freedom to refuse to apply laws, judicial decisions and administrative acts of foreign States any time the judge ascertains in good faith that such acts are not in conformity with precise international obligations.

3. *The Dependence of the Judiciary on the Executive*

Forms of judicial dependence on the Executive, in the settling of questions of international law, vary from Country to Country and find their legal justification either in the case law itsef or in express legislative provisions. Such dependence was, however, more clear-cut in the past, when international relations were considered the exclusive domain of foreign ministries. An important example of evolution in the direction of autonomy of judges can be seen in United States practice with regard to the granting of immunity from civil jurisdiction to foreign States, when we consider that between 1943 and 1970 — and therefore several years before the adoption of the Foreign Sovereign Immunities Act of 1976 — that

[9] See, for example, Supreme Court of the Netherlands (civil chamber), 17 October 1969, International Law Reports, vol. 74, pp. 152-153. See also, for France, the decisions cited by WEIL, "Le contrôle par les tribunaux nationaux de la licéité internationale des actes des Etats étrangers", Annuaire français de droit international, 1971, XXIII, p. 23, note 35.

Country went, without any change in the law, from a position of dependence of judges to the autonomy of the Courts with regard to the State Department and the Justice Department [10].

Some examples of dependence are:

— the competence recognized in France to the Executive in matters concerning the interpretation of treaties;

— the competence of the Foreign and Commonweath Office to issue certificates, with binding effects for the British Courts, with regard to the so-called "facts of State". Such competence in fact does not refer to the ascertainment of mere facts, but concerns the existence of international facts (frontiers, limits to Great Britain's jurisdiction in foreign territory, state of war and neutrality, formation and extinction of foreign states, title of sovereignty over a territory, and so on) as they are recognised and thus considered as legally existing by the Executive [11];

— the wide power that is given in Italy to the Ministry of Justice, on the basis of an old law of 1926 (Law no. 1263 of 15 July 1926), to allow or to prevent, through ascertainment of reciprocity, the forceable execution of the property of foreign States;

— the possibility the United States President has to request the Courts to apply the Act of State Doctrine, thereby preventing review of the international legality of foreign governmental acts of expropriation, even when such doctrine would not be applicable under the Second Hickenlooper Amendment of 1964:

— the deference paid by United States Courts to the Executive with regard to the direct applicability or inapplicability of treaties in domestic law [12].

The rationale for maintaining the Judiciary's dependence on the Executive coincides more or less with the rationale of the Act of State Doctrine, which consists in concern about avoiding embarassment to the Government. Hence the need arises that the Judiciary and the Executive speak with one voice. It is interesting that this

[10] See American Law Institute, "Restatement of the Law, III (The Foreign Relations of the United States)", St. Paul, Minn., 1987, vol. 1, pp. 292-394.

[11] See MANN, "Foreign Affairs in English Courts", Oxford, 1986, p. 23 ff.

[12] *Cf.* the case law cited by IWASAWA, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis", Virginia Jour. of Int. Law, 1986, vol. 26, p. 666, note 175.

need is felt in some Countries and not in others. For example, the competence of the French executive in the interpretation of treaties constitutes a rather unique case. The competence of the Foreign Office regarding facts of State is unparalleled in other Countries, for example, in Italy, as has been shown by the many Italian decisions which quite autonomously settled the problem of whether sovereignty over Trieste still belonged to Italy after the 1947 Peace Treaty [13], or the problem of sovereignty over the Trusteeship Territories [14], or that of whether the PLO is to be recognised as a subject of international law [15].

If, as we believe, the role of the national judge in the application of international law should be strengthened, it is to be hoped that his autonomy be guaranteed to an ever greater extent. We do not want to deny the appropriateness of close cooperation between the Judiciary and the organs carrying out the foreign policy of the State either in the ascertainment of international facts or in the settlement of uncertain questions of international law. But such cooperation should be brought about by attributing to the Executive the role of *amicus curiae* and not by giving it instead a binding and final decision-making power. The judge should indeed have the last word, and only in the case of the supreme interests of the Country, interests whose assessment should remain in the hands of the legislative branch, could binding competence be recognized to the Executive.

To sum up, the following conclusions can be made: the national judge should be free to autonomously evaluate international facts and to autonomously settle every question of international law. Naturally, the Executive should retain its prerogative to intervene as *amicus curiae* for the purpose of cooperating. An exception to judicial autonomy should be maintained for the case in which the legislative branch specifically provides that in relation to ascertainment of inter-

[13] To mention only the last of a series of decisions, *cf.* Corte di Cassazione, 6 June 1978, n. 2824. Rivista di dir. internazionale, 1980, p. 505.

[14] *Cf.* CONFORTI, "Sovranità sui Paesi in amministrazione fiduciaria," Rivista di dir. internazionale, 1955, p. 13 ff.

[15] *Cf.* Corte di Cassazione, 26 June 1985, n. 1981. Rivista di dir. internazionale, 1986, p. 884 ff.

national facts or in relation to specific questions of international law, a different course may be required otherwise in the supreme interest of the Country. Legislative provisions or judicial practices which are not consistent with the above should be eliminated.

II. *National Courts and Customary International Law*

1. *National Courts and* Opinio Juris ac Necessitatis

National judges as a rule apply customary or general international law usually following the classical definition of custom as resulting from *diuturnitas* and *opinio juris ac necessitatis* and utilizing, in the search for these two elements, international treaties, the resolutions of international organs, diplomatic exchanges, laws, international and national Court decisions and the acts of administrative organs.

No particular problems rise in the application of established international customs which have continued to reflect contemporary reality. We must instead ask what the role of national judges is in a period of transformation in customary law, when they are faced with a customary norm that is undergoing obsolescence. May the judge, and under what conditions, refuse to apply a customary rule or "modify" it to adapt it to the times, while perhaps exposing the State to international responsibility. We know that *new* customary international law always arises from a violation of the *old*, but within what limits can national courts take steps toward such violation?

It is clear, first of all, that a violation of old customary law can be justified as long as it is sustained by the *opinio juris ac necessitatis*, or, rather by *opino necessitatis* (since at the time a custom is established what holds is not the sense of the legal obligation of the required behavior but its social propriety). It is necessary, therefore, that the judge will give reasons for the existence of this *opino*. This usually occurs with the appeal, by the judge, to considerations of equity and justice. It can, in fact, be said that the function of equity in the system of international sources is

related to the formation or transformation of customary law [16]. Examples of resort to equity considerations may be found in domestic case law regarding immunity of foreign States from civil jurisdiction. In the decision of the House of Lords in the *Trendtex Trading Co.* v. *Central Bank of Nigeria* (1977), the Court turned to the doctrine of limited immunity, a doctrine which in its view was not yet accepted by everyone but was "consonant with justice" [17]. Also paradigmatic is decision no. 2329 of the Italian Court of Cassation of 15 May 1989, which, in regard to labor relations with foreign States, substituted the criterion of citizenship of the worker for the distinction between acts *jure imperii* and *jure gestionis*, and justified the substitution with the necessity "... of assuring citizens working in their territory the protection of their rights through access to their judges, access which appears decisive in allowing them to obtain justice with means within their reach" [18].

Besides ascertaining the *opinio necessitatis*, it is necessary that the new norm be already supported by a practice, perhaps only at the formative stage and not yet universally followed, that is, by a series of other acts of States, such as laws (also, obviously, laws of States different from the forum State). Recognizing that a domestic judgment may exist in a vacuum and that it may itself start the formative process of new customary law seems excessive in as much as it would transform the judge into a maker rather than an interpreter of the law. In looking over the text of the two decisions cited above, for example, it is clear that there is a reference to pre-existing practice, although such practice, in itself, would be considered insufficient.

To conclude on this point, we can say that the judge may refuse to apply an international customary norm or consider it wholly or in part modified if he ascertains the existence of an *opinio necessitatis* in this sense, and if the extinction of the norm or the formation of a new norm has its basis in an international and/or domestic practice, even if such practice is fragmentary.

[16] See CONFORTI, Cours génér. de droit internat. public. Recueil des Cours de l'Ac. de droit intern., 1988, V, chapter 2, para. 10.

[17] *Cf.* the opinion of Lord Stephenson, shared by the other members of the Court, in International Legal Materials, 1977, pp. 485-495, esp. p. 493.

[18] Foro Italiano, 1989, I. col. 2466.

2. *National Courts, the Executive and* Opinio Juris Ac Necessitatis

A delicate problem arises, on the subject of the formation or modification of customary international law, regarding the relationship between the Judiciary and the Executive. The problem has been the subject of a lively doctrinal debate in the United States, a debate that began with the *Garcia-Mir* v. *Meese* case in 1986 [19]. In the *Garcia-Mir* case, the Court of Appeals of the 11th Circuit, although it recognized that the prolonged detention of Cuban citizens who had illegally entered the Country was a violation of customary international law, concluded that such detention was to be upheld because it had been authorized by the Attorney General. In doing so, the Court gave a strict interpretation to the statement contained in an old and famous decision of the Supreme Court (*The Paquet Habana*, 1900), according to which "customs and usages of civilized nations" can apply "where there is... no controlling executive ... act". We do not wish to discuss here whether the *Paquet Habana* case actually means that American Courts cannot review conduct of the Executive that is contrary to customary international law, something, which is challenged by some authors [20]. This aspect of the case would in any event come under the topic of the political question which we have already dealt with. We wish to emphasize instead that the doctrinal debate which began with the *Garcia-Mir* decision has largely moved away from the issue of the political question and developed around the theme of the relationship between the Judiciary and the Executive in the formation and modification of customary law. If the Executive and especially the President of the United States — it has been said — are not allowed to violate customary international law, does this not amount to excluding them from the process of transformation of customary law itself? This question has had various answers: some authors are against

[19] For this debate, *cf.* "Agora: May the President Violate Customary International Law?", The American Jour. of Int. Law, 1986, pp. 913-937 and 1987, pp. 371-390. *Ibidem.*, 1986, p. 913, the citations from the *Garcia-Mir* v. *Meese* case (and from the *Fernandez-Roque* v. *Smith* case, decided in the first instance on the same question).

[20] See PAUST, "The President is Bound by International Law," "Agora...", cit. (*supra*, note 3), 1987, pp. 385-386.

the attribution of a ... power of violation to the Executive, while other are favorable, and still others are inclined to request ... the authorization to violate from Congress.

In our view, the problem of the relationship between the Judiciary and the Executive in the process of transforming customary law can be resolved if we bear in mind the role played in the process by *opinio juris ac necessitatis*, or, rather, for the reasons already given in the preceding paragraph, by *opinio necessitatis*. It is not a question of simply recognizing that the Executive has the power to violate pre-existing customs, but of admitting that the Executive can contribute to the transformation of customary law (which initially implies also its violation), provided that its conduct is supported by an evident *opinio necessitatis*, that is, by the consciousness of its social propriety. Nor it is a matter of preventing the Courts from reviewing Executive conduct, but only of obligating them to verify whether the Executive's conduct, although unlawful in the light of pre-existing customary law, is justifiable (under the same principles of international law that govern the formation of customs) in so far as it is supported by *opinio necessitatis*. To go back to the *Garcia-Mir* case — and without entering into the issue, which is not of interest here, of whether the prohibition against prolonged detention correspond to a practice so generalized among the States as to be considered part of customary law — it is certain that this kind of detention could not today be considered as supported by the opinion that it corresponds to a ... social duty.

We can conclude by saying that the national judge cannot review conduct of the Executive that is contrary to customary law when, and only when, the Executive shows that its conduct is justified by an adequate *opinio necessitatis* and therefore aims at contributing to the transformation of the customary law in force.

III. — *National Courts and International Treaties*

1. *Direct Applicability of Treaties by the National Courts*

National Courts do not always tend to make correct use of the distinction between self-executing treaties (or treaty provisions) and non-self-executing treaties (or treaty provisions). Resort to the

notion of non-self-executing provisions is often only a pretext for not applying the treaty. In our opinion, one must react against this tendency and seek to specify precisely the limits within which a treaty provision can effectively be considered not directly applicable.

As has been rightly observed [21], we must not confuse non-self-executing treaties because they do not have a full *formal validity* in the domestic legal order with non-self-executing treaties that are *incomplete* as far as their content is concerned and therefore requiring implementation and integration by the national authorities. For the purpose of this paper, the former aspect is not relevant since, as we said in our introduction, we start from the premise that international law be formally valid for the domestic organs administering the law, and only upon this premise are we dealing with the role of the national judge in its implementation. We are thus interested only in the second aspect.

When, then, can it be held that a treaty is incomplete owing to its content and therefore not directly applicable by domestic courts?

As we have noted, in the domestic case law of various Countries, a tendency is emerging to make excessive use of the distinction and to make a use that in a broad sense can be called " political". The case law tends to use the category of non-self-executing treaties in order to get of "non-desirable " provisions that are contrary to supervening national interests or that are too progressive, or only because of an instinctive sense of diffidence towards rules that come from the outside.

As an example of this tendency we can, first or all, cite the case law that still today is based on the old prejudice which would have international law creating rights and duties only for States, a prejudice which underlies, for instance, those decisions holding that the United Nations Charter *on the whole is not self-executing* [22].

[21] P. De Visscher, "Les tendances internationales des Constitutions modernes". Recueil des Cours, 1952, vol. 80, pp. 558-559.

[22] *Cf.* the *Bradley* v. *Commonwealth of Australia and the Postmaster General* case (Australian Supreme Court, 1973) Journal du droit int., 1974, pp. 865-868, *Cf.* also Italian *Consiglio di Stato*, 14 Nov. 1969, Italian Yearbook of Int. Law, 1975, p. 266.

Another example is provided by case law which excludes the direct applicability of a treaty owing to its "vague" or "indeterminate" content. *i.e.* of a particular treaty which contains general principles instead of detailed rules. The criterion of "indeterminacy" used in some Countries, for example, in Germany, to deny the direct applicability of the principles of the General Agreement on Tariffs and Trade (GATT) relating to freedom of international trade [23]. Proof that in this case it is a pretext for not applying the treaty is found in the fact that in other Countries such as Italy the same principles — for example, the stand-still principle on customs duties (art. III) or the one on equal fiscal treatment for imported goods and national goods — are normally and frequently enforced [24]. In any case, it seems to us that there is no principle, even a very general one, from which an interpreter cannot draw some concrete applications, perhaps only from the point of view of its abrogating force.

Another pretext for not applying a treaty can be had when it is held that a treaty is not directly applicable because it provides special international means for dispute settlement in the case of suspension or of failure to apply, or of difficulty in applying, its provisions on the part of one of the contracting Parties: something which would infer the "flexibility" of its provisions. This kind of view had been maintained, again with regard to the GATT, by the Court of Justice of the European Communities, in order to deny its actionability before the courts of the member States, actionability which would, in this particular case, have preempted the applicability of community law [25]. The Court's thesis must be criticized, from the viewpoint of correct and complete application of international law. And the same must be said of a similar thesis, upheld in a decision of the Swiss federal Tribunal, in which direct applicability would be

[23] *Cf.* FROWEIN, in JACOBS and ROBERTS (eds), "The Effect of Treaties in Domestic Law", London, 1987, pp. 69-70.

[24] See the various decisions reported in PICONE and CONFORTI, *op. cit.* (*supra*, note 7), pp. 304-311.

[25] Decisions of 12 Dec. 1972, cases 21-24/72, of 14 Oct. 1973, case 9/73 and of 16 March 1983, cases 267-269/81. It goes without saying that in so far as in these decisions the Community Court raised the problem of the applicability of the GATT in the legal orders of the member-States, it can be equated, for our purposes, to a national Court.

excluded any time the treaty contained a reciprocity clause: such a clause would leave the State free to apply or not to apply the treaty, thereby exposing itself to the other party's breach [26] ! Actually, clauses such as the one contained in the GATT or such as the reciprocity clause simply mean that the contracting State can adopt measures that are inconsistent with the treaty: in the case of the GATT, the State may adopt such measures when faced with economic difficulties, and then shift the issue to the conciliation procedure on the international level; in the case of reciprocty, the State may adopt such measures when the other contracting party has violated the treaty. It is clear that, *after the State has adopted* (legislative or executive) *measures* of this kind, the national judge is obligated to apply them. However, it is also clear that, until such measures are adopted, nothing can prevent the judge from apply the treaty entirely.

Nor should we consider (as, instead, some Courts have done) as an obstacle to the direct applicability of a treaty the fact that such treaty contains a clause of implementation, that is, it provides that the contracting States "shall adopt" all legislative or other measures, perhaps progressively, to give effect to its provisions. Clauses of this kind are found in many conventions, and among them, in the Conventions on human rights: we can mention art. 2 para 2, of the United Nations Covenant on Civil and Political Rights and art. 2, para. 1, of the Covenant on Economic, Social and Cultural Rights. In some countries, for example in the United States, the clause of implementation is interpreted as evidence of the intent of the contracting States to deny the direct applicability of the treaty on a whole [27]. In other Countries, the case law is not, or is not always, of the same opinion [28]. Some recent decisions relating

[26] Decision of 2 Sept. 1986, Annuaire suisse de droit international, 1987, pp. 154-155.

[27] *Cf.* IWASAWA, *op. cit.*, (*supra* note 12), p. 658.

[28] *Cf.*, for example (in addition to the decisions cited in the subsequent notes 29 and 30): Supreme Court of Madagascar, 19 April 1969 (International Law Reports, vol. 73, pp. 388-390) with regard to the 1948 San Francisco Conference on freedom of association: Turin Court of Appeal, 15 Oct. 1965 (in PICONE and CONFORTI, *op. cit., supra,* note 7, p. 32, n. 11) with regard to the 1883 Paris Convention on industrial property.

to the United Nations Covenant on Civil and Political Rights are indicative: in spite of art. 2, para. 2, of the Covenant, the Dutch Supreme Court and the Belgian Court of Cassation (the latter notwithstanding a contrary opinion expressed by the Council of State at the time of the adoption of the law approving the Covenant) gave direct application respectively to art. 14, para. 3 (c) (right to be tried without undue delay) [29] and to art. 14, para. 3 (a) (right of the individual charged with a criminal offence to be informed of the nature and cause of the charge against him) and para. 3 (f) (rights of the individual charged with a criminal offence to have the free assistance of an interpreter) [30]. These decisions are to be approved and to be considered as models. In our opinion, the implementation clauses do not concern the *content* of the treaty; from the point of view of content, the only thing that can be objectively drawn from a clause binding the States to take necessary measures to implement treaty provisions is the intent and the expectation of the treaty itself to ... be applied. Actually, the implementation clause concerns only the *formal validity* of the treaty in the domestic legal order: it simply binds the State to guarantee such validity. When, then, as usually occurs, the treaty as a whole has acquired legal value in domestic law — by virtue of the Constitution or of an *ad hoc* law — the clause exhausts its function. At the most we can say that it continues to have effect with regard to the provisions of the treaty (if there are any) that are not self-executing because of the absence of domestic organs or procedures indispensable for their implementation, binding the State to take appropriate legislative or administrative measures. However, it is clear that a commitment of this kind would exist even if the implementation clause did not exist! Returning to the United Nations Covenants on human rights, we can say that art. 2, para. 2, of the Covenant on Civil and Political Rights, once the Covenant itself had acquired legal value in domestic law, continues to have meaning only if it is referred to provisions

[29] Supreme Court of the Netherlands, 23 Sept. 1980, The Netherlands Yearb. of Int. Law, 1982, pp. 66-68.

[30] Belgian Court of Cassation, 17 Jan. 1984 and 16 Oct. 1984, both cited, together with the opinion of the Council of State, by MARESCEAU, in JACOBS and ROBERTS, *op. cit.* (*supra* note 23), p. 18.

which, owing to their content, are not self-executing: it can refer, to mention a provision which Italian and Dutch case law has dealt with, to art. 14, para. 5, which, by recognizing the right of everyone to have his or her conviction or sentence reviewed by a higher tribunal, is not enforceable until the higher tribunal has been set up [31]. The same must be said of art. 2, para. 1, of the Covenant on Economic, Social and Cultural Rights, which speaks of the " progressive" implementation of its provisions.

In our view, if we want to guarantee the correct and complete application of international law by national judges, the category of non-self-executing treaties should be maintained within very narrow limits: it must be limited to rules which do not lay down obligations but simply give authority to the States [32] as well as to rules which, although laying down obligations, cannot be implemented owing to the lack of the organs and procedures that would be indispensable for their implementation [33], including procedures which, under the Constitution of the State, are reserved to the law-maker [34].

In conclusion, the national judge should not refuse to directly apply a treaty simply because its content is vague or indefinite, or because it contains a clause of implementation or any other

[31] *Cf.* Italian Constitutional Court, 6 Febr. 1979, The Italian Yearb. of Int. Law, 1978-79, vol. 4, pp. 512-514; Supreme Court of the Netherlands, 14 Apr. 1981, The Netherlands Yearb. of Int. Law 1982, p. 367, note 150.

[32] *Cf.*, for example, art. 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone (or art. 7 of the Montego Bay Convention on the Law of the Sea) which autorizes the State to adopt the method of straight baselines for measuring the territorial sea. Rules that are expressly limited to recommending a certain conduct, leaving the States free to follow them or not, may be assimilated to rules simply giving authority to the contracting States: *cf.*, for example, art. 20 of the 1961 European Social Charter which gives the contracting States the possibility of choosing the articles (at least five) they wish to be bound by.

[33] *Cf.*, for example, art. 14 of the United Nations Covenant on Civil and Political Rights which lays down the obligation to guarantee review by a higher tribunal and which is not applicable — as Italian and Dutch case law have said (*cf.* the decisions cited supra in note 31) — until a higher court has been established.

[34] This is the case of treaties binding the State to appropriate special funds, an appropriation which under many Constitutions must be necessarily made by *ad hoc* laws.

clause (such as a reciprocity clause, the clause which provides procedures of mere conciliation in case of breach of its norms, etc.) which involves a weakening of the *international* guarantees of executing of the treaty. The national judge should thus declare a treaty non-self-executing only when the treaty itself does not lay down obligations or, although laying down obligations, it cannot be in any way implemented without the intervention of especially created organs or of procedures especially put in place.

2. *Admissibility of Judicial Finding of Invalidity or Termination of a Treaty*

When a circumstance causing invalidity (for example, breach of constitutional norms on treaty-making power, violation of *jus cogens*, coercion on the State representative, error, fraud, etc.) or termination (for example, impossibility of performance, fundamental change of circumstances, succession of a new State to a State party, breach of the treaty by the other party, etc.) of a treaty occur may the national judge take note of such circumstance and refuse to apply the treaty? Or is it necessary that the State to which the judge belongs first denounce the treaty at the international level [35] ?

A recently published study of national case law, which the author of this report has jointly carried out with another scholar [36], has revealed the following data:

— national Courts tend to keep for themselves the power to decide whether a treaty must be deemed, for any cause whatsoever, invalid

[35] The alternative we posit is between a finding a domestic judge and a formal act of the State addressed to the other contracting parties. We are, instead, not interested at this point in the question — already dealt with — concerning the degree of deference the Judiciary affords the Executive when deciding questions of international law. In other words, what we are interested in establishing here is whether a domestic judge may find a cause of invalidity or termination of a treaty irrespective of whether he must, in order to make his decision, ask for a more less binding opinion from the organs of the Executive.

[36] CONFORTI and LABELLA, "Invalidity and Termination of Treaties: The Role of National Courts," European Journal of International Law, 1990, vol. 1, pp. 44-66. A reprint of this article has already been sent to all members of the Ninth Commission.

or terminated and thus not applicable to the specific case brought before them;

— the *only* important exception to this tendency concerns two causes for termination: the fundamental change of circumstances (*rebus sic stantibus* principle) and the breach of treaty by the other party. For these two causes the Courts in fact usually state that they cannot refuse to apply the treaty as long as their State has not denounced it or has not in some way shown, at the international level, its intention to terminate it. There are, however, decisions that say the opposite [37]. One must also consider that the national courts are in a kind of contradiction when they maintain that they cannot decide autonomously with regard to fundamental change of circumstances while they usually decide autonomously on the effects of war on treaties and of supervening impossibility of performance: yet in both these cases it is a question of a special application of the *rebus sic stantibus* principle [38].

— the decision of the national judge not to apply a treaty because it is invalid or terminated only affects the particular case at issue. In other words, the judge's finding regarding the treaty's invalidity or termination may be different from what another judge holds in relation to another case, just as judicial application of any legal rule, whether international or domestic, may vary from one case to another.

— the denunciation or other act with which a State declares at the international level that a treaty is to be considered invalid or terminated and therefore no longer applicable as far as such State is concerned (for example, the act with which the procedure provided for by arts 65 ff. of the Vienna Convention on the law of treaties may be begun) binds the Courts of the denouncing State, provided such denunciation is made in compliance with the internal rules on the power to denounce treaties.

On the contrary, the denunciation has nos value — unless authorized by the treaty and hence *in itsef* constituting an independent cause of termination — for the Courts of the other contracting States.

[37] See CONFORTI and LABELLA, art. cit., p. 61-62.

[38] For this thesis, see CONFORTI, "Diritto internazionale," Naples, 1982, pp. 104-105 and "Restatement III" cit. (*supra*, note 10), vol. 1, pp. 219 and 222 and para. 336.

On the basis of the above elements we can conclude by acknowledging that the national judge has the authority to decide whether a treaty is to be considered invalid or terminated and therefore no longer applicable to the specific case. This is true even if the State to which the judge belongs had not taken steps to denounce the treaty, or to show in another way that it intends to withdraw, at the international level. Only when the State of which the judge belongs has expressed this intention is the judge obligated to consider the treaty invalid or terminated.

If we consider that the judge's decision has an effect limited to the specific case, and if we consider how much we have emphasized the necessity of strengthening the role of domestic Courts in the application of international law, it is to be hoped that the power of the national judge to decide on the invalidity or termination of a treaty be carried out with regard to all causes of invalidity and termination, including the fundamental change of circumstances and the breach of the treaty by the other party.

3. *Application of the Last-in-Time Rule in the Relations Between Treaty and Subsequent Laws*

A problem that the national judge is very often called upon to settle concerns the application of principles on the succession in time of norms to the relations between treaties and subsequent national laws. The problem does not arise (or at least should not arise) when the Constitution of a State guarantees the treaty a *formal* superiority with respect to the laws; however, this rarely happens. In most Countries it is the Courts who must settle the problem on the basis of the general principles of their legal order [39].

[39] Here, obviously, the problem is examined from the point of view of the national judge and of the obstacles which, in domestic law, may interfere with a correct and complete application of international law. If, on the contrary, it is seen from the view point of international law, one would have to conclude — as does the international case law — that the provisions of a domestic law... should never prevail over the provisions of a treaty (*cf.*, for example, the case concerning the *Greco-Bulgarian Communities*, P.C.I.J., Série B, no. 17, p. 32 and the case concerning the *Applicability of the Obligation to Arbitrate*, I.C.J., Reports, 1988, pp. 34-45, para. 57).

A common starting point for all domestic case law is, when a formal superiority is not sanctioned, the principle that the subsequent provision abrogates the anterior rule also in relations between treaties and national legislation. However, there are not many decisions that strictly follow this principle, that is, of having posterior laws always prevail over *incompatible* treaties applicable within the forum. Instead, there are a great many decisions which seek in various ways to distinguish between one incompatibility and another, and therefore to increase the cases of prevalence of the international provision even if it is anterior. The most common criterion for ensuring this prevalence is that of presumption of conformity of the domestic law to international law. On the basis of this criterion, when subsequent law is ambiguous, it must be interpreted so as to allow the State to honor international obligations previously undertaken [40]. Another criterion, which is, for example, much applied in Italy in the relations between conventions of uniforme law or of cooperation in judicial matters and Italian domestic provisions in the field of private and procedural law, is that of considering the convention as *special* law, and thus of applying the principle *lex posterior generalis non derogat priori speciali* [41]. Although the case law is not very generous with reasoning on this point, it seems that the speciality to which it refers is the speciality *rationae materiae*, based on the special character (although not always proven) of the subject matter governed by the international treaty. Lastly, there is the criterion, followed mostly by American and Swiss Courts, according to which subsequent law prevails only if there is a "clear indication" of the intention of the law-maker to derogate from the treaty or other international commitment in force, only if, in other words,

[40] For the application of this criterion, *cf.* the United States case law cited in "Restatement III," cit. (*supra*, note 10), vol. 1, pp. 62-63, and the case law of various Countries cited in JACOBS and ROBERTS (eds), *op. cit.* (*supra*, note 23), pp. 33, 60, 69, 100, 135, 137 and 160.

[41] *Cf.* the many decisions reported in PICONE and CONFORTI, *op. cit.*, (*supra*, note 7), pp. 862-864. The speciality criterion is applied also in Germany: cf. FROWEIN, in JACOBS and ROBERTS, *op. cit.*, p. 69.

the law maker derogates "in full awareness of cause" [42]. It is obvious that, if we accept this last criterion, which is the broadest and the most favorable to the prevalence of the treaty, recourse to the two other previous criteria is useless.

The idea that we would need a clear intention of the law-maker aimed at neutralizing or, if we will, at violating the pre-existing international provision, and that, therefore, the refusal to apply such provision cannot be drawn from simple *incompatibility* with the subsequent domestic provision, is an idea we fuly share. It has its justification in the fact that the treaty, once it has in whatsoever way acquired formal validity within the State, ultimately is upheld in the domestic legal order by a two-fold normative intent: on the one hand, the intent that certain relations be governed as they are governed by international law, and on the other, the intent that commitments undertaken towards other States be respected. It is necessary, therefore, in order to have the posterior domestic provision prevail, that both intents be annulled; it is necessary that the posterior provision show not only and not so much the intent to regulate differently the same relations as the intent to reject international commitments already undertaken.

But when is a "clear" intent ascertainable that the law-maker wants to withdraw from international commitments? Must it be *expressly* declared — something which surely is difficult if not impossible to find in practice [43] — or may it be *implicitly* shown? And, in this second case, up to what point can the search for implicit intent be brought without entering into the mere incompatibility between norms? The case law does not give us any certain

[42] For the American case law, *cf.* "Restatement III", cit. (*supra*, note 10), vol. 1, p. 64 (*adde* Court of Appeal, 2nd Circ., *Am rada Hess Shipping Corporation* v. *Argentine Republic* (1987), Intern. Legal Materials, 1987, XXVI, p. 1380). For the Swiss case law, *cf.* the decision of the federal Tribunal cited *infra*, note 44 (*cf.* also the opinion of the "Direction du droit international public du Département politique fédéral," of 10 April 1975, Annuaire suisse de droit internat., 1976, p. 82).

[43] An example of express abrogation is provided by Italian law no. 84 of 26 March 1983 (Gazzetta Ufficiale 1 April 1983, no. 90), which both in its title and in art. 1 states the intention to modify art. 22 of the Warsaw Convention on international air transportation.

answers. We need only cite two examples, taken from Swiss case law, in which the federal Tribunal, although starting from the criterion of the clear intent of the law-maker, and although in the presence of similar cases, came to diametrically opposed conclusions. In a decision of 22 November 1968, the federal Tribunal declared that a national law on commercial navigation would not, even though it came later, prevail over a treaty between Switzerland and Germany on Rhine navigation between Neuhausen and Basel; this was because, in the Court's view, it did not appear in the specific case that the law-maker intended to "expressly undertake the risk of creating national law that would conflict with international law" [44]. In a more recent decision, of 9 March 1986, the same federal Tribunal instead applied several provisions of a national law relating to the acquisition of real estate by aliens and refused to take into consideration the fact that the provisions were in conflict with previous treaty obligations undertaken with the German Federal Republic; the Court stated that since the instrument at issue referred, though generally, to aliens, the law-maker had to be clearly considered "conscious of the violation of international law that such instrument could entail and that it was ready to undertake such risk" [45].

In our view, the intent of the law-maker to reject a pre-existing international obligation may be implicitly drawn *only* when the object of the obligation and that of the differing domestic provision are *perfectly identical* both with regard to the subject matter which is being regulated and to the subjects which are the addressees. We can take, for example, the United States legislation which, between 1971 and 1976, authorized imports of "Southern Rhodesian chrome": there is no doubt that this legislation was binding on American courts, since there was a clear intent to violate the 1968 Security Council decision regarding the total economic blockade of Southern Rhodesia, a decision that up to that time had been applied.

[44] Swiss Federal Tribunal, 22 Nov. 1968, Int. Law Reports, vol. 72, pp. 679-689, esp. p. 689.

[45] Swiss Federal Tribunal, 9 March 1986, Annuaire suisse de dr. internat., 1987, p. 153.

When, instead-as in the two above-mentioned Swiss cases, which more or less correspond to the way in which the conflict between international rules and subsequent national rules usually occurs in practice — a perfect identity between the factual hypothesis contemplated by the two rules does not exist, we are then faced with a real incompatibility between norms, not susceptible as such of entailing the prevalence of the domestic rule.

One must ask whether also the case of the perfect identity between factual hypotheses must be further limited, and whether, in particular, we must exclude the prevalence of the posterior domestic provision whenever it can be shown that the law-maker, perhaps in a mistaken interpretation of the international obligations of its own State, did not intend to fail to conform to such obligations. The District Court of New York (Judge Y. Palmieri) was concerned with a question of this kind in a judgment of 29 September 1988 handed down in a dispute between the United States Government and the Palestinian Liberation Organization (PLO). The Court decided that the PLO office at the United Nations was not to be closed, as the United States government had requested, holding that such a measure would be contrary to the 1947 headquarters agreement between the U.S. and the U.N., an agreement which by law duly entered into the American legal order. The Court refuse, instead, to apply the 1987 *Anti-Terrorism Act* (ATA), in spite of the fact that this act solely and expressly prohibited the establishment or maintenance of PLO offices (or any other PLO activity) in the United States, in spite of the fact that in adopting it Congress declared that the provision was directed against the PLO Office at the United Nations, and in spite of the fact that the only PLO office existing at the time the law was passed was the New York office. In its decision the Court did not deny that the ATA was aiming at such results, but held, on the basis of the preparatory works, that Congress had acted on the mistaken assumption that the provisions of the headquarters agreement relating to freedom of transit and of stay of persons accredited with the United Nations did not apply to the PLO Office: since there did not exist a specific intent to derogate from the previous international commitment, such commitment was to be considered prevalent and still

applicable [46]. What can be said? Without doubt such a daring thesis marks the limit beyond which the interpreter cannot go!

In conclusion, and on the basis of an examination of the case law, it seems to us that the starting point for domestic case law, that is, the application of the principle of the last-in-time rule to relations between international treaties and subsequent domestic provisions, must be so understood: if the treaty is formally applicable in domestic law, it prevails over subsequent laws as long as the subsequent laws do not clearly shown that they intend to derogate from the international commitments.

4. *National Courts and the Interpretation of Treaties*

As we know, the Vienna Convention on the Law of Treaties (art. 31) adopted the so-called "objective" method with regard to the interpretation of treaties. According to this method, the treaty is to be interpreted according to the plain meaning of the text, which results from the logical relationships between the various parts of the text and which is in harmony with the object and function of the instrument as they can be drawn from the text itself.

In the interpretation of treaties by national Courts — which, as it has been noted [47], provide a much more impressive body of precedents than what is offered by international case law — there is also a trend toward the objective method. There are, indeed, decisions that expressly mention the Vienna Convention [48]. On the other hand, we should not exaggerate the differences between the objective method and the subjective method (that is, the search in every case and at any cost for the effective intent of the parties); nor should we exaggerate the differences — which are emphasized

[46] For the text of the decision, see Int. Legal Materials, 1988, pp. 1055-1088.

[47] SCHREUER, "The Interpretation of Treaties by Domestic Courts," The British Yearb. of Int. Law, 1971, p. 255.

[48] *Cf.* decision no. 9321 of the Italian *Corte di Cassazione* (*Sezioni Unite*) of 16 Dec. 1987 (Rivista di diritto internazionale privato e processuale, 1989, pp. 141-143), and the opinion of Lord Diplock and of Lord Scarman in the *Fothergill* v. *Monarch Airlines, Ltd.* case, House of Lords, 1980 (Int. Law Reports, vol. 74, pp. 661 and 669).

by some authors in comparing the *modus operandi* of English Courts with that of continental Courts — about the resort which is sometimes made to the preparatory works of between a strict textual construction and a functional interpretation [49]. We must not forget that the rules on interpretation, even if we would want to consider them as real legal rules, regulate a form of *knowledge* which, as such, does not lend itself to be conveyed along a rigid and precise track.

The only point we believe is truly important on the whole subject is that national Courts must avoid any *unilateral* interpretation of a treaty, that is to say, any interpretation dictated by nationalistic interests ("politcal" unilateralism) or inspired by legal concepts of their own legal order ("legal" unilateralism). National Courts must interpret the treaty as an international Court would interpret it, therefore placing themselves in a position *super partes*. Actually, a study of the most recent case law shows that unilateralism has largely been abandoned even where — as in Great Britain, and for reasons also connected with the techniques of incorporation of the treaty into domestic law — it was most widely practiced [50]. There are, however, still today exceptions; and it is worthwhile discussing them briefly.

A first exception consists of those decisions according to which obligations arising from a treaty are to be interpreted restrictively since they would always involve a limitation of sovereignty. However, such decisions are even more rare: they are influenced by the by now obsolete ideas of German positivism of the last century and are to be disapproved as amounting to a form of "political" unilateralism. The only case where we can perhaps make an exception and say that a restrictive interpretation must be the rule is that of *unequal* treaties, that is, of treaties with respect to which one of the parties does not have at its disposal a reasonable margin of bargaining power. Under this aspect there could, for example, be

[49] On this point see MUNDAY, "The Uniform Interpretation of International Conventions," The Int. and Comp. Law Quarterly, 1978, pp. 453-456.

[50] A history of the "unilateralism" of the English Courts is traced, as far as the conventions of uniform law are concerned, by Lord Roskill in the already citer *Fothergill* v. *Monarch Airlines, Ltd.* case (*supra*, note 48).

justified the constantly restrictive approach of German case law in the period after the First World War, with regard to the Treaty of Versailles, or that of a part of Italian case law relating to the 1947 peace treaty between Italy and the Allied Powers.

Another form of unilateralism, which we can call " legal", and which still appears here and there in national case law, is given by the interpretation of technical-legal terms, used in a convention, according to the meaning they have in the legal system of the forum or, if they are private law terms, in accordance with the meaning they have in the legal order referred to by the conflict rules of the forum. This phenomenon, as we know, occurs mainly, but not exclusively, in the field of the conventions of (private) uniform law, a field which has been the subject of so many studies that we need not examine even its main points here. We shall restrict ourselves to confirming that also for this kind of convention, national judges should always act as if they were international judges. They should thus investigate what is the meaning of the legal terms employed in the light of the convention itself, and perhaps in the light of the preparatory works, of subsequent interpretative agreements, of implementing practice and of all relevant rules of international law applicable between the parties (cf. art. 31, para. 3 and 32 of the Vienna Convention on the Law of Treaties). At the most such meaning may be obtained through a synthesis of principles common to the contracting States. Obviously resort may be made to the legal order of the forum State, or to any other given legal order only if the convention itself expressly and unambiguously so provides.

With regard to conventions of uniform law (but this may be valid for any kind of convention), the judicial precedents from all the contracting States acquire special relevance, as "implementing practice" of the treaty in view of assuring the uniformity which is the aim of the convention. Many authors emphasize and many judicial decisons confirm, the appropriateness for the judge to take into account the comparative case law. In spite of this, differences remain from one Country to another. Nor, in our view, should we exaggerate the importance of the comparative aspect: the "implementing practice" is a secondary means of treaty interpretation, and it may well be that the foreign precedents cannot be used,

either because they are in conflict with the text of the treaty or because they buttress a very restrictive interpretation as compared to the object and purpose of the treaty, or, lastly, because they adopt solutions of a unilateral nature.

In conclusion, we can say: that the interpretation of treaties by the national judge should be carried out in conformity with. the principles of customary international law that have been formed on the subject and that are codified in the Vienna Convention on the Law of Treaties; that the national judge should always make an effort to interpret the treaty as it would be interpreted by an international Court, avoiding "unilateral" interpretation of the treaty, or interpretations fueled by national interests or by legal rules of his own legal order, that, in the interpretation of treaties, and especially of treaties aimed at bringing about uniformity in laws or regulations, the national judge should utilize the judgments handed down in other contracting States, but ascertain, however, that such judgments are not inconsistent with the principles enunciated above.

Questionnaire

1. Do you agree with the basic idea underlying this report, that is, that the powers of the domestic judge regarding the application of international law should be strengthened so as to make such application as consistent and complete as possible? Do you think that this idea is preferable, within reasonable limits, to the contrary one, underlying the case law of several Countries, according to which the judge must not "cause embarrassment" for his own Government? Do you have any suggestions on the subject?

2. Do you think that the subjects dealt with in the report completely cover what the report should be concerned with? If not, what new subjects be dealt with?

3. What individual points in the report seem to you to be incomplete and how should they be completed? Would you like to note, with regard to these points, any recent cases or any cases you believe are especially important?

4. What solutions on the various points in the report do you believe are not quite correct? In what way should they be modified?

5. Would it be appropriate to draw up a draft resolution? If so, do you think the conclusions at the end of the individual sections in the report could be utilized, with any possible changes or additions suggested by the Commission?

May 1991.

Observations of the Members of the Ninth Commission on the Preliminary Report and on the Questionnaire.

1. *Observations of Mr F.A. Mann*

29th May 1991

My dear Colleague,

Thank you for your letter of the 3rd May with your preliminary report and your questions, to which my replies are as follows:

1. (a) The answer to the first and second parts of this question is an emphatic «Yes».

(b) On the second question, I do not think that embarrassment to a government can ever be a relevant point in the application or non-application of law. The embarrassment of governments is a relevant element only where facts are concerned, and in such cases I am very much in favour of the Anglo-American practice of certification. I realise that on occasions it is not easy to draw a line between law and fact, but this is a familiar problem and the argument that it is difficult to draw a line is in truth a non-argument.

2. Yes.

3. (a) In my view there should be no "political question" doctrine as it now stands. There are only certain questions which by their very nature come within governmental discretion and are therefore incapable of being decided by legal standards.

(b) The act of State doctrine has in my view been greatly reduced in scope by the *Kirkpatrick* decision. Thus the American cases invoked by the House of Lords in *Buttes* have lost validity altogether. The act of State doctrine as a whole should be rejected by the Institute.

(c) International *facts* should be certified by the Foreign Office to avoid a clash between the Government and the Courts (see above).

4. The reference to the direct applicability of treaties leads to misunderstandings.

(a) Treaties may have been adopted by the legislative process of a given country. In such a case they are likely to be directly applicable if their terms are sufficiently succinct.

(b) Treaties which have not been adopted by the Legislator can never be called "aplicable", whether they are self-executing or not, because if they were the legislative procedure of the country would have been circumvented by the Executive: the Executive would legislate. This cannot be allowed. But this does not mean that such treaties cannot be taken into account and applied as if they were foreign law, *i.e.* where the conflict rule refers to them.

(c) The later statute may change the treaty, — it is a matter of interpretation. The New York decision referred to is a bad example for it is clearly wrong. The United States of America had guaranteed access to the United Nations. Access simply does not have any bearing upon the creation of a mission. You can have access without having a mission.

5. I think a resolution is necessary and would be useful.

Yours sincerely,

2. *Observations de M. P. De Visscher*

6 juin 1991

Mon cher Confrère,

J'ai pris connaissance avec grand intérêt du rapport préliminaire que vous avez consacré au problème que la Commission des Travaux a confié à notre Neuvième Commission. Je vous félicite pour cet excellent travail dont la fermeté de la pensée et la clarté de ses développements faciliteront certainement la suite de nos travaux.

A votre première question, je réponds affirmativement. Je suis, depuis longtemps, un adepte de la supériorité du droit international (conventionnel ou coutumier) sur l'ordre juridique interne. Cette supériorité commande logiquement d'être reconnue et défendue sur le plan interne par des juges indépendants de l'Exécutif, lorsque ces juges sont confrontés à des dispositions self-executing de droit international. Aucune considération d'opportunité politique ne peut influencer le règlement de tels conflits de normes (voir à ce sujet mon étude sur la Constitution belge et le droit international dans la *Revue belge de droit international*, 1986-I, pp. 30-31). Après de nombreux autres pays, la France a franchi une étape décisive en ce sens par l'arrêt Nicolo prononcé par le Conseil d'Etat, le 20 octobre 1989.

En réponse à votre deuxième question, je pense qu'il serait utile d'évoquer la place exacte qu'occupent, dans l'ordonnancement juridique global, les " règles et principes " auxquels la Cour internationale de Justice a fait fréquemment appel dans le règlement des différends de délimitation des espaces maritimes et auxquels des juges internes peuvent être confrontés.

A propos de la coutume internationale, vous utilisez l'expression *opinio juris ac* (*ou sive*) *necessitatis*. Dans ses arrêts du 20 février 1969 relatifs aux plateaux continentaux de la mer du Nord, la Cour a utilisé tantôt l'expression *opinio juris* et tantôt celle *d'opinio juris sive necessitatis*. Ma préférence va à l'expression *opinio juris* sans autre qualification. La « conviction » est le produit d'une nécessité ressentie et il est superflu de faire état de ce facteur d'utilité ou de nécessité sociale comme élément distinct de la coutume. Je n'insisterai cependant pas sur ce point.

Dans l'état actuel d'avancement de nos travaux, je souhaite vivement que l'Institut puisse aboutir à l'adoption de Résolutions en s'inspirant des conclusions qui figurent au terme des différentes rubriques de votre exposé.

A la page 16[1] de votre rapport vous esquissez les lignes d'une résolution par laquelle l'Institut affirmerait la présomption de supériorité, dans l'ordre juridique interne de la règle la plus récente, « aussi longtemps qu'il n'est pas démontré que les lois entendaient déroger aux engagements internationaux ».

[1] *Cf.*, p. 354.

Je sais que les juges internes, soucieux d'éviter de devoir constater la violation par la loi d'une règle de droit international, ont fréquemment recouru à cette technique de la présomption, et cette jurisprudence a été utile. Je doute cependant de l'opportunité pour l'Institut de recommander aussi nettement pareille jurisprudence car il me semble contradictoire d'affirmer la supériorité du droit international et d'admettre simultanément, sur le même objet, une forme d'échappatoire à ce principe de la hiérarchie des normes. La pratique des réserves me paraît préférable dans la mesure où elle est permise par la Convention de Vienne sur le droit des traités.

En attendant le plaisir de vous revoir à Bâle, je vous prie de croire, mon cher Confrère à mes meilleurs sentiments.

P.S. — Pour rester fidèle au texte original anglais, l'intitulé des résolutions en projet devrait être rédigé comme suit : « Les activités des juges internes et les cher Confrère, à mes meilleurs sentiments.

3. *Observations of Mr I. Seidl-Hohenveldern*

June 10, 1991

My dear Confrère,

Please accept my congratulations for your excellent report as well as for the thorough scholarly research in your joint article with A. Labella ... May I draw your attention to the book edited by E. Lauterpacht and John G. Collier, *Individual Rights and the State in Foreign Affairs.* New York, Praeger, 1977. One of the topics to be dealt with in this compendium concerned national implementation of international rights and duties. The volume contains reports also from developing countries.

I am very much in favour of the tendency of your report to give judges a maximum of freedom to decide international law issues. I am therefore strongly opposed to the Act of State doctrine, unless it contains a general international law exception. Far from embarassing the forum State such freedom is even preferable for those responsible for the foreign relations of the forum State. The Foreign Ministry is not forced to take sides. It will be able — to a certain extent — to reassure the protesting foreign State that this is merely the excentric view of a single court and not of the Government. Of course, this would be no defence against an accusation of a denial of justice, but such an accusation would be brought with even more fervor if the judgment had been the outcome of a clearly declared government policy.

I am all in favour of courts finding for themselves whether a given State exists and what are its borders. This seems a logical corollary from judicial

independence. I recall an early Austrian judgment of a lower court on the status of Israel right at the end of the British mandate. I have some misgivings about the penultimate phrase in the third paragraph on p. 7[1]. This "supreme interest of the country" reservation reminds me of the 19th century attitude to accept international adjudication except where the honour and welfare of the country is concerned. Courts, in Austria *e.g.* are free not to follow the Austrian Government's certificate as to which foreign nationals enjoy diplomatic immunity. Practically, a reasonable judge will need such a certificate, but he is no longer bound to do so, as he formerly was.

I agree that a well-documented court decision may depart from customary international law rules which it finds obsolete. The Dralle decision of the Austrian Supreme Court in 1950 is a case in point. Thereby, Austria became one of the States accepting the limitation of immunity to *acta jure imperii* of foreign States. Logically the same power should be conceded by the courts also to the executive. All the same I can easily imagine, abuses in the situation you deal with at the bottom of page 9[2].

I agree with you to regret the tendency to avoid the application of "less desirable" treaties by the simple subterfuge of declaring them non-self-executory. This was the fate suffered *e.g.* by the European Convention on Human Rights in its early days.

I approve the penultimate paragraph on p. 12[3]. I merely wonder what significance you want to attribute to the words "in any way". I would agree with this formula if you intend to say thereby, that the judge should consider such rules self-executory, which figure in an otherwise non-self-executory treaty, but which, considered by themselves, could be executed without special organs or procedures.

In your article with Labella you have referred in more detail to the problem of *desuetudo* than on p. 13 of your report[4]. On p. 15[5] note 43 may I refer to the United Kingdom and France declaring inapplicable the Load Line Convention at the outbreak or World War II. On p. 15[6] note 45 I have not the slightest doubt that given the mentality of the Swiss electorate against foreigners purchasing land in Switzerland I have very little doubt that they were willing to violate treaties preventing this intention taking its full effect.

[1] *Cf.*, p. 338.
[2] *Cf.*, p. 341.
[3] *Cf.*, p. 346-347.
[4] *Cf.*, p. 347-348.
[5] *Cf.*, p. 351.
[6] *Cf.*, p. 352.

I agree with the qualification "daring" in the last line of the second paragraph on p. 16[7].

There have been recently two Austrian cases concerning lump sum agreements where the courts refused to take into considerations restrictions figuring in the Austrian Government's memorandum concerning this Treaty but not in the text of the Treaty itself. Thus, as no *dies ad quem* figured in the Austro-Czechoslovak Treaty, an Austrian could obtain compensation under that Treaty for assets expropriated not after World War II but after World War I. Only the Government memorandum had indicated that the Treaty referred merely to nationalizations after World War II[8].

I agree that any national court should interpret a treaty binding in several languages in the same way as an international tribunal. I object to the Austrian Administrative Court's decision in the Glider case, "as German is the offical language of Austria," this court gave preference, to the German version[9]. This is at least inopportune. Should the dispute be raised to the inter-State level, the competent international tribunal would, of course, heed the international law rules on interpretation.

Right now I cannot lay my hands on Munday's article quoted in your footnote 49. I therefore do not know whether he has noted there the procedure of interpreting the Property Treaty of 1957 between Austria and the Federal Republic of Germany. The procedure is copied from the preliminary ruling procedure under Art. 177 EEC, although the subject matter of the Treaty has nothing to do with EEC. Litigation is initiated in the national courts, which interrupt to obtain the preliminary ruling (called "Binding Opinion") of the Arbitral Tribunal instituted by the Treaty. The national court renders the final decision in accordance with the Binding Opinion. (*Cf.* my book: *The Austrian-German Arbitral Tribunal.* Syracuse, 1972).

I assume that my above letter has answered also your questionnaire. I would deem it appropriate to draw up resolution. I have stated above my remarks concerning the conclusions at the end of the individual sections of your report.

Looking much forward to see you in Basel, I am with best personal regards,

yours sincerely.

[7] *Cf.* p. 354.

[8] *Habsburg-Lorraine v. Austria,* 11 February 1980, ILR, 77, 475.

[9] *Austrian Glider case,* 31 May 1957, ILR, 24, 639.

4. *Observations de M. G van Hecke*

le 10 juin 1991

Cher Confrère,

J'ai lu avec beaucoup d'intérêt votre rapport préliminaire sur le sujet de l'activité du juge interne et les relations internationales de l'Etat.

Vous avez de manière pénétrante identifié le problème comme étant pour l'essentiel celui de la possibilité et du devoir, pour le juge interne, de faire application des règles du droit international.

Je dis « pour l'essentiel » car il me semble que certaines questions soumises au juge interne peuvent être considérées comme affectant les relations internationales sans pour autant être régies par une règle de droit international. Je songe à la reconnaissance d'un Etat (p. ex. la « république turque de Chypre »), à la décision d'accorder ou non la protection diplomatique, à l'appréciation d'une loi étrangère comme contraire à l'ordre public du for sans qu'une règle internationale soit en jeu.

Revenant au problème essentiel, je partage entièrement votre opinion que « the powers of the domestic judge regarding the application of international law should be strengthened ».

L'obstacle que la doctrine de l'*Act of State* oppose à l'application du droit international par le juge interne se fonde sur des conceptions relatives à la séparation des pouvoirs qui existent dans le droit constitutionnel de certains pays (principalement les Etats-Unis) mais pas dans d'autres. L'Institut pourrait, dans une résolution, désapprouver cette doctrine qui mène à un sérieux affaiblissement supplémentaire du droit international déjà menacé par le recul de la juridiction internationale.

Une doctrine encore plus pernicieuse que l'*Act of State* est celle de la non-justiciabilité que la Chambre des Lords a appliquée dans l'affaire *Buttes Gas v. Hammer*. Je me permets de joindre à mes observations un tiré-à-part de l'article que j'ai publié à ce sujet avec mon collègue Lenaerts dans la *Revue belge de droit international*. Ici aussi il me paraît souhaitable que l'Institut exprime un désaccord.

En définitive j'estime que si le juge interne ne peut pas, à titre principal, se prononcer sur une demande qui trouve son fondement dans le droit international, il peut et doit en revanche résoudre toutes les questions de droit international qui surgissent de manière incidente dans un litige qui entre dans sa compétence.

Vous soulignez à juste titre que le juge interne peut contribuer à l'évolution du droit international coutumier. L'introduction en droit international de la conception restrictive (limitée aux actes *jure imperii*) de l'immunité de juridiction

des Etats en est un bon exemple. Dans cette activité le juge interne peut s'appuyer sur la doctrine. C'est ainsi que lorsque la Cour de cassation de Belgique a, par son arrêt du 11 juin 1903, proclamé la conception restrictive de l'immunité de juridiction elle a été guidée par les conclusions de son Procureur-général qui se fondaient sur les travaux de l'Institut à Hambourg en 1891 (voir *Pasicrisie* 1903-I p. 301).

Je me permets d'être en désaccord lorsque vous écrivez au b) du troisième paragraphe de la p. 4 [1] du rapport préliminaire que le juge doit s'abstenir en présence d'un instrument législatif. Il s'agit ici d'un problème de hiérarchie de normes sur lequel les solutions peuvent différer d'un Etat à l'autre. Dans son arrêt du 27 mai 1971 (*Pasicrisie* 1971-I, p. 886) la Cour de cassation de Belgique a décidé que « lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir ; que la prééminence de celle-ci résulte de la nature même du droit international conventionnel » alors qu'il s'agissait d'une loi prétendant régulariser et rendre incontestable une perception fiscale que la Cour de Justice des Communautés Européennes avait déclarée contraire au Traité CEE. Il en résulte que, dans certains pays tout au moins, la solution que vous indiquez aux pages 14 à 16 du rapport préliminaire [2] ne serait pas considérée comme suffisante.

Pour finir je crois que nous ne devons pas nier que certaines décisions du juge interne peuvent causer des difficultés dans les relations internationales. Un bon exemple nous est donné, en matière d'immunité d'exécution, par le jugement du 30 avrl 1951 du tribunal de première instance de Bruxelles (*Rev. crit. d.i.p.* 1952, p. 111). Les difficultés internationales causées par cette décision ont été décrites par notre confrère Sir Ian Sinclair dans son cours de La Haye (RCADI, 1980-II, p. 219).

Il y a donc un problème d'organisation judiciaire interne qui doit être résolu pour prévenir ces accidents. Je ne crois pas que l'Institut doive exprimer une préférence pour une méthode plutôt que pour une autre, afin de réaliser la coordination entre le pouvoir judiciaire et le pouvoir exécutif. Mais il ne sortirait pas de sa mission en attirant l'attention sur ce problème.

J'espère que nous pourrons, à Bâle, poursuivre le travail si bien entamé par votre excellent rapport préliminaire.

Veuillez croire, mon cher confrère, à mes sentiments dévoués.

[1] *Cf.* p. 333.

[2] *Cf.* p. 349-354.

5. *Observations of Mr L. Collins*

16th July, 1991

Dear Benedetto,

I am very sorry that I was not able to give you detailed comments on your provisional report for Basel...

The only point which I have which may be of any interest to you is that there have been a number of interesting cases in the European Court, which raise, indirectly, the question whether the courts of one member state can decide that the legislation of another member state is contrary to the latter's obligations under the EEC Treaty or under directives issued under it. The most recent is Case C — 150/88 *4711 v. Provide* [1989] E.C.R. 3891, at 3913 (enclosed). See also Case 244/80 *Foglia v. Novello (No. 2)* [1981] E.C.R. 3045 ; *Cf.* Case 244/78 *Union Laitière* [1979] E.C.R. 2663.

I look forward to seeing you in Basel.

With best regards,

Yours ever.

6. *Observations of Mr Ni Zhengyu*

22 July 1991

Dear Professor Conforti,

May I congratulate you for the excellent work you have done on the subject of *The activties of national judges and the international relations of their State.*

I am very much impressed by the skilfulness with which you deal with many aspects of the problem. Likewise, I am quite attracted by your comment towards the end of your paper that "the national judges should always make an effort to interpret the treaty as it would be interpreted by an international court". In fact, you mention this point three times, albeit couched in different phraseologies, in the last two pages of the same paper.

With all respect for you, what concerns me is that, given the freedom of the national judges to interpret international treaties, how any possible discrepancy between the Judiciary and the Executive in the interpretation of the same treaty can be avoided. It is also possible that discrepancy may occur in the interpretation by different courts of the same State. I do not intend to differ with you, but I only would like to know how such things may be remedied.

You menion on page 7 [1] of your paper the role of *amicus curiae* which, you think, is mean to retain for the Executive its prerogative in carrying out the foreign policy of the State either in the ascertainment of international facts or in the settlement of uncertain questions of international law, while in the meantime to give the Judiciary the power to have the final say. Could you kindly supply information as to how widely this practice, having its origin in the procedural law of the Common Law system, is in operation or can be resorted to under other legal systems?

With best wishes.

Yours sincerely.

7. *Observations of Mr R. Bernhardt*

July 25, 1991

Cher Confrère,

Thank you very much your letter of May 3, 1991, and the preliminary report on *The Activities of National Judges and the International Relations of Their State.*

I am very much in agreement with the principles contained in your report and also with a great number of details. At the present stage, I would like to make only a few remarks.

It is true that national judges can apply international law only in so far as international norms are part of the internal legal order, and that according to the prevailing opinion States are still not obliged to transform or adopt international norms in their internal legal order. But would it not be appropriate to express the opinion that international law should in principle become part of the law of the land in all States?

My approach to the subject in general would possibly be even more radical than yours in one respect: the question of international law should primarily or even exclusively be decided by (international and) national courts and not by other State organs. In our time, the international order is changing rapidly and profoundly; old notions such as those of sovereignty and exclusive domestic jurisdiction dot not totally disappear, but they lose some of their former importance (*e.g.* the international protection of human rights). It is therefore no longer adequate to leave the final decision on questions of international law to the executive. Only in so far as political decisions have to be taken and only as far as legal norms leave some discretion to State organs, courts can and should not intervene.

[1] *Cf.*, p. 337.

In this broader context, I have doubts concerning the exception you are making on page 4 under b [1] of your preliminary report. When you write: "It is not, in fact, conceivable that the judge may review Legislative decisions", I must disagree. Many States now permit judicial review of legislative acts, and I do not see compelling reasons for excluding the judicial control in cases where the conformity of a statute with international law is doubtful. In this respect, I would like to mention that in several States treaties (or at least certain treaties) have a higher rank in the internal legal order than normal statutes, and the courts have to decide on the conformity of a statute with a treaty. Also norms of customary law can have a higher rank than a statute adopted by the legislature. In my country the constitution (Art. 25 in connection with Art. 100 § 2 of the Basic Law) provides that general principles of international law are superior to normal statutes and that the Federal Constitutional Court finally decides on the existence of such general principles.

May I add that I even have some hesitation in accepting your exception (also formulated on page 4) [2] that the national judge can review the conduct of the executive only "when there exists a precise international obligation... ". What is in this context precise? Take the field of State immunity and the distinction between *acta iure imperii* and *acta iure gestionis*. The border-line is sometimes difficult to draw and the existing rules are in my view far from being precise; nevertheless, the courts and not the executive should decide.

I entirely agre with you statement at the bottom of page 5 [3] that the judge should refuse the application of foreign acts incompatible with international law.

In answer to question 5 of your questionnaire, I am of the opinion that a draft resolution should be drawn up. I would propose that you transform your main conclusions into such a draft resolution which should be confined to the guiding or essential principles.

Let me repeat what I said at the outset. In principle and to a large extent I am in agreement with your preliminary report.

I am looking forward to seeing you in Basel.

Sincerely yours.

[1] *Cf.*, p. 333.

[2] *Cf.*, p. 333.

[3] *Cf.*, p. 335.

8. *Observations de M. M. Sahovic*

25 juillet 1991

Monsieur le Rapporteur et Cher Confrère,

En m'excusant de n'avoir pas répondu plus tôt au questionnaire que vous avez préparé en partant du Rapport préliminaire *L'activité du juge interne et les relations internationales de l'Etat*, je tiens à vous féliciter tout d'abord pour le travail accompli en nous présentant un cadre bien établi pour l'activité de la Neuvième Commission de l'Institut.

Après avoir pris connaissance des thèses que vous élaborez dans votre Rapport, je formule mes réponses tout en soulignant qu'il s'agit de mes premières réactions et que je les fais sous réserve des conclusions auxquelles je pourrais arriver en continuant l'étude de notre sujet.

1. Ma réponse à la première question est affirmative. Je trouve aussi que l'application du droit international doit être renforcée par une précision et un élargissement du rôle du juge interne. Au niveau actuel de l'interdépendance des Etats et de l'institutionnalisation de la communauté internationale, c'est non seulement préférable mais inévitable. J'approuve également votre approche méthodologique qui laisse de côté les problèmes théoriques, ceux qui concernent les rapports entre les systèmes juridiques internes et le droit international. Je suis d'accord avec vous qu'il faut chercher des solutions qui correspondent "aux limites raisonnables", ce qui d'après mon opinion signifie qu'on respecte les réalités juridiques existant dans les divers Etats. Il me paraît, en conséquence, et c'est une suggestion de ma part, qu'il serait utile de prendre comme une des bases de notre analyse l'état actuel du droit positif interne des Etats en partant de leurs constitutions et législations qui définissent la position du juge interne par rapport au droit international. Les affaires, le *case law* ne doivent pas être la source unique de nos délibérations.

2. Je trouve que les aspects principaux du sujet sont indiqués dans le Rapport préliminaire. En tout cas, je ne pense pas qu'il serait utile d'élargir trop l'étude. Il serait peut-être intéressant de voir comment dans la jurisprudence internationale on traite l'activité du juge interne et quelle est l'autorité juridique internationale de ses décisions.

3. En ce qui concerne la troisième question qui parle des points individuels, il me semble d'une manière générale qu'il est nécessaire de s'occuper de l'expérience d'un plus grand nombre d'Etats appartenant à toutes les régions du monde et de tenir compte de l'évolution récente dans les domaines de la protection des droits de l'homme, de l'intégration et des rapports dans le cadre des fédérations.

4. A propos des actes de gouvernement et des obstacles qui limitent l'action du juge interne dans le domaine de la politique extérieure, il me paraît nécessaire de considérer plus concrètement ces obstacles. De telle façon, on pourrait

voir s'il n'y a pas lieu de formuler d'autres conditions, avec ces deux que j'approuve, qui élargiraient les pouvoirs du juge interne dans ce domaine.

On parle du juge interne dans les transformations du droit international coutumier en tenant compte des tendances actuelles de son évolution. La question générale de son rapport avec le droit coutumier existant ne mériterait-elle pas peut-être également une attention particulière ? Cette question se pose aussi dans la pratique judiciaire des Etats. De même, il serait utile de préciser un peu plus le rapport du juge envers les principes d'équité et de justice, et de ne pas le mentionner seulement en parlant des transformations du droit coutumier. Enfin, à propos de l'idée que le juge interne ne peut pas vérifier la décision de l'Exécutif quand elle montre que sa compétence est justifiée par une *opinio juris sive necessitatis* adéquate, la logique demande de prendre comme point de départ la possibilité générale de vérification, indépendamment des transformations du droit international coutumier.

5. Il est peut-être trop tôt de se prononcer sur la proposition d'adopter une résolution. On peut, cependant, en partant du Rapport préliminaire tirer certaines conclusions. Premièrement, il me paraît qu'on peut travailler sur un projet de résolution. Deuxièmement, je trouve que les conclusions figurant à la fin des chapitres du Rapport peuvent être traitées comme base des formulations des paragraphes de ce projet.

En attendant le plaisir de vous revoir bientôt à Bâle, je vous prie de croire, Monsieur le Rapporteur et Cher Confrère, à mes sentiments très cordiaux.

Provisional Report

Introduction

1. The *questionaire* attached to the *preliminary report* we presented to the members of the Ninth Commission prior to the Basel session received a number of important written replies [1]; other critical reactions and observations were made during the meeting the Ninth Commission held in Basel in the summer of 1991 [2]. The present report (which presumes familiarity with the previous one) takes into account — hopefully as completely as possible — what has been written and said up to now in the Commission. The subject matter in the report has been systematically arranged with regard to the *draft resolution* which appears as an annex. This introduction will make some observations of a general nature mainly concerning the "whereas" clauses; subsequent parts will deal instead with the subject matter of the individual articles.

All the members of the Commission who made either written or oral comments were favorable to the preparation of a draft resolution, and were of the opinion that the conclusions made at the end of the previous report could serve, following appropriate modifications, eliminations and integrations, as the basis for the draft.

[1] Letters were received from *confrères* MM. Bernhardt, Collins, van Hecke, Mann, Ni, Sahovic, Seidl-Hohenveldern and De Visscher. I take this opportunity to express my sentiments of sorrow for the loss of Dr. F.A. Mann to whom I was attached by feelings of great admiration and friendship. His loss has deprived us of one of the most prepared contributors to the specific topic of our study.

[2] In addition to several members of the Commission who had already sent written replies, the *confrères* MM. Capotorti and Paolillo took part in the Basel meeting.

2. One of the comments which was made and which seems to us to be preliminary to any other is that the subjects treated in the previous report were not always homogeneous. The report ranged from topics such as the relationships between the Judiciary and the Executive to questions — such as those concerning the validity and extinction of treaties or the formulation of customary law — which, although considered from the viewpoint of national courts, are not specific to the activities of the courts.

Although one could easily answer that a certain absence of homogeneity is inherent to the subject on which the Commission has been asked to work — as can be seen from the list of examples in the *Commission des Travaux's* proposal [3] — we should clearly make every effort to attain a satisfactory degree of uniformity. We believe that by deleting several points in the previous report that do not concern only the position of national courts, and by reviewing and specifying others, the effort toward uniformity may yield some satisfactory results. What has been deleted, revised and specified will be seen in the present report. We want to emphasize here that the *focal point* of this report, and of the annexed draft resolution, is the *position of national courts with respect to the organs of the forum State that are responsible for foreign policy when they are called upon to apply international norms either directly or indirectly.* This position will be considered first with regard to the application of any international norm whatsoever (*cf.* arts. 1-3 of the draft resolution); it will then be examined in relation to the application of individual categories of international norms (customary, treaty, and so on) and to the specific problems that are linked to them (*cf.* arts. 4-7), and lastly it will be evaluated with regard to international "facts" of State (*cf.* art. 8). We think that sufficient homogeneity can be found in all this.

3. Some members of the Commission have placed an emphasis on the necessity of taking into account in our research positive law elements obtainable from the legal systems of the greatest possible number of States, belonging to all the various regions of

[3] *Cf. Annuaire de l'Institut,* 1990, vol. 63-II, p. 72 f.

the world. We certainly share this view and have made every effort to put it into practice. However, it cannot be hidden that as far as many Countries are concerned, access to sources (provided that sources concerning the position of national courts with respect to international relations do indeed actually exist) is impossible or very difficult. One need not overestimate the need for the completeness of data, if we bear in mind that, as was pointed out in the previous report, the study of the subject in the *Institut*, especially for purposes of the adoption of a resolution, should lean toward establishing which role *it is hoped* will be ensured to national courts within their respective legal systems to attain the objective of a complete and correct application of international law. In other words, the *Institut* should indicate a *model*, and in order to indicate it there is no doubt that the most important legal material can only be supplied by the most advanced legal systems from the point of view of respect for the *rule of law*. On the other hand, precisely because we are to indicate a model, and such model is to be indicated in subjects which pertain more to domestic law than to international law, a resolution by the *Institut* can only be understood as a document of a hortatory nature with regard to the States rather than a synopsis of positive law elements.

The fact that the subject of this report pertains to domestic law more than to international law suggests that we include in the opening paragraphs of the draft resolution — after having emphasized in the first two "whereas" clauses that in a world of increasing internationalism national courts are called upon more and more to decide, either as a principal or an incidental question, matters of international law — the following (the third) " whereas" clause:

> "Whereas in principle it is the concern of the legal system of each State to provide the most appropriate forms and modalities for ensuring that international law is applied within the State, particularly with regard to the relationships between the Judiciary, on the one hand, and the organs responsible for foreign policy, on the other."

For the same reasons it may be advisable to use the conditional tense in formulating the rules contained in the resolution to be adopted by the *Institut* (this formulation is indicated in parentheses in the draft resolution articles).

4. All the members of the Commission who submitted remarks shared the basic idea of the previous report, that is, that the role of national courts in the application of international law, in so far as such courts are the organs that are institutionally responsible for applying the law and seeing that it is complied with, must be strengthened if international law is to have a greater efficacy. It also seems that there is agreement among the members of the Commission who expressed their views in maintaining that the strengthening of the role of national courts involves, at least as a general tendency, an *independence* of judgment in questions of international law equal to the independence these courts enjoy when they are called upon to resolve questions of domestic law. The basic core of the preliminary part of the draft resolution therefore consists of the following (the fourth, fifth, and sixth) "whereas" clauses:

> "whereas, however, in view of a correct and complete application of international law within each individual State, it is to be hoped that the role of national courts will be strengthened, since they are the organs institutionally responsible for ensuring compliance with the law;
>
> whereas the strengthening of the role of national courts may more easily be achieved by removing certain limits to their independence that are provided, with regard to the application of international law, by the laws and the practice of different States;
>
> whereas it is appropriate to indicate which rules should be followed in the international legal systems to attain the strengthening of the role of national courts and to guarantee them an independence in deciding questions of international law comparable to the independence they enjoy in deciding domestic issues..."

5. A fundamental point in setting the proper perimeter of the subject of the Commission's works was raised in some of the replies to our questionnaire and was widely discussed during the Basel meeting. This was the problem of whether we should be concerned, preliminarily and in order to indicate the *conditions* in which the national courts are called upon to apply international law, with traditional topics involving the relationship between domestic law and international law, and particularly with the way this relationship is regulated in the national constitutions.

In our previous report we began with the idea that it would be advisable to avoid such topics in order to concentrate on the specific problems concerning the position of the courts, taking it for granted that these problems would arise when, and only when, international law may be *formally* applied by the courts, and may be so applied even to the exclusion of municipal law. We believed — and we frankly continue to believe — that this was also the view assumed by the *Commission des travaux*, when we consider the special emphasis it has given to the possibility for the national judge to "affecter les relations extérieures de son Etat" and when we consider the list of examples drawn up by the *Commission des travaux*[4]. None of these topics is influenced by the question of how municipal law must receive, incorporate, or... subject itself to, international law.

The idea that the traditional topics concerning the relationship between municipal law and international law could be avoided was not shared by some members of the Commission. Some of them suggested only a more in-depth study of the issue. Others have entered more into the merits of the issue and have maintained that it would be appropriate to take a position as a matter of principle in favor of the precedence of international law, particularly of international treaties, over domestic laws. Indeed, these suggestions and opinons were also encouraged by some parts of our previous report in which, to some extent contradicting our premise, we touched upon issues which involved implicitly taking a position on the *formal* relalionship between international law and domestic law. We are referring to the part where, in discussing the "political question", we excluded from judicial review of Executive action conduct contrary to international law in the case in which such conduct was authorized by the legislative branch. We are referring also to the part where, in discussing the relationships between international treaties and domestic laws, we dealt with the last-in-time rule and its limits of applicability. It is clear that these topics are not immune from the influence that the acceptance or the rejection of the supremacy of international law over domestic law is bound to exercise.

[4] *Cf. Annuaire de l'Institut, cit., loc. cit.*

In light of this, and if we want to rapidly discuss the subject of the relationships between domestic law and international law [5], at least in the aspects which interest us and in order to establish to what extent they must be taken into account, it may be advisable to consider separately what we believe are the two fundamental aspects of the subject. The first aspect concerns *how* international law becomes formally applicable within the State; the second concerns the *rank* of international law within the State, that is, its relationships (of precedence, of coordination, and so on) with ordinary laws, especially statutory rules.

We do not think that the first aspect, on which the greatest influence is exerted by the monist or dualist orientation of each legal system, is of any special interest for our purposes. Actually, whether international law is applied *proprio vigore* — as occurs in most legal systems, particularly *common law* systems, for customary international law — or whether it is applied only following a specific domestic normative act which "receives" it, or "incorporates" it, or "transforms" it — as occurs in some legal systems, for example, in the English or Italian system, for treaties, or as occurs in nearly all legal systems for binding decisions of international organs [6] — the position

[5] In the abundant literature on the subject of the relationships between domestic law and international law, *cf.*, for the aspects considered here, CASSESE, *Modern Constitutions and International Law. Recueil des Cours*, vol. 192 (1985-III); JACOBS & ROBERTS (ed), *The Effect of Treaties in Domestic Law*, London, 1987; SCHREUER, *Die Behandlung internationaler Organakte durch staaliche Gerichte*, Berlin, 1977.

[6] For an example of the refusal to apply a treaty that had not been "adopted" by legislation, see, recently, Supreme Court of Israel, 10 April 1988, *Hindi* v. *Commander Israel Force in the Judea and Samaria Region*, in *Int. Law Reports*, vol. 83, p. 150 ff. and in *Int. Legal Materials*, 1990, p. 155 ff.

In the sense that the binding resolutions of international organs are usually made formally applicable within the State through *ad hoc* or administrative acts, cf. SCHREUER, *op. cit.*, p. 203 ff and 216 ff.; ID, *The Relevance of UN Decisions in Domestic Litigations, The Int. and Comp. Law Quarterly*, 1978, p. 9 ff. One of the rare exceptions is the Dutch legal system (*cf.* art. 92 of the 1983 Constitution, in accordance with which "Provisions of... resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published"). We are not concerned here, obviously, with the special case of national application of European Community legislation, particularly of Regulations.

of the court with respect to the other organs responsible for foreign policy does not seem to change. What is important is that, in one way or another, international law is made formally applicable within the State: if and when this does not happen, a problem concerning its "treatment" by national courts does not arise.

The second aspect, concerning the relationships between international law ordinary domestic norms, may have instead a greater impact on our subject. As we have noted, some members of the Commission emphasized the necessity of expressing an opinion in favor of the principle of the precedence of international law over domestic law and it is clear that strengthening the position of the courts with respect to the other organs responsible for foreign policy, a strengthening to be hoped for in view of the correct and complete application of international law within the State, would certainly make use of this precedence. In what way? First of all, the principle of precedence could strengthen the position of the courts with regard to the legislative power, where judicial review of legislative acts is permitted; in such a case, in fact, the courts would even be enabled to annul domestic laws contrary to international law. Secondly, the principle of precedence could strengthen the position of the courts with regard to the Executive, in the sense of avoiding the risk that domestic laws may be invoked to justify Executive conduct contrary to international law when a court is called upon to express a negative judgment on such conduct.

Unfortunately, a comparative overview of the domestic legal systems of the States shows that the principle of the precedence of international law over domestic law is still far from being universally recognized. With regard to customary international norms, the Countries in which this principle is applied are indeed very few, consisting essentially of Germany, Greece, Japan and Italy. In the others, and also in those Countries which, such as Austria, Portugal and some Third World Countries, have constitutions which refer to customary law, such law is not given a rank higher than that of the domestic laws [7]. As far as treaties are concerned, the situation is certainly

[7] *Cf.* CASSESE, *op. cit.*, p. 368 ff. In the sense that subsequently enacted statutes may supersede existing customary international law, *cf.*, again recently, U.S. Court of App., D.C. Circ., 14 Oct. 1988, *Committee of U.S. Citizens living in Nicaragua v. Reagan, Amer. Journ. of Int. Law*, 1989, p. 382.

better, indeed one can say that the supremacy of validly concluded treaties over domestic laws is taking root more and more in constitutions and in contemporary practice [8]. This must not lead us to forget, however, that in numerous Countries the treaty has the same rank as a statute, and that among these Countries, there are important ones such as the United States (the supremacy clause contained in art. VI of the United States constitution provides for formal superiority with respect to state laws but not to federal laws). Lastly, with regard to the acts of international organizations, such acts do not seem to enjoy any special privileged status, with the exception of the provisions of art. 94 of the Dutch constitution with regard to all binding acts of international organizations ("Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions... of resolutions by international institutions") and with the exception, for the member Countries of the EEC, of the primacy of Community legislation.

It should be very clear that the precedence of international law over domestic law, where it is acknowledged, always means precedence over the ordinary laws of the State (and *a fortiori* over administrative acts). In no legal system, instead, do international norms, and, in particular, treaties, have precedence over constitutional norms (except in the case, obviously, of a constitutional amendment adopted in order to specifically allow the conclusion of a treaty in conflict with it).

Rebus sic stantibus, what conclusion may be drawn for the purpose of our research, and in what way can we take into account

[8] Aside from the constitutions of several European Countries which by now can be considered *traditionally* bound to the principle of the supremacy of validly concluded treaties over domestic laws, such as France and Holland, and aside from the constitutions of those Third World States that have their roots in the French tradition, the principle of the supremacy of treaties is acknowledged by a number of more recent constitutions, both of developed Countries, such as, for example, Spain, and of Latin American Countries, such as Peru. For an overview of the constitutions, *cf.* CASSESE, *op. cit.*, p. 422 ff. The supremacy of treaties over domestic laws is clearly recognized in some Countries by the case law; this has been the case, for example, in Belgium, beginning with a judgment of the Court of Cassation of 27 May 1971 (*Pasicrisie*, 1971-I, p. 886).

the relationship between international law and domestic law in the draft resolution to be proposed to the *Institut*? We think that, as far as the first of the above two aspects is concerned, it is sufficient to say that problems relating to the position of national courts arise when international law has acquired a formal validity within the State, and, moreover, that the modalities with which this acquisition takes place in the various legal systems does not have an influence on the solution to the above problems. With regard to the principle of the precedence of international law, particularly of treaties, over domestic law, we believe, in keeping also with the opinion expressed by the majority of Commission members who commented on this point, that the principle of precedence may be referred to as a desirable goal to be included in one of the "whereas" clauses in the draft resolution, in so far as it is a principle than can strengthen the position of national courts with respect to the other organs responsible for foreign policy. We think there is no need to go back to this principle in the articles of the draft resolution, whose purpose is to indicate the applicable rules even in those Countries where the principle is not in force, thus making such rules more easily acceptable. In the articles it is only necessary to avoid possible contradictions with the principle of precedence. We shall come back to this later.

We propose, therefore, that the last two "whereas" clauses of the draft resolution be formulated as followed:

> "whereas the aforesaid rules postulate that international law has a formal validity within the State,
> whereas this resolution does not intend to take a position on the modalities with which such formality has been achieved and does not put into question the principle according to which international law, precisely in view of its full and correct application in domestic law, should be given precedence over domestic law."

Part. 1. — *General Aspects of Judicial Independence in the Settlement of Questions of International Law.*

6. As we have already noted, all the members of the Commission who commented on the previous report expressed the view that the role of national courts is to be strengthened and that this strengthening must consist in their independence of judgment

when they are called upon to resolve issues of international law. This independence is therefore expressed as *a general rule* in the first article of the draft resolution, with the exception, obviously, of the limitations found in the subsequent articles [9].

The court's independence is to be affirmed in relation to the Executive branch, which normally is responsible for foreign policy. It is indicative that in some Countries where dependence on the Executive still exists, in certain areas it is progressively waning [10]. On the other hand, independence does not exclude cooperation, even close cooperation, between the Judiciary and the Executive; such cooperation can be very profitable since it is the Executive and not the Judiciary which is in contact with other States and with the international community as a whole. The opinion of the Executive (provided that it is not of a binding nature, in which case independence would be compromised) can be enlightening for the national court and facilitate its search for the most appropriate answer to the issue of international law before it. In the words of a judgment of the Dutch Council of State, a judgment concerned with cooperation between the Judiciary and the Executive in the application of customary international law but whose content can very well be extended to any issue of international law:

> "When interpreting and applying customary international law in particular, the courts should take account of the fact that the government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on those views. Justice can be done to the government's special position if the courts hear the government's adviser on international law to ascertain its views on legal positions, either *ex officio* or at the

[9] See, in particular, art. 4 para 3, art. 5 para. 3 and art. 8 para 1.

[10] Aside from the example of United States practice on the immunity of foreign States from civil jurisdiction, an example cited in our previous report, here we should mention the discontinuance, by the French *Conseil d'Etat* (judgment of 29 june 1990 (in the *G.I.S.T.I.* case), of the practice of requesting the Minister for Foreign Affairs for the interpretation of treaties. This practice is still followed, instead, for many categories of treaties, by the *Cour de Cassation*. *Cf.* BUFFET-TCHAKALOFF, *L'interprétation des traités internationaux par le Conseil d'Etat. Revue gén. de droit int. public,* 1991, p. 109 ff. For the text of the judgment. *Ibidem,* 1990, p. 879 ff.

government's request, and accord the deference to this opinion which is due on account of the special position" [11].

Cooperation between the Judiciary and the Executive, aiming at a *correct* application of international law, is able to avoid the possibility of complications of a diplomatic nature arising from a court decision. This is on the assumption, as we already emphasized in our previous report, that *foreign States cannot complain about the correct application of international law by national courts even if it is contrary to their interests.* In other words, we do not think that cooperation must arrive at the point of putting a court in the position of not applying international law in order to avoid embarrassment to its government. It is clear, then, that if the court's decision is not correct, and no internal remedies exist to reverse it, international responsibility of the State could arise and it is for the Government to settle the issue at the international level [12].

Lastly, we wish to note that the independence of national courts, as advocated here, concerns the settlement of questions of international *law.* The reasons for this choice were given in our previous report and they were generally shared by the members of the Commission who have so far expressed their views. It was noted only that, if "essentially" this choice is shared, there can be some cases in which an important problem relating to the position of the court with respect to the international relations of its own State arises even without the application of an international norm coming

[11] Decision of 24 November 1986, in *Netherlands Yearb. of Int. Law*, 1986, p. 441.

[12] We can mention in this regard the *Socobelge affair*, decided by the Brussels Court of the first instance in 1951 (*cf.* SINCLAIR, *The Law of Sovereign Immunity. Recent Developments, Recueil des Cours*, 1980, II, p. 218 ff.). In this case, after the Court had allowed the *Socobelge* company to seize large amounts of money deposited by the Greek Government in Belgium, it was discovered that these amounts belonged to Marshall Aid Funds: when the ECA threatened to suspend Marshall Aid to Belgium, the Belgian Government was forced to resolve the issue with an amiable settlement between *Socobelge* and the Greek Government. In this case the Court had not correctly applied international law, since the Marshall Aid funds were clearly public funds, and as such not subject to seizure.

directly into question. The example was given of the influence that the recognition of the State from which the law emanates can have on the application of a foreign law or on the conflict of such law with the public order of the forum State. Aside from this specific example, to which we will return later with regard to the so-called "facts of State", it seems that from a general point of view we can maintain the reference to the question of international *law*, specifying, however, that this question may become important for the courts not only as the principal question but also as a preliminary or incidental question.

To conclude, we think that art. 1 of the draft resolution should be formulated as follows:

> *Art. 1*
>
> With the limitations provided by the present resolution, national courts enjoy [should enjoy] full independence in settling questions of international law that are relevant, either as principal questions or as preliminary or incidental questions, for the decision in the case being examined.
>
> In order to reach the most correct solution of a question of international law, national courts may [should be able to] request the non-binding opinion of the Executive, and in particular of the organs responsible for the State's foreign policy.
>
> The Executive may [should be able to] ask to express its own non-binding opinion when it is aware that a question of international law is pending before one of the courts of its own State.

7. With regard to the political question (*acte de gouvernement* in French terminology, *Hoheitsakte* in German or *atti politici* in Italian, and so on) there was also complete agreement among the members of the Commission who commented on the previous report. Everyone agreed with our reasons why this doctrine must, in principle, be rejected. The accepted view is that the national courts must be able to review the Executive's conduct when there is an international obligation to be observed.

In our previous report we were concerned that rejection of the political question doctrine — a rejection based on the concept that the Executive is subject to law, whether it is domestic or international — could lead to the unacceptable consequence that the courts

could review legislative decisions. The situation which we especially had in mind — and over which discussion of the political question is still very much alive in the United States — is that of war being carried out in violation of international law and of the limits met by the courts in "stopping the war" [13]. We maintained that to decide that the courts should have judicial review also when war, although internationally unlawful, has been authorized by the legislative branch, would be a very daring and unrealistic conclusion. We therefore proposed that in this and in similar cases the courts' power of review over internationally unlawful conduct of the Executive should hold only in the absence of the legislative branch's authorization of Executive action. This proposal, however, was opposed by those members of the Commission who insisted on the necessity of confirming the precedence of international law over national laws, and therefore with respect to any act of the legislative branch: judicial review, especially of supreme courts, over the acts of Parliament — it was also noted — already occurs in some Countries, and there is no reason it should not be taken as a model.

We think that the problem of the relationship between national courts and the legislative branch in the application of international law cannot be resolved *only* in the light of the principle of precedence of international law over domestic law, a principle which now appears in the "whereas" clauses of our resolution; also the principle of separation (or, better, of balance) of powers is important, particularly with regard to the intensity and the modalities with which the principle is put into effect in the individual legal systems. It may be that in certain areas, and especially in areas where the highest organs of the State have to make particularly important choices such as the decision to use force in handling domestic and international events, the balance between different branches of government may require that review of the actions of the supreme organs be only *political* and not *jurisdictional as well*. If what we are saying is true, we can then agree to the necessity of not subordinating the courts' review of internationally unlawful conduct

[13] For a brief and efficacious synthesis of the debate in the United States, *cf.* GLENNON, *Foreign Affairs and the Political Question Doctrine, Am. Journ. of Int. Law*, 1989, p. 814 ff.

of the Executive to conditions that contradict the principle of precedence of international law over domestic law, but in the meantime it seems prudent to *safeguard the principle of the division (or the balance) of powers.*

It must be very clear that rejection of the political question doctrine concerns strictly the case in which there are international obligations to be observed, and in which, therefore, international law leaves no discretionary power to the State. In all matters connected with foreign policy in which such power exists, the political question (or *acte de gouvernement*) doctrine may be invoked, or, better, the possibility of having recourse to it becomes a purely domestic issue and therefore has no importanc for purposes, of interest here, of the correct and complete application of international law within the State. A fitting example of this is provided by the refusal to extend diplomatic protection, which has sometimes been the subject of suits before domestic courts. The trend in the courts has been to reject such suits and have the extension of diplomatic protection come within the discretionality of the public administration, for reasons simply of domestic order [14].

Lastly, we should point out that art. 4, para. 3, of the draft resolution provides that the court must refrain from reviewing the Executive's conduct contrary to a customary norm when such conduct is with good reason aimed at modifying the norm. Moreover, art. 5, para. 3, provides that the court must comply with the denunciation of a treaty by the organs of its State who have the power to denounce treaties, even when this power finds no basis in an unambiguous cause of termination or invalidity of the treaty. It is well-known that such power belongs, in some Countries, exclusively to the

[14] *Cf.* for example, in Italy, *Cass. Sez. Un.*, 8 Oct. 1965 n. 2088 and 17 July 1968 n. 2452, in PICONE & CONFORTI, *La giurisprudenza italiana di dirrito internazionale pubblico, Repertorio*, 1960-1987, Napoli, 1988, p. 128 ff.; in France, *Conseil d'Etat*, 25 March 1988, in *Revue gén. de droit int. public*, 1989, p. 258. Also of interest is the judgment of the Hague Court of Appeal of 22 November 1974, in *Netherlands Yearb. of Int. Law*, 1986, p. 299 ff., according to which, under Dutch law, the discretionality of the Government would exist but the Courts could intervene if the assistance given to the citizen were less than, or different from, what could be reasonably expected.

Executive. It would be advisable, therefore, to avoid ambiguity, that, in affirming the possibility for the courts to review the Executive's conduct contrary to international law, exceptions be made for two above-mentionned hypotheses.

To conclude, we propose that the draft resolution article concerning the "political question" be formulated as follows:

> *Art. 2*
>
> Without prejudice to the provisions of art. 4, para. 3, and of art. 5, para. 3, of the present resolution, national courts may not [should not] consider a question "political" (or concerning an "*acte de gouvernement*"), and may not [should not] refuse to adjudicate such question even when they are called upon to review conduct of the Executive, if the applicable international norms do not leave any margin of discretionality to the forum State.
>
> The present provision shall not prejudice the principles governing the division of powers within a State.

8. Also rejection of the Act of State doctrine, in the part which prevents national courts from reviewing the *international lawfulness* of a statute, has so far met with complete agreement in the Commission [15]. As we have noted, this is a doctrine which, both when it is directly applied by the courts and when it is used in the framework of public order of the forum State, weakens the efficacy of international law. It has been wisely suggested that rejection be formulated so as to refer not only to the Act of State doctrine but, more in general, to that of the non-justiciability of the issue (non-justiciability was affirmed in the well-known and widely criticized judgment in the *Buttes Gas* case). On the other hand — and this also was pointed out in the Commission — the main reason for the doctrine of non-justiciability, that is, the danger of undertaking judicial inquiries that might create embarrassment for the government, was recently disclaimed by the United State Supreme Court in the *Kirkpatrick* case. From this point of view *Kirkpatrick* is a very important "pièce" in favour of the basic idea of our report,

[15] Given the special nature of European Community law, we have decided not to treat the issue — which was called to the attention of the Commission — of whether one member State of the Community may review the conformity to Community law of the laws of another member State.

even if the Court, which was concerned with the payment of bribes, confirmed the preclusion of judicial examination of the validity or legality of foreign State acts [15 bis].

On the basis of the considerations made in the previous report and of the suggestions that have been received, we suggest the following wording for the draft resolution article concerning the Act of State doctrine:

> *Art. 3*
>
> National courts may not [should not] invoke reasons of public order of the forum State or any other reason in order to refuse to review a foreign legislative, judicial or administrative act in the light of international law; or may [should] they apply or implement such acts if such review leads to the conclusion that they constitute internationally wrongful acts.

Part 2. — *Judicial Independence and the Sources of International Law.*

9. In arts. 4-7 of the draft resolution the independence of national courts with respect to the organs of the State responsible for foreign policy is considered in relation to the various sources of international law.

Beginning with customary law, it does not seem that there has ever been any doubt that national courts, when they are called upon to apply a customary rule, are fully independent with respect to its ascertainment. There are, hovewer, at least two aspects of such ascertainment which have a rather problematic nature: one concerns the court's participation in the *formation* and *modification* of customary law; the other concerns the courts' relationships, still regarding the formation and modification of such law, with the Executive. As far as the first aspect is concerned, we can say, in keeping with the main trend in domestic case law, that the courts are able to review whether a customary rule corresponds to the exigencies of equity and justice, and if it does not, to refuse to apply it, provided that such course of action has a basis in State practice, even if it is still fragmentary and at a formative stage. With regard to the second aspect, we must bear in mind that the Executive may also

[15 bis] For the text of the decision, *see Int. Legal Materials*, 1990, p. 182 ff.

contribute, under the same conditions, to the process of formation and modification of customary law and that the courts therefore cannot criticize the Executive on the basis of pre-existing law. We have said "under the same conditions" because it is not admissible that the Executive may decline to apply customary law arbitrarily; this is so even if there may be the occasional example in the case law — a much criticized one — which seems to be evidence of this [16].

What we are saying has already been given more ample treatment in our previous report and has not yet met with any objections in the Commission. There has only been some doubt, which, however, has not put in question the principle, as to whether granting the Executive the power to modify customary laws it deems obsolete could lend itself to abuse. This doubt is a justified one, but the very nature of customary law and the ways it is formed involve this kind of risk; on the other hand, the risks diminishes when in the formation and modification of customary law there is, as we are proposing, a kind of cooperation between the Judiciary and the Executive.

It remains to be asked whether any other points concerning customary law need to be dealt with. It was suggested in the Commission that reference be made to the "rules and principles" frequently applied by the International Court of Justice with regard to the delimitation of marine areas, rules and principles on which national courts may be called upon to take a position. As we know, these are rules and principles which, according to the Court, contribute to determining, in each individual case, an "equitable" delimitation. According to the Court, equitable principles or "equitable result" in the matter of delimitation would not have their own autonomous force. They would be binding by virtue of a reference made to them by customary international law [17]. If this is so, we

[16] We are referring to the cases *Fernandez Roque* v. *Smith* (1985) and *Garcia-Mir v. Meese* (1986), both in *Int. Legal Materials*, 1986, p. 664 ff.

[17] This view is basically confirmed in the Court's decision in the *North Sea Continental Shelf*, in ICJ, *Reports*, 1969, n. 85, and taken up again in subsequent decisions. On this, refer to our study, *L'arrêt de la Cour internationale de justice dans l'affaire de la délimitation du plateau continental entre la Libye et Malte*, *Revue gén. de droit int. public*, 1986, p. 315 ff.

believe that reference to the courts' powers with regard to ascertainment of customary law covers also the above-mentioned rules and principles. We would not, however, exclude a specific reference to them in the draft resolution if the Commission considers it advisable.

It was also suggested that the position of the national courts be precisely determined with respect to the principles of equity and justice independently of the ascertainment of customary law. We are, however, puzzled by this suggestion, given the difficulty, always present in legal literature, of defining the role of equity in international law, a difficulty which arises from the fact that is not possible to transfer *sic et simpliciter* the experience of the English legal system into international law. In the English system aspects of both substantive law and law of procedure are interwoven whenever resort to equity is made. We should mention also that the *Institut* already gave an opinion on equity in its Luxembourg session in 1937, assigning it the role of a mere interpretative instrument [18].

In light of the above, we propose the following formulation of the article on customary law:

Art. 4

National courts have [should have] the power to independently find whether a norm of customary international law has come into existence or has been modified or terminated.

National courts may [should] decline to aply a customary norm, or may [should] consider a customary norm partially or wholly modified, if they find that such norm no longer corresponds to the requirements of equity and justice and as long as a practice exists, even at a formative stage, to support such finding.

National courts may not [should not] review conduct of the Executive that is contrary to a customary norm when such conduct is clearly aimed at contributing to changing the customary norm to meet the exigencies of equity and justice.

10. With regard to treaties, we think that, in order to take into consideration some convincing objections that have been made within

[18] *Cf. Annuaire de l'Institut*, 1937, p. 271. The resolution specifically concerns the application of equity by the international courts, but may be extended to national courts whenever they are called upon to enforce international law.

the Commission, it would be advisable to take out some of the proposals in the previous report. Perhaps the problem of the direct applicability of treaties should not be dealt with, so as to keep a certain homogeneity in the subjects being considered; determining the limits within which national courts must consider a treaty that has been duly ratified and is formally valid in the forum State as self-executing is, in fact, an issue which is rather far-removed from the central theme of our study, in so far as it is not relevant for the position of the court with respect to the State organs responsible for foreign policy. The same must be said of the "last-in-time" rule in the relationships between treaties and subsequent national laws. Independently of its lack of pertinence to our main topic, the elimination of this subject has even better justification in the necessity of emphasizing the hope, expressed in the "whereas" clauses of the draft resolution, that in the domestic legal orders of all States there be followed the principle of the precedence of international law over domestic law. It is clear that, if the supremacy of the treaty over domestic laws is ensured from a formal point of view, the possibility of applying the "last-in-time" rule will be eliminated at its origin.

A different conclusion can be reached with regard to the finding of the existence, the validity, the modification and the termination of a treaty by the courts, particularly in connection to the power of denunciation that the State may exercise, and with regard to the independence of the courts (with respect to the Executive) in the interpretation of treaties. These two subjects fall within the central theme of our report [19]. For them, the considerations made in our previous report, and which on the whole have not been criticized, still hold. We should only note that some concern was shown in the Commission that the court's independence in the interpretation of treaties can lead to a discrepancy between the Judiciary and the Executive or within the Judiciary itself; and it was asked whether and in what way this discrepancy could be eliminated. We believe

[19] With regard to the interpretation of treaties an important step in the direction of the independence of the courts with respect to the Executive was made in France with the 1990 judgement of the *Conseil d'Etat in the G.I.S.T.I.* affair (see *retro*, note 10).

that, as far as the relationships among the courts themselves are concerned, uniformity in the interpretation of treaties is not a particular problem and is no different than that of uniformity in the interpretation of laws and, more generally, of the jurisprudential trends. Such uniformity — which, however, is not always indispensable, since the plurality of voices may contribute within certain limits to the development of the law and to the vindication of justice — is assured by the case law of the supreme courts. Certainly, it is more difficult to guarantee uniformity in the relationships between the Judiciary and the Executive in so far as, if we exclude a formal dependence of the former on the latter, with regard to the interpretation of treaties, neither can the contrary be maintained. Indeed, more than uniformity we could speak of coordination, and this can be achieved through the function of *amicus curiae* which, as we saw in dealing in general with the independence of the courts, should be recognized by the Executive in any issue of international law (*cf.* art. 1 of the draft resolution).

In light of the above, we propose that the draft resolution contain the following article:

> *Art. 5*
>
> National courts have [should have] the power to independently find whether a treaty binding on the forum State has come into existence or has been modified or terminated.
>
> In a case brought before them, national court may [should] refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even when the forum State has not denounced the treaty at the international level.
>
> National courts are [should be] bound to refuse to apply a treaty when such treaty has been denounced by the competent organs of the forum State, even if they believe that the cause of invalidity or termination which has been alleged for purposes of the denunciation has not actually been verified.
>
> National courts shall [should] proceed with full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international court and avoiding interpretations influenced by national interests.

11. For the sake of completeness, and even if significant elements are not provided by the practice, we think that in dealing in the draft resolution with the position of the courts in regard to the various categories of international norms, mention should be made of the general principles of law common to the domestic legal orders under art. 38, para. 1, of the Statute of the International Court of Justice. In mentioning these principles we should add that the court is bound to apply them, even when they are not specifically contemplated in its legal system [20].

The draft resolution article on general principles could therefore be formulated as follows:

> *Art. 6*
>
> National courts shall [should] determine with complete independence the existence of a general principle of law common to the national legal systems, within the limits in which such principles are applicable pursuant to art. 38, para. 1, of the Statute of the International Court of Justice.
>
> National courts may [should] apply one of such principles even when it is not expressly recognized by other organs of the forum State.

12. We believe that an article concerning the acts of international organs should be included in the draft resolution. With regard to this the problem has arisen, both in the legal literature and in the case law, as to whether national courts can determine the validity or legality of such acts, when called upon to enforce them, or whether they must refrain from so doing in deference to a kind of "act of State" doctrine extended to international organizations or in observance of the "political question" [21]. The tendency in domestic courts has been to ascribe to themselves the power of review. Although in most cases the courts have eventually decided,

[20] For the domestic case law on this subject, especially Italian case law, *cf.* CONFORTI, *Cours gén. de droit int. public, Recueil des cours,* 1988-V, p. 80 and note 45.

[21] Cf. SCHREUER, *op. cit.*, p. 153 ff ; by the same auhor, *cf.* also *The Relevance of UN Decisions in Domestic Litigation, The Int. and Comp. Law Quarterly,* 1978, p. 8 f.

sometimes even without extensive inquiry [22], in favor of the validity of the act of an organization, there are some cases in which the act was considered unlawful and therefore not applicable. In addition to a German judgment of 1930 relating to a decision of the League of Nations on the status of the Saar territory and a United States judgment of 1950 concerning the decision of an O.A.S. organ regarding Puerto Rico [23], this tendency is witnessed in the following judgments: the decision of the Egyptian prize court of 10 September 1960 in the *Inge Toft* case [24] and that of the Supreme Court of Rhodesia in the *Madzimbabuto* v. *Lardner-Burke* and the *Baron* v. *Ayre and Others* cases (1968) [25]. The Egyptian court considered unlawful the 1948 resolution of the United Nations General Assembly on the partition of Palestine. The Rhodesian court stated, although incidentally, that the way in which the United Nations action against Rhodesia in the sixties had been brought before the U.N. was questionable from the viewpoint of the Charter and of international law.

We maintain that the possibility for national courts to verify the lawfulness of the acts of international organizations, whenever they are called upon to apply them (either as a principal, preliminary or incidental question), is to be allowed. It should all the more so be allowed in so far as normally international organizations do not have organs which control the lawfulness of their acts [26].

We should emphasize, however — exactly because of the concept inspiring the proposals we are making, that is, the concept that the courts must contribute to the affirmation of the law and only of the

[22] An exception is the decision of an Australian court (*New South Wales Quarter Session Appeal Court*, 6 April 1951, *Burns* v. *The King*, in *Int. Law Reports*, vol. 20, p. 596 ff.), which affirmed the legality of the Korean War and of the Security Council acts which authorized it only after having asked the Australian Foreign Office a series of questions. We will deal with the decision later with regard to ascertainment of the so-called facts of State.

[23] Both are cited by SCHREUER, *op. cit.*, p. 158.

[24] In *Int. Law Reports*, vol. 31, p. 509 ff., at p. 517.

[25] *Ibidem*, vol. 39, p. 61 ff., at. p. 338.

[26] For the same consideration, see SCHREUER, *The Relevance of UN Decisions*, *cit.*, p. 9.

law — that the courts' power must be exercised without any political pressure or political purpose. Unfortunately, anyone who examines the above-mentioned cases will realize that this does not always happen! The draft resolution should therefore contain a reference (as it did concerning the interpretation of treaties) expressing disapproval of the political use of the judicial function in this field.

Up to now we have spoken in a general way of *acts* of international organizations, so as not to limit the subject to binding decisions. Actually, a recommendation can also acquire some relevance before a national court, for example, if the court must decide on the lawfulness of an international action of its own State or of another State and such lawfulness may be justified only if the action has been authorized by an international organ. In this case the lawfulness of the action will depend on the lawfulness of the recommendation [27]. It would be advisable therefore to use general terminology also in the draft resolution and speak of "resolution of an international organ".

We propose, therefore, with regard to this topic, the following article:

> *Art. 7*
>
> National courts shall [should] decide, with full independence and without being influenced by national interests, upon the existence and validity of a resolution of an international organ.

Part 3. — *The Independence of National Courts and the Ascertainment of International Facts.*

13. With regard to the so-called international facts or facts of State (the first term seems preferable) and the relative degree of dependence of the Judiciary on the Executive there is abundant

[27] *Cf.*, for example, the Australian decision, cited *retro* in note 22, regarding the Security Council resolutions (recommendations) on the Korean War. On the effect of lawfulness of recommendations, an effect which consists in rendering lawful the behavior of a State (as long as the recommendation is legally flawless).), *cf.* CONFORTI, *Le rôle de l'accord dans le système des Nations Unies, Recueil des Cours*, vol. 1974-II, p. 262 ff.

practice [28]. This practice is found especially in the United Kingdom and in the United States, and also in those Countries which belong to the same legal tradition. In other Countries, although they do not disclose the practice of the Executive "certificate" or "suggestions" which has become standard practice in the Anglo-American legal systems, it would be incorrect to say that similar forms of judicial dependence, or limited dependence, are not known.

Questions which may arise regarding the ascertainment of international facts are the following: a) What is meant by international facts? b) Are the courts obligated to request the intervention of the Executive (it does not matter whether it is the Ministry for Foreign Affairs or of any other department of the Government) or may it do so at its own discretion and in particular when it has not been able to ascertain the fact with other means? Once the intervention of the Executive has been requested, is it decisive and is the court therefore obligated to adhere to it?

We dwelt only briefly on this subject in our previous report and shall now treat it more in depth.

14. (*a*) What are "international facts"?

According to the definition given by the late Dr. Mann, and which can be very useful as a starting point, international facts are "facts, circumstances, and events which lie at the root of foreign affairs" and which are "peculiarly within the cognisance of the Executive" [29].

[28] Instead, legal literature is not especially abundant. *Cf.* LYONS, *The Conclusiveness of the Foreign Office Certificate*, in *The British Yearb. of Int. Law*, 1946, p. 240 ff.; IDEM, *The Conclusiveness of the "Suggestions" and Certificate of the American State Departement, ibidem*, 1947, p. 116 ff.; IDEM, *Conclusiveness of the Statements of the Executive, Continental and Latin-American Practice, ibidem*, 1948, p. 180 ff.; O'CONNELL, *International Law*, 2nd ed., London, 1970, I, p. 113 ff.; BOLEWSKY, *Les certificats gouvernementaux relatifs à l'application du droit international public par le juge interne. Etude de la jurisprudence anglaise, Revue gén. de droit int. public*, 1973, p. 672 ff.; HERDEGEN, *Erklärungen der englischen Krone vor Gerichten in auswärtigen Fragen, Zeit. Für ausl. öff. Recht und Völkr.*, bd. 40 (1980, p. 783 ff.; MANN, *Foreign Affairs in English Courts*, Oxford, 1986, p. 23 ff. Useful indications, concerning a group of about twenty Countries, may be found also in LAUTERPACHT & COLLIER, *Individual Rights and the State in Foreign Affairs, An International Compendium*, New York, 1977.

[29] *Cf.* MANN, *op. cit.*, p. 23.

If we consider the practice, we realize that almost never are the international facts for which the courts usually request the Executive's intervention pure and simple facts, or events of actual life. However, some examples of facts of this kind do exist. We may mention the following: the tendency in the practice of the French courts to ask, at least up until 1984, the Government to ascertain reciprocity concerning international treaties, and therefore whether the other party had applied or refused to apply the treaty [30]; the obligation that Italian courts have by law to request the Minister of Justice to ascertain reciprocity regarding execution over the property of foreign States, and therefore the treatment reserved by the foreign State, against which action is being taken in Italy, to the property of the Italian State [31]; the request for ascertainment of diplomatic status, if the question is simply that of establishing whether a person has been accepted and registered as a member of a mission accredited in the forum State [32], the request for information concerning the state of ratifications, of adhesions, and so on,

[30] On this practice, cf. DECAUX, *La réciprocité en droit international*, Paris, 1980, p. 171 ff.; LAGARDE, *La condition de réciprocité dans l'application des traités internationaux : son appréciation par le juge interne, Revue crit. de droit int. privé*, 1975, p. 25 ff.; DROZ, *ibidem*, 1985, p. 112 f. We speak of tendency in the practice up to 1984 because in the decision of the *Cour de Cassation* (*1re Ch. Civ.*) of 6 March 1984, *ibidem*, 1985, p. 109 ff., the request for the precise ascertainment of reciprocity no longer seems to be considered necessary; according to this decision, the judge could be satisfied by the fact that the treaty had not been denounced by the Government.

[31] On this matter, *cf.* recently, CONFORTI, *L'interferenza del Governo nelle procedure esecutive riguardanti beni di Stati esteri e di altri soggetti internazionali: perché non seguire l'esempio degli Stati Uniti?, Rivista di diritto internazionale*, 1992, fasc. 1.

[32] *Cf.*, for example, in the United States case law, the judgment of the Court of Appeal, District of Columbia, in the *Shaffer et al.* v. *Singh* case (1965), in *Int. Law Reports*, vol. 35, p. 219 ff. Also with regard to the ascertainment of the status of consul the investigation may be of pure factual character if such status depends on the circumstances that the forum State has granted or has not revoked the *exequatur* (for an example, *cf. U.S. District Court, Southern District* New York, 1963, *The Dominican Republic et al.* v. *Peguero*, in *Int. Law Reports*, vol. 34, p. 173 f.

of international treaties or the adoption of acts of international organs [33] when the reply does not involve also a legal opinion [34].

In most cases, instead, what the Executive is asked to ascertain are not simple events of actual life but facts that may be legally characterized, that is, facts whose (legal) existence cannot be ascertained except through the application and interpretation of legal norms. It is clear that the decision as to the existence of facts of this kind necessarily involves a legal opinion: we can say — in Dr. Mann's words — that the Executive, in providing an answer, "speaks of what it recognises rather than of what exists" [35]. Examples of facts whose ascertainment by the Executive requires a legal investigation are found in the Anglo-American practice and in the practice of Countries whose legal systems derive therefrom. They concern: events concerning the coming into existence and extinction of States and Governments, with regard to which the Executive is called upon to establish not whether the State or Government in facts exists but whether it is to be recognized as such on the basis of the pertinent international norms [36]; the existence of a state of

[33] *Cf*, for example, the Australian judgment in the *Burns* v. *The King* case (1951), *Int. Law Reports*, vol. 20, p. 598, which, among the various questions put to the Australian Foreign Office regarding the Korean War, asked to know "What Nations were present as required under art. 27 (of the Charter of the United Nations) when the resolution (of the Security Council) was carried that North Korea was the aggressor" (answer: "All members of the Security Council except the U.S.S.R.").

[34] If, fore example (as in the Canadian case, *Chateau-Gai Wines* v. *Attorney general of Canada*, cited by MORIN in LAUTERPACHT & COLLIER, *op. cit.*, p. 115), there is some doubt whether a treaty has entered into force owing to an exchange of notes or for the *facta concludentia* of the parties, the ascertainment of the existence of the treaty itself involves a legal opinion. It then falls within the category of international facts with which we will be concerned shortly.

[35] *Cf.* MANN, *op. cit.*, p. 24.

[36] On the Anglo-American practice, *cf.* MANN, *op. cit.*, p. 37 ff.; *Restatement of the Law (3rd), The Foreign Relations of the United States*, para. 205. For a recent case, *cf.* New Zealand High Court, 4 Nov. 1988, *Attorney-General for Fiji* v. *Robt. Jones House Ltd.*, in *Int. Law Reports*, vol. 80, p. 1 ff.

war [37]; the extension of the forum State's or of other States' jurisdiction either over the land, over the sea or over air space, an extension which, especially in the last two cases, depends on the application and interpretation of pertinent international norms [38]; the status of a person entitled to special protection or to diplomatic immunity, when such status depends on the interpretation of international norms [39], the status of warships or of governments vessels [40]; and others. In all these cases, which make up the basic core of "international facts", fact and law are closely interwoven [41].

15. (*b*) Is the court required to seek advise from the Executive?

In order to reply to this question, we need to keep the Anglo-American system distinct from the Continental system. In the latter the principle of the division of powers and the judicial independence

[37] *Cf.*, for example, the judgment of the Supreme Court of Pakistan in the *Masur Ali* v. *Arodhendu Shekhar Chattarjee and Others* (1968) case, in *Int. Law Reports*, vol. 71, p. 708 ff. (*ibidem*, p. 712, for reference to other cases in Pakistan's case law). *Cf.* also the already cited decision of the Australian Appeal Court of 6 April 1951 (*supra*, note 33) *Burn* v. *The King*, which, among the various questions put to the Executive regarding the Korean war, asked to know whether there was a real state of war between Australia and North Korea.

[38] *Cf.*, for example, Supreme Court of Israel, 19 May 1960, *Kassem and Ziara* v. *Attorney General*, in *Int. Law Reports*, vol. 32, p. 80 ff. (extension of Israeli territory); United States Tax Court, 1960, *Souza* v. *Commissioner of internal revenue*, *ibidem*, vol. 31, p. 129 ff. (extension of Peru's territorial sea); Supreme Court of India, 1961, *N. Mathan Sahib* v. *Chief Commissioner, Pondicherry*, *ibidem*, vol. 49, p. 484 ff. (whether or not a part of a former French settlement was included in Indian territory).

[39] *Cf.*, for example, the Supreme Court of the Philippines, 29 December 1972, *WHO and Verstuyft* v. *Aquino and Others*, in *Int. Law Reports*, vol. 52, p. 389 ff., concerning the immunity of a WHO official under an agreement concluded between the Philippines and the WHO; Australian Supreme Court, 6 December 1979, *Duff* v. *R.*, *ibidem*, vol. 73, p. 678 ff., relating to the status of a person protected under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973.

[40] *Cf.*, in Australian case law, the judgment of the Supreme Court of the Northern Territory of 28 March 1962 in the *R.* v. *Liveris and Another case*, in *Int. Law Reports*, vol. 38, p. 149 ff.

[41] *Cf.* O'Connell, *op. cit.*, I, p. 113 and p. 121; Bolewsky, *op. cit.*, p. 739.

is meant to te quite rigid. Therefore *in principle* an obligation of this kind is to be excluded. It can then be said that in principle Continental courts are not obligated to ask, under any form, for the Executive's intervention, except, obviously, in the case where specific legistlaive norms require it to do so. It is indicative, however, that even where specific norms exist which, by way of exception, provide for a dependence on the Executive, the present tendency is clearly toward eliminating them. In Italy, for example, the previously cited law which provides for the Executive's intervention in ascertaining reciprocity with regard to forcible execution over the property of foreign States has been critized by the judges of the lower courts, and with regard to this law a complaint raised by the administrative tribunal of the region of Lazio is now pending before the Constitutional Court (order of 5 June 1991) [42]. Similarly, even where judicial practice exists favoring deference to the Executive, although by way of exception, there is a tendency to eliminate it. We may mention, for example, that in France the judicial practice of requesting the Executives' advice with regard to reciprocity of treaties was practically interrupted in 1984 when the Court of Cassation established that the only competence of the Executive in the matter was that of... denouncing a treaty not respected by the other party [43].

An entirely different picture is provided by the Anglo-American systems. Here, the practice of the Executives' certificate or of suggestions regarding international facts is abundant and well-established. Also in these systems, however, it is questionable whether there exists a true *obligation* of the court to request the Executive's *intervention*, whether, in other words, the Executive's power to ascertain and certify international facts is *exclusive*, in the sense of not allowing any other source of information or evidence [44]. Even in the Country where the practice of the Executive's certificate was born, in England, we find no conclusive evidence to this effect [45]. In favor of exclusiveness, we can note the argument, drawn

[42] *Cf.* CONFORTI, *L'interferenza del Governo nelle procedure esecutive, cit.* (*supra*, note 31).

[43] *Cf. supra*, note 30.

[44] In a decidedly negative sense, see O'CONNELL, *op. cit.*, I, p. 119.

[45] *Cf.* MANN, *op. cit.*, p. 50.

mainly from the old English case *Duff Development* v. *Government of Kelantan* (1924), that the practice of the certificate is to ensure that the Judiciary and the Executive speak with one voice[46]; the same result is reached with the other justification, also given in the light of the English system, which is based on the Crown's "prerogative" in international relations[47]. Contrary to this, as we shall see shorlty in dealing with the conclusiveness of the Executive's opinion, in a number of judgments the Executive's finding is taken into consideration together with other sources of evidence and in other judgments the Executive's certificate acquires at most the value of *prima facie* evidence.

16. (*c*) Is the ascertainment of international facts by the Executive conclusive?

Here also we need to keep the Anglo-American legal systems separate from those of the Continent. In the latter, just as there is, in principle, no obligation for the court to turn to the Executive for the ascertainment of international facts, so, once ascertainment has been requested, the court is not, in principle, bound by the decisions of the Executive. Obviously, it may happen that specific provisions of law consider the Executive's opinion binding on the court. There are, however, exceptional cases, and it is noteworthy that in several instances provisions of this kind have been declared unconstitutional and have been annulled as being contrary to the principle of the separation of powers. This occurred, for example, in Austria with regard to the last part of art. IX (3) of the Introductory Act to the Jurisdiction of Courts Statute: this Act, which provides that the courts may address the Minister of Justice to resolve doubts concerning the status of diplomats, added, in the part which was annulled, that the declaration of the Minister was

[46] *Cf.* BOLEWSKY, *op. cit.*, p. 741.

[47] *Ibidem*, p. 743 f. On the Crown's prerogative, but without, however, drawing from it the exclusiveness of the Executive's power with regard to international facts, *cf.* also O'CONNELL, *op. cit.*, I, p. 117, regarding the *Elgelke* v. *Nusmann* case (1928).

binding on the requesting Court[48]. Moreover, an overall view of the case law of the Countries with a continental type of legal system shows that, in matters where in the Anglo-American systems the practice of the certificate has become accepted, the courts feel free, and we could even say feel bound, to proceed independently[49].

[48] The annulment was effected by a judgment of the Austrian Supreme Court of 14 October 1970 and is referred to in a judgment of the Court of 28 April 1971, in *Int. Law Reports*, vol. 71, p. 547. *Cf.* on this point also SEIDL-HOHENVELDERN, in LAUTERPACHT & COLLIER, *op. cit.*, p. 42 f.

[49] *Cf.* merely as examples and without going too far back in time, the following decisions. With regard to the existence of States, Governments or other international subjects: District Court of Tokyo, 9 June 1954 (access of local Courts), in *Int. Law Reports*, vol. 32, p. 124 ff.; *id.*, 14 May 1957 (effects of change of sovereignty on nationality), *ibidem*, vol. 32, p. 185 ff.; Swiss Federal Tribunal, 30 March 1965 (application of laws of a non-recognized State), *ibidem*, vol 72, pp. 551 ff.; Tribunal de grande instance de la Seine, 12 January 1966 (application of laws of a non-recognized State), *ibidem*, vol. 47, p. 73 ff.; Swiss Federal Tribunal, 3 May 1967 (*id.*), *ibidem*, vol. 72, p. 59 ff.; Tribunal de grande instance de la Seine, 15 March 1967 (immunity from the jurisdiction of a non-recognized State), *ibidem*, vol. 48, p. 145 ff.; Court of Appeal of Paris, 7 June 1969 (id.), *ibidem*, vol. 52, p. 310 ff.; German Constitutional Court, July 1973 (capacity to conclude agreements of a non-recognized State), *ibidem*, vol. 78, p. 150 ff.; Italian Court of Cassation, 7 February 1975 (application of the laws of a non-recognized State), in *Italian Yearb. of Int. Law*, 1976, p. 314; Swiss Federal Tribunal, 4 October 1978 (status as an international organization of the International Air Transport Association and its capacity to conclude agreements), in *Int. Law Reports*, vol. 75, p. 99.; Osaka High Court, 14 April 1982 (property in the forum State of the non-recognized State), cited by TSUTSUI, *Subjects of International Law before Japanese Courts*, in *Int. and Comp. Law Quarterly*, 1988, p. 329. On the subject of the ascertainment of diplomatic status: Tribunal de grande instance de la Seine, 31 May 1966, *ibidem*, vol. 48, p. 205 ff. Court of Appeal of Paris, 30 June 1981, *ibidem*, vol. 77, p. 495 ff. On the subject of the existence of a state of war: Prize Court of the United Arab Republic 10 September 1960, *ibidem*, vol. 31, p. 509 ff.; Conseil d'Etat, 30 March 1966, *ibidem*, vol. 48, p. 467 ff.; Tribunal de commerce de Nantes, 12 December 1966, *ibidem*, vol. 48, p. 469 ff.; Federal Social Court of the Federal German Republic, 14 December 1978, *ibidem*, vol. 80, p. 666 ff. On the subject of extension of territory: Cour de Cassation 22 March 1960, *ibidem*, vol. 40, p. 50 ff.; German Superior Administrative Court, 8 June 1973, *ibidem*, vol. 74, p. 121 ff. There are also exceptions: *cf.*, for example, the judgment of the Rabat Court of Appeal of 5 July 1963 (*ibidem*, vol. 40, p. 40 ff.) which held that the laws and all the norms concerning the functioning of the State of a non-recognized State are not applicable. Also in Italy, in spite of the above-mentioned position of the

With regard to Countries with an Anglo-American legal system, the conclusiveness of the Executive's certificate can be said to be firmly established — beginning with the old *Mighell* v. *Sultan of Johore* (1924) and *Engelke* v. *Musmann* (1928) cases — only in England and in some other Countries whose case law is strictly based on the English practice [50]. Even in England, however, the practice of the Executive's certificate and its conclusiveness is not brought to the extreme consequences: when the domestic court has to deal with a private contract that refers to international facts (for example, an insurance contract excluding "war" risks) the tendency is to establish what the contract intended to provide and not what the Executive thought about the international facts themselves [51].

With regard to the United States, the conclusiveness of the Executive's certificate or suggestions is much more debatable. Only with regard to events relating to the existence and the extinction of States and Governments may one say that there is a well-established practice in the sense that a State or a Government not recognized

Court of Cassation, there is a decision — which has been very much criticized in the literature — of the Tribunal of Bolzano which refused to recognize a judgment of the former German Democratic Republic in that it was a State not recognized by the Italian Government (cf. Trib. Bolzano 21 May 1971, in *Foro italiano*, 1972, I, p. 226 ff).

The topic of judicial independence from the Executive in the ascertainment of international facts in Countries with continental systems is dealt with also in the sections dealing with a certain number of these Countries in the already mentioned volume of LAUTERPACHT & COLLIER.

[50] *Cf.* Mann, *op. cit.*, p. 49; O'CONNELL, *op. cit.*, I, p. 117. In the more recent case law, *cf.*, for example, Supreme Court of India, 8 December 1961 (on extension of territory). *N. Masthan Sahib* v. *Chief Commissioner, Pondicherry*, in *Int. Law Reports*, vol. 49, p. 484 ff.; Pakistan Supreme Court, 10 May 1968 (on existence of a State of war), *Mansur Ali* v. *Arodhendu Shekhar Chattarjee and Others*, *ibidem*, vol. 71, p. 708 ff.; Court of Appeal of Ghana, 5 April 1976 (on diplomatic status), *ibidem*, vol. 60, p. 374. ff.; High Court of New Zealand, 4 November 1988 (on the recognition of Governments), *Attorney-General for Fiji* v. *Robt. Jones House Ltd*, *ibidem*, vol. 80, p. 1 ff. *Cf.* also the Canadian decision in the *Chateau-Gai Wines* v. *Attorney-general of Canada* case, cited by MORIN in LAUTERPACHT & COLLIER, *op. cit.*, p. 115 f., which refers to all subjects normally considered as pertinent to international facts.

[51] *Cf.* MANN, *op. cit.*, p. 57 ff.

by the Executive is denied access to courts, the possibility of owning property in the United States and the right to invoke immunity from jurisdiction [52]. In other matters a uniform case law does not exist. For example, on the subject of determining diplomatic status for purposes of immunity, there are decisions supporting conclusiveness [53], decisions which, although attributing great importance to the Executive's certificate, assign it only the role of *prima facie* evidence [54], and decisions which, without taking a precise position, clearly arrive at determining diplomatic status with various types of evidence [55]. Similarly, we can find decisions that are sometimes

[52] *Cf. Restatement of the Law (3rd), Foreign Relations of the United States*, para. 205. For the case law, *cf.* District Court, Southern District, Texas, 27 January 1960, *Dade Drydock Corp. et Al.* v. *The M/T Mar Caribe et Al.*, in *Int. Law Reports*, vol. 32, p. 70 ff. (immunity from jurisdiction); Court of Appeal of Luisiana, Fourth Circ. 4 September 1962, *Republica of Cuba* v. *Mayan Lines, S.A., et Al., ibidem*, vol. 33, p. 36 ff. (access to courts); Court of Appeals, First Circ., 5 September 1962, *P. & E. Shipping Corporation* v. *Banco para el Commercio Exterio de Cuba, ibidem*, vol. 33, p. 42 ff (id.); U.S. Courts of Claims 22 July 1963, *Tilmann et Al.* v. *United States, ibidem*, vol. 34, p. 16 ff. (property regime); District Court, Eastern Distr., New York, 25 June 1970 and 25 September 1972 and Court of Appeals, Second Circ., 25 April 1973, *Kunstsammlungen zu Weimar* v. *Elicofon, ibidem.*, vol. 61, p. 143 ff. (access to courts).

It is held, instead, that in private law matters the American courts usually apply the laws of the unrecognized State of Government: *Cf. Restatement Third, cit. loc., cit. Cf.* Superior Court of New Jersey, 17 April 1964, *in re Alexandravicus' Estate*, in *Int. Law Reports*, vol. 35, p. 51 ff., which considered as valid a mandate issued in Lithuania under U.S.S.R. law, although the United States had never recognized U.S.S.R. sovereignty over that Country (see, however, *contra*, regarding the same question, State of New York Surrogate's Court, Kings County, 15 October 1962, *In re Mitzkel, estate, ibidem*, vol. 33, p. 43 ff. and *id.*, 11 January 1965, *In re Estates of Luks et Al., ibidem*, vol. 35, p. 62 ff.).

[53] *Cf.*, for example, District Court, Eastern District, New York, 7 October 1963, *United States* v. *Egorov et Al., Int. Law Reports*, vol. 34, p. 151 ff.; Court of Appeals, Distr. of Coloumbia Circ., 11 February 1965, *Shaffer et Al.* v. *Singh, ibidem*, vol. 35, p. 219 ff.

[54] *Cf.*, for example, District Court, Eastern Distr., New York, 7 January 1971, *United States* v. *City of Glen Cove*, in *Int. Law Reports*, vol. 57, p. 332 f.; Court of Appeals, Fourth Circ., 1 February 1982, *ibidem*, vol. 72, p. 652 ff.

[55] *Cf.*, for example, District Court, Southern Distr. of New York, 28 November 1960, *United States* v. *Melekh et Al.*, in *Int. Law Reports*, vol. 32, p. 308 f.; *id.*, 1 May 1964, *United States* v. *Arizti, ibidem*, vol. 35, p. 217 ff.

favorable to the Executive's prerogative and sometimes unfavorable, for example, with regard to the question of the existence of a state of war [56], or those concerning the territorial scope of State jurisdiction [57].

Lastly, also in other Countries, with legal systems of the Anglo-American type, there are judgments which either have decided autonomously or have taken into consideration the Executive's finding only as *prima facie* evidence [58].

[56] In favor of the Executive's prerogative, *cf.* Court of Appeal of Luisiana, 3rd Circ., 15 January 1971, *Hammond* v. *National Life and Accident Insurance Co.*, in *Int. Law Reports*, vol. 54, p. 522. In favor of the independent finding by the Court, *cf.* the following decisions: Supreme Court of New York, 9 November 1961, *Shneidermann* v. *Metropolitan Casualty Co. of New York*, *ibidem*, vol. 32, p. 552 f.; District Court, Southern Distr., New York, 5 April 1962 and Court of Appeals, Second Circ., 6 February 1963, *United States* v. *Sobell*, *ibidem.*, vol. 34, p. 496 ff.; Supreme Court of Virginia, 1 September 1971, *Jackson* v. *North America Assurance Society of Virginia Inc.*, *ibidem*, vol. 54, p. 525 f.

[57] In the sense that finding what are the boundaries of a foreign State (in the specific case of the territorial sea of Peru) is strictly the competence of the Executive, *cf.* Tax Court of the United States, 8 February 1960, *Souza* v. *Commissioner of internal revenue*, in *Int. Law Reports*, *vol.* 31, p. 129. Instead, there are many United States decisions — which we need not mention — which resolve territorial problems in an independent manner.

[58] *Cf.*, for example, in the Australian case law Federal Court, General Division, 6 December 1979, *Duff* v. *R.*, in *Int. Law Reports*, vol. 73, p. 681, which considers the Executive's certificate (relating in this case to the status of a person protected under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973) as "*prima facie* evidence of the facts stated therein"; Supreme Court of Western Australia, 15 October 1976, *Chin Yin Ten* v. *Little*, *ibidem*, vol. 69, p. 77 ff. and High Court, 27 June 1977, *Raptis and Son* v. *State of South Australia*, *ibidem*, p. 32 ff., which autonomously resolve problems of the territorial extension of the State's jurisdiction (in Australian case law, as in that of the United States, conclusiveness is upheld instead regarding the recognition of States and Governments: *cf.* High Court, 11 February 1976, *Chang and Another v. Registrar of Titles*, *ibidem*, vol. 55, p. 61 ff.). In Israeli case law, *cf.* Supreme Court, 19 May 1960, *Kassem and Ziara* v. *Attorney-General*, *ibidem*, vol. 32, p. 80 ff., which, with regard to borders considers both the Executive's certificate and other sources of evidence. *Cf.* also High Court of Singapore, 24 October 1974, *Simon* v. *Taylor and Another*, *ibidem*, vol. 56, p. 46 f., which resolves problems of the existence and continuity of the State on the basis of various sources of evidence.

17. We should now draw some conclusions from what we have investigated heretofore. Our task is not easy, both because in this field more than in any of the other fields dealt with in this report, there is a clear distinction between legal systems of the Anglo-American type and those of the Continental type and because, within each system, the positions taken in the case law are not always clear and unambiguous.

In light of this, and keeping in mind that the central idea shared by the Commission members who have so far expressed an opinion is the necessity of strengthening the powers of the national courts in the solution of issues of international *law*, we believe that a balanced evaluation of the elements obtained from our comparative investigation may be the following.

In the first place, a true *obligation* of the court to ask for the Executive's intervention in the ascertainment of international facts does not exist with certainty in any system; therefore we should restrict ourselves to stating, in the draft resolution to be proposed to the *Institut*, that the court *may* request such ascertainment when it itself does not succeed in this task with the normal procedural means at its disposal.

Secondly, we believe that the case law of the majority of Countries studied tend to give the ascertainment carried out by the Executive the value of "the best evidence" or of *prima facie* evidence" and not that of "final proof". It is in this sense, we believe, that the *Institut* could take a position. Further, when, as in most cases, the type of ascertainment (or, better, ascertainment/recognition) required involves the application and interpretation of international norms, we think it is advisable, again in order to safeguard judicial independence, to attribute to the court a power of review regarding such application and interpretation.

Our proposals may seem rather unbalanced in favor of the independence of the courts. However, this is true especially (and perhaps only) with regard to the practice of Countries with an Anglo-American legal system and in relation to effects of the *recognition (or of the non-recognition) of States and Governments* in domestic judgments. Recognition of States and Governments is the most sensitive matter and one in which we find a consistent acceptance

of the Executive's power to decide. One must consider, however, that this matter, although normally included among the ones concerning international facts (and this is why it is being examined here), nevertheless has its unquestionable specificity, a specificity which comes, *inter alia*, from the never settled dispute concerning the effect of recognition (constitutive, declarative, of estoppel, and so on) *as an international act*. In view of this — and also to avoid the above-mentioned risk to unbalance, as well as not to seek to reconcile... what is unreconciliable — we ask whether it would not be better to leave the matter of the ascertainment of the existence of States and Governments out of the draft resolution. We should mention ,moreover, that the *Institut* already expressed its view on the recognition of new States and new Governments (and also, at least partially, on its effects on domestic court decisions) in its Brussels session in 1936[59]. Perhaps the opinions of the *Institut* should be reconsidered; but we do not think it is advisable to do so here.

We propose, therefore, that the drat resolution article concerning the ascertainment of internatoinal *facts* (the article which appears at the end of the draft, after the articles on the ascertainment of international norms, but which could also appear as art. 4, after the articles relating, in general, to the relationships between the Judiciary and the Executive) be formulated as follows:

> *Art. 8*
>
> National courts may [should] defer to the Executive and in particular to the organs responsible for foreign policy the ascertainment of facts pertaining to the international relations of the forum State and of other States.
>
> The ascertainment of international facts made by the Executive constitutes [should constitute] *prima facie* evidence of the existence of the facts themselves.

[59] *Annuaire de l'Institut*, 1936, II, p. 300 ff. Art. 17, para. 2, of the resolution, the article of interest to us here, provides that also the acts of organs of an unrecognized Government and precisely the acts "des organes judiciaires, administratifs ou autres" can be applicable "par les jurisdictions et administrations compétentes" when, "considérant notamment le caractère réel du pouvoir exercé par le gouvernement nouveau", it is a matter of safeguarding " les intérêts d'une bonne justice" and "l'intérêt des particuliers".

When the ascertainment of international facts involves the application and interpretation of international norms — as, for example, in the case in which it is necessary to ascertain whether a state of war or of neutrality exists between the forum State and other States, whether a territory or a given marine or air space is under the sover eignty of one State or another, whether a given person has diplomatic or consular status, whether a vessel is a warship or a government vessel — the courts may [should be able to] verify that the application and interpretation of the international norms made by the Executive are correct.

The present article does not apply to the effects that recognition, or non-recognition, of States and Governments displays in domestic judgments.

Draft Resolution

The Institute of International Law,

— *whereas* in an increasingly internationalized world, relations within the various national Communities tend to be governed more and more by international law;

— *whereas* this necessarily leads national courts to have to decide, either as a principal question or an incidental question, issues whose solution depends on the application of international norms;

— *whereas* in principle it is the concern of the legal system of each State to provide the most appropriate forms and modalities for ensuring that international law is applied within the State, particularly with regard to the relationships between the Judiciary, on the one hand, and the organs responsible for foreign policy, on the other;

— *whereas*, however, in view of a correct and complete application of international law within each individual State, it is to be hoped that the role of national courts will be strenghtened, since they are the organs institutionally responsible for ensuring compliance with the law;

— *whereas* the strengthening of the role of national courts may more easily be achieved by removing certain limits to their independence that are provided, with regard to the application of international law, by the laws and the practice of different States;

— *whereas* it is appropriate to indicate which rules should be followed in the national legal systems to attain the strengthening

of the role of national courts and to guarantee them an independence in deciding questions of international law comparable to the independence they enjoy in deciding domestic issues;

— *whereas* the aforesaid rules postulate that international law has a formal validity within the State;

— *whereas* this resolution does not intend to take a position on the modalities with which such formal validity has been achieved and does not put into question the principle according to which international law, precisely in view of its full and correct application in domestic law, should be given precedence over domestic law;

adopts the following resolution:

Article 1

With the limitations provided by the present resolution, national courts enjoy [should enjoy] full independence in settling questions of international law that are relevant, either as principal questions or as preliminary or incidental questions, for the decision in the case being examined.

In order to reach the most correct solution of a question of international law, national courts may [should be able to] request the non-binding opinion of the Executive, and in particular of the organs responsible for the State's foreign policy.

The Executive may [should be able to] ask to express its own non-binding opinion when it is aware that a question of international law is pending before one of the courts of its own State.

Article 2

Without prejudice to the provisions of art. 4, para. 3, and of art. 5, para. 3, of the present resolution, national courts may not [should not] consider a question "political" (or concerning an "*acte de gouvernement*"), and may not [should not] refuse to adjudicate such question even when they are called upon to review conduct of the Executive, if the applicable international norms do not leave any margin of discretionality to the forum State.

The present provision shall not prejudice the principles governing the division of powers within a State.

Article 3

National courts may not [should not] invoke reasons of public order to the forum State or any other reason in order to refuse to review a foreign legislative, judicial or administrative act in the light of international law; nor may [should] they apply or implement such acts if such review leads to the conclusion that they constitute internationally wrongful acts.

Article 4

National courts have [should have] the power to independently find whether a norm of customary international law has come into existence or has been modified or terminated.

National courts may [should] decline to apply a customary norm, or may [shoud] consider a customary norm partially or wholly modified, if they find that such norm no longer correspond to the requirements of equity and justice and as long as a practice exists, even at a formative stage, to support such finding.

National courts may not [should not] review conduct of the Executive that is contrary to a customary norm when such conduct is clearly aimed at contributing to changing the customary norm to meet the exigencies of equity and justice.

Article 5

National courts have [should have] the power to independently find whether a treaty binding on the forum State has come into existence or has been modified or terminated.

In a case brought before them, national courts may [should] refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even when the forum State has not denounced the treaty at the international level.

National courts are [should be] bound to refuse to apply a treaty when such treaty has been denounced by the competent organs of the forum State, even if they believe that the cause of invalidity or termination which has been alleged for purposes of the denunciation has not actually been verified.

National courts shall [should] proceed with full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international court and avoiding interpretations influenced by national interests.

Article 6

National courts shall [should] determine with complete independence the existence of a general principle of law common to the national legal systems, within the limits in which such principles are applicable pursuant to art. 38, para. 1, of the Statute of the International Court of Justice.

National courts may [should] apply one of such principles even when it is not expressly recognized by other organs of the forum State.

Article 7

National courts shall [should] decide, with full independence and without being influenced by national interests, upon the existence and validity of a resolution of an international organ.

Article 8

National courts may [should] defer to the Executive, and in particular to the organs responsible for foreign policy, the ascertainment of facts pertaining to the internatoinal relations of the forum State and of other States.

The ascertainment of international facts made by the Executive constitutes [should constitute] *prima facie* evidence of the existence of the facts themselves.

When the ascertainment of international facts involves the application and interpretation of international norms — as, for example, in the case in which it is necessary to ascertain whether a state of war or of neutrality exists between the forum State and other States, whether a territory or a given marine or air space is under the sovereignty of one or another State, whether a given person has diplomatic or consular status, whether a vessel is a warship, or a government vessel — the courts may [should be able to] verify that the application and interpretation of the international norms made by the Executive are correct.

The present article does not apply to the effects that the recognition, or the non-recognition, of States and Governments display in domestic judgments.

Observations of the Members of the Ninth Commission on the Provisional Report and on the Draft Resolution.

1. *Observations of Mr I. Seidl-Hohenveldern*

My dear Confrère,

5 September 1992

Please let me convey to you my compliments for your admirable provisional report as well as my approval thereof. I feel somewhat sorry that you eliminated some of the topics discussed in the preliminary report — but I bow to your reasons. Although it is now moot, let me signal you nonetheless that even the way, *how* international law become formally applicable within a State may be of practical importance. If the 1917 Peace Treaty of Brest-Litowsk had been incorporated into German Law as a part of German law, the Treaty's provision on the right to acquire real estate would have had to be applied to a situation having arisen in 1919 as they were not abrogated at that time. However, as the Treaty had been "adopted" into German law, conserving its nature as a treaty, its rules were no longer applied by the Reichsgericht to a situation having arisen in 1919, when this Treaty had become inapplicable under international law (Reichsgericht 23 May 1925, 3 Ann. Dig. (1925-26), p. 354).

I agree with you that it would be absurd for a court to "stop a war" entered into by the executive in violation of international law. But what about a court garanting some compensation for nationalized property for foreigners, although the law of the forum deprives them of any such compensation, should the court find that such a rule violates international law.

I had already expressed apprehension that the rule now figuring in Art. 4, para. 3 could easily be abused. Your explanation in the second paragraph on p. 12[1] dispels these fears. I wonder whether it would not be possible to incorporate these views somehow into the text of article 4 para. 3.

Like you, I deem it redundant to discuss "equitable principles" but would not oppose such a proposal.

I fully agree with your article 7. Let me point out a decision of the Austrian Administrative Court of 16 May 1972, Off. Coll. Slg. No. 8235 (A), ILR 71, 284, interpreting the various UNGA resolutions of freedom fighters in a very

[1] *Cf. p.* 386.

restrictive way ("a right of resistance can only be recognized as a last resort after all other available possibilities have been exhausted and in case of flagrant and extreme State injustice. Such resistance is to be directed exclusively against the authors of the State injustice and not against uninvolved persons") alas contradicted by UN practice. The Court, in full independence, rejected the claim of South Tyrolean bomb-layers to be recognized as "freedom fighters" and thus as refugees having not been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of Art. I F (c) of the Convention relating to the Status of Refugees.

At present several lawsuits are pending before German courts claiming that the UN Security Council Resolutions concerning the embargo against Iraq and Kuwait and the EEC Regulation adopted pursuant thereto were contrary to international law as they failed to provide compensation for the firms affected by the embargo. An expert opinion by Mestmäker and Engel, *Das Embargo gegen Irak und Kuwait*, Baden-Baden, 1991 supports this view. I strongly object thereto in my forthcoming review of their book in Archiv des Völkerrechts.

Last but not least, I approve your views on "international facts". May I contribute a further example? "The Austrian Supreme Court on 29 April 1982, Jur. Blätter 1983, p. 102, Clunet 1986, p. 900 had to decide whether, in a geographical sense, Cyprus was a European or an Asian State. The lower Court did not refer to the executive but to an expert to establish this "fact", in a case, where insurance cover extended to "accidents in Europe in a geographical sense". The Supreme Court approved the expert's findings. His answer to this question was said to be a matter of natural science and not of the interpretation of any legal rules.

I do not disagree with Article 8 para. 4 but I see no reason to reconsider the 1936 resolution of the *Institut*.

With best regards, I am, Yours sincerely.

2. *Observations de M. G. van Hecke*

18 septembre 1992

Cher et honoré confrère,

J'ai lu avec grand intérêt votre deuxième rapport et projet de résolution sur l'activité du juge interne et les relations internationales de l'Etat.

De manière générale je suis d'accord avec vos propositions.

Comme le problème met en jeu des règles d'organisation judiciaire interne, j'exprime une préférence nette pour la rédaction que vous avez mise entre

crochets. Je ferais une exception pour le premier paragraphe de l'article 8 où il ne s'agit pas d'un conseil mais de la constatation d'une possibilité.

La décision de ne pas traiter du problème de la reconnaissance des Etats et gouvernements me paraît acceptable, mais je préférerais la voir indiquée dans le préambule.

Sur le texte de la résolution proposée, je n'ai que quelques suggestions :

— à l'article 3, il me paraît tout de même désirable de condamner de manière expresse dans le texte la doctrine de *l'Act of State;*

— au deuxième paragraphe de l'article 4, je me demande s'il ne faut pas intervertir les deux conditions : il faut d'abord vérifier si une pratique modificative a commencé à se manifester.

Enfin une remarque qui concerne vos considérations générales sur la prééminence du droit international. La prééminence du traité sur la Constitution ne peut pas être exclue de manière absolue comme vous le faites à la p. 6 [1]. Nous considérons en Belgique que les règles du traité CEE sur la libre circulation des travailleurs ont priorité sur l'article 6 de la Constitution qui réserve aux Belges les " emplois civils et militaires ". Le premier avocat-général Velu a récemment consacré sa mercuriale à la Cour de cassation aux rapports entre la Constitution et le traité ; je vous enverrai le texte dès qu'il aura été publié.

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

3. *Observations de M. P. De Visscher*

28 septembre 1992

Cher et honoré Confrère,

J'ai pris connaissance avec le plus grand intérêt du deuxième rapport provisoire que vous avez rédigé à l'intention des membres de la Neuvième Commission de notre Institut ainsi que des résolutions annexes.

Je vous félicite de ce travail qui témoigne à la fois de la fermeté de votre pensée et du sens des nuances que commandait la nature fort délicate du sujet.

.....

Au seuil de la discussion générale, il conviendra d'insister sur le fait que la Commission des travaux ne vous a pas demandé de dresser un bilan exhaustif de toutes les solutions jurisprudentielles relatives au traitement du droit inter-

[1] *Cf. p.* 378.

national par les tribunaux internes de tous les Etats du monde. Je partage sur ce point, sans réserve, l'opinion que vous avez développée au paragraphe 3 de votre deuxième rapport. Ce que l'Institut attend, c'est un exposé général des *tendances fondamentales et actuelles* des principales jurisprudences dont les auteurs statuent en pleine indépendance, face aux pressions dont ils sont susceptibles de faire l'objet et, plus particulièrement de celles du pouvoir gouvernemental. Il est clair qu'une description exhaustive des solutions qui ont trouvé écho dans les jurisprudences de plus de cent Etats serait dépourvue de tout intérêt. Il est des systèmes juridiques qui présentent, pour la doctrine, plus d'intérêt que d'autres et il est des Etats où l'indépendance du juge est ancienne et mieux garantie que d'autres. Le rapport qui vous a été confié doit souligner, comme vous l'avez fait, le degré de convergence et les principales divergences entre les jurisprudences des principaux Etats civilisés sur les thèmes fondamentaux abordés (*Act of State doctrine*, Immunités, Etablissement des faits).

C'est dire que je ne partage pas l'opinion selon laquelle le rapport pécherait par manque d'homogénéité. La réponse que vous avez donnée à ce grief (par. 2) me donne pleine satisfaction.

Je suis également d'avis que la discussion générale ne doit pas être l'occasion de ranimer la vieille querelle entre monistes et dualistes. En définitive, je n'ai que quelques observations à faire sur le Préambule et sur la rédaction de certains articles.

Préambule.

1) Je suggère de supprimer le Premier considérant. En effet, au moment où le nationalisme se développe de manière inquiétante et où le mépris du droit s'étale avec insolence, il me paraît irréaliste d'affirmer que le monde s'est " intensément " (*increasingly*) internationalisé et est, par conséquent, " de plus en plus régi par le droit international ". Je propose de substituer au Premier considérant du projet, le texte suivant : " Considérant que la multiplication des rapport internationaux et le démantèlement de nombreux Etats sous la poussée de forces nationalistes, au même titre que les violations graves et répétées des règles élémentaires du droit international et des droits fondamentaux de la personne humaine, commandent la présence, au sein de tout Etat, d'un pouvoir judiciaire, pleinement indépendant, intègre et mieux informé des règles et principes du droit international public et privé ";

Si la suggestion ci-dessus était retenue, il conviendrait d'amender légèrement la première ligne du Second considérant par suppression des mots " *this necessarily leads...* "

Texte

La présence, tant dans le Préambule que dans le corps des résolutions du terme " Etat(s) " est traditionnelle dans les résolutions de l'Institut, mais est de nature à faire problème dans les Etats fédéraux ou en voie de fédéralisation, lorsque le *treaty-making power* est morcelé entre l'entité fédérale et ses

parties composantes. Un projet en ce sens est en voie d'adoption en Belgique. Est-ce à cette hypothèse que vous avez songé en employant, aux paragraphes 3 et 4 du Préambule l'expression : "*within the State*" qui est exempte de toute équivoque ? Je n'ai pas encore d'opinion arrêtée sur cette question à laquelle je vous demande de réfléchir de votre côté.

Quoi qu'il en soit, il est certain que la mutiplication des sujets de droit, investis d'une part du *treaty-making power*, ne contribuera pas à favoriser l'interprétation du droit international.

La multiplication des sujets de droit investis par le droit interne du *treaty-making power* n'est pas de nature à favoriser une interprétation cohérente du droit international. Ne pourrait-on pas suggérer la révision de l'article 65 du Statut de la C.I.J. de manière à ce que les juridictions suprêmes des Etats membres de l'O.N.U. soint habilitées à solliciter des avis consultatifs sur toute question d'interprétation du droit international ? On pourrait s'inspirer à cet effet de l'article 177 du Traité de Rome (C.E.E.).

Pour l'article 1er, al. 3 du projet, je propose le texte suivant :

" Sauf disposition expresse en sens contraire, le pouvoir exécutif doit pouvoir exprimer spontanément son opinion dans les causes pendantes devant les juridictions internes, lorsque le jugement de ces causes implique l'interprétation d'une norme ou règle de droit international."

L'article 7 du projet comporte une tautologie en ce qu'il affirme d'une part que les juridictions internes doivent statuer en pleine indépendance et, d'autre part, qu'elles ne peuvent pas se laisser influencer par des " intérêts " nationaux. Le premier membre de phrase me paraît suffisant.

Par respect de la liberté des Membres de l'Institut, vous avez rédigé les résolutions en plaçant entre crochets les *shoud* et *should not*. Je crains que cette manière de formuler les résolutions déclenche de vives querelles entre les juristes épris de fermeté et ceux qui préfèrent la prudence. Je souhaiterais éviter pareille discussion et c'est au rapporteur qu'il appartient de proposer l'une ou l'autre formule. Personnellement, je n'aime pas la forme conditionnelle qui, en français, est équivoque mais je reconnais qu'elle peut se justifier ou même s'imposer dans certains cas.

Veuillez excuser, cher Confrère, ces remarques quelque peu désordonnées et croyez à mon fidèle et cordial souvenir.

4. *Observations of Mr F. Paolillo*

14 October, 1992

Cher Confrère et ami,

I am sending you, enclosed, a few comments on the draft resolution you forwarded to the members of the Commission last August. Since this is the

first time I make comments on your work, let me first congratulate you for the excellent reports you have submitted and to tell you that I agree with the general approach to the matter you have adopted and with most of the recommendations you propose.

I am very sorry for not having been able up to now to participate more actively in the work of our Commission. Last months have been particularly exacting for me.

.....

Moreover I had to move twice in a period of 16 Months. When at last I settled down in Geneva, in November 1991, I decided to leave my household, including my books and documents, in Montevideo. Your first report and all writings related to the matter dealt with in your report were among the documents I left in Montevideo.

The comments I am sending you now focus on only 7 articles of your draft (1 to 7). Most of them refer to very concrete questions or to "drafting points". But of course, as you know, "drafting points" very often conceal questions of substance. I have read the introductory provisions and the remaining articles as well, and I may have some comments on them. But since you wish to receive the comments around October 15, I decide to concentrate on the feasible task of commenting on few important provisions rather than preparing a complete set of comments which would require time for study and reflection which nowadays I do not have. I would be pleased to send you additional comments later on, if it is not too late.

Te lack of time also explains the superficiality and the possible unsoundness of my comments. Indeed, a deeper and more careful study of the subject and related matters was required in order to make well founded comments. I hesitated very much before deciding to make you know my few thoughts on the draft. At the end, I came to the conclusion that it should be better you know that I gave your report the attention it deserves, (although not the amount of attention it really deserves) and that knowing my reaction to it you would, perhaps, reaffirm your positions.

Avec mes sentiments les plus amicaux.

A. — *Comments of general nature:*

In general the use of "should" seems to me preferable to "may".

The numbering of paragraphs within each article will facilitate references to the text.

Uniformization of the language is advisable throughout the text. For instance: art. 4, para. 2: "should decline"; art. 5, para. 2: "should refuse".

B. — *Comments on art. 1:*

I fully agree with the content of paras. 1 and 2. My comments refer to drafting points:

a) Paragraph 1:

i) Because it is the first provision of the resolution, and because it formulates an important principle, I would start by the formulation itself, moving the "proviso" to the end of the paragraph. It is only an " optical" question.

ii) Moreover I suggest a slightly different drafting for the second part of the paragraph that may make still clearer the distinction you propose between principal or incidental questions of international law.

iii) It seems to me more accurate to declare the independence of the tribunal in the "interpretation and application of international law" rather than "in settling questions of international law". So my proposal is the following:

Article 1

> 1. — National courts enjoy full independence in interpreting and applying international law to cases submitted to them where questions of international law arise, either as principal questions or as preliminary or incidental questions, without prejudice to articles... para... of the present resolution.

b) Paragraph 2:

i) In the text of your report (page 8) [1] you use an expression (" a correct application) that, in my view, is more appropriate than the one you use in this paragraph (" the most correct solution").

ii) I do not like very much the use in this paragraph of the word "non-binding" because we should not assume that, in general, an opinion of the Executive is binding, but I understand the reasons you have to keep it.

iii) The following suggested paragraph 2, also clarified the content of the opinion (The Executive is resquested to give an opinion on the rule of international law, not on the case).

> 2. — In order to ensure the correct interpretation and application of international law, national courts, may request the [non-binding] opinion of the Executive, in particular of the organs responsible for the State's foreign policy; on the content and meaning of the rule to be interpreted and applied.

c) Paragraph 3: I suggest to eliminate this paragraph. In my opinion it is unnecessary, and may be dangerous. If the State is a party to the

1 *Cf.* p. 381.

litigation, it will have plenty of opportunities to express its opinion. If it is not, I do not see any reason to allow it to give opinions if it has not been requested to do so by the national court.

C. — *Comments on article 2.*

I suggest something along the following lines:

> 1. — Without prejudice to articles 4, paragraph 3 and 5, paragraph 3 of the present resolution, national courts called upon to adjudicate a question related to the conduct of the Executive, should not refuse to exercise their competence on the basis of the political nature of the question if such a conduct of the Executive [has been regulated by], [is governed by], [is subject to] a rule of international law.

I understand that the proposed text, while embodying the same idea contained in your article 2, departs too much, and perhaps, unnecessarily, from your original text. But the reference to the idea of "margin of discretionality" left to the forum State troubles me a little bit. It seems to me preferable to eliminate any reference to this complex notion and keep away the possibility of this article being interpreted as establishing the need to decide, previously, whether a conduct of the Executive is or is not within its discretionary powers. A reference to the existence of a rule of international law regulating the act or conduct in question may be less problematic. Perhaps the proposed draft does not reflect thoughts on the matter (which I completely share), but you may found in it some elements that you may use in the drafting of another text to replace the present one that I found, I repeat, a little ambiguous and potentially dangerous.

D. — *Comments on article 3.*

I must confess that the meaning of this article somehow escapes me. I do not understand in what circumstances the court of a State can "*review*" a legislative or administrative act of other State. This may be in part because, as I have explained in my letter to you, I do not have in Geneva the text of your first report. Therefore, I now abstain from making any comment.

E. — *Comments on article 4.*

Paragraph 3.

In my opinion the situations envisaged in paragraph 3 of this article may be covered, in most cases, by the precedent paragraphs, especially paragraph 2. In paragraph 3 we have an existing customary rule that "no longer corresponds to the requirements of equity and justice". National courts, then, may, in accordance with paragraph 2, "decline to apply" it (I prefer "may decide not to apply" it). If this is true, paragraph 3 could be deleted. I see a great

advantage in it. We avoid to say in a categoric manner that national courts may endorse the Executive when the latter is acting contrary to a rule of international law in force.

F. — *Comments on article 5.*

I think that it was a good idea to take out some of the proposals that, according to the first part of paragraph 10 of your report, were included in your first draft. After all the main idea in this article seems to be to declare the independence of national courts in determining the existence and binding character of a treaty vis-a-vis the forum State. The main idea and the only idea, I would say. Because a national court in determining independently that a particular treaty is in force and applicable to the forum State, is implicitly stating that the treaty, — or the amended treaty, as the case may be — has come into existence, that it is valid and that it has not been denounced or otherwise terminated with respect to the forum State. Thus, all situations contemplated in paragraphs 2 and 3 may be considered included in paragraph 1. I would, then, eliminate paragraphs 2 and 3, and in order to formulate the principle of independence of the national courts in clearer terms, I would amend paragraph 1 as follows:

Article 5

> National courts have the power to independently determine whether a treaty to which the forum State is a party, is binding upon the forum State.

As far as paragraph 4 is concerned, the independence to interpret (and apply) any rule of international law has been covered by article 1 as it is proposed in this paper. That provision refers to international law in general, including, needless to say, treaties as well as customary law. So, if the proposed article 1 is accepted, the first part of paragraph 4 should be deleted because it should be redundant. If the proposed article 1 is not accepted, I would suggest to find a more general formulation of the principle of independence, making it extensive to all international law regardless the source, and to its application as well as interpretation.

The second part of paragraph 4 does not seem to me to be necessary.

G. — *Comments on article 6.*

I do not think paragraph 2 is necessary.

H. — *Comments on article 7.*

I think that the basic idea in this article is the same of articles 4 and 5, applied in this case to decisions of international organizations. For this reason I would keep in this provision the structure (and as far as possible the language) used in those two articles. Article 7 could read as follows:

Article 7

National courts shall independently determine whether a decision of an international organization is applicable to cases submitted to them.

5. *Observations of Mr L. Collins*

28th October, 1992

I read with great interest and profit your provisional report. In case it would he helpful, I have made some purely linguistic suggestions for the draft resolution, which I enclose.

My only real misgiving is whether or not the resolution goes too far in certain important respects.

1. Is Article 2 intended to prevent a national court from refusing to adjudicate a purely political claim? I must say that I think that national courts should retain the power to refuse to adjudicate purely political claims, such as attempts by various interest groups to declare a war invalid etc., as in the Viet Nam cases. Nor do I think that national courts should be used as a forum for the adjudication of purely international disputes. This was the rationale of *Buttes*, although I think that case was wrong because the international dispute was not in fact central to the conspiracy/defamation aspects of the case.

2. I would be surprised if Article 4(2) would be acceptable.

3. I think that Article 5(2) goes too far.

4. The last sentence of Article 8(3) does not fit easily with the common law methods of proof. The court does not "verify" anything — if the court is to disregard the statement of the executives, it would have to accept the evidence put forward by one more of the parties.

These points are not meant to detract from the excellence of the report. My only concern is whether the resolution goes much further than might be acceptable to members, national courts and governments.

Yours ever.

6. *Observations de M. M. Sahovic*

21 novembre 1992

Monsieur le Rapporteur et cher Confrère,

En regrettant le retard de ma réponse à votre demande de commentaires sur votre deuxième rapport et le projet de résolution sur " l'activité du juge interne et les relations internationales de l'Etat " je m'empresse de vous communiquer mes observations. Vous avez rédigé un excellent rapport qui a clarifié les aspects fondamentaux de ce sujet et nous permet de proposer à l'Institut l'adoption d'une résolution.

Mes commentaires sont les suivants :

1. Je souligne en premier que je suis d'accord avec le *focal point* de votre analyse qui s'occupe du rapport entre les juges internes et les organes de l'Etat responsables de la politique étrangère. Vos vues sur la position indépendante des juges internes, leur compétence envers les sources diverses du droit international, le problème de la primauté du droit international et l'évaluation de la nature juridique des faits internationaux sont en principe acceptables pour moi. En basant l'analyse sur la situation existant dans les divers systèmes juridiques du monde, vous avez établi une base solide pour une formulation des réponses qui peuvent être sans hésitation incluses dans le texte du projet de résolution.

2. Cependant, en lisant le rapport, je me suis posé quelques questions à propos des thèses que vous présentez. C'est le cas avec la question du rapport entre l'indépendance des juges et leur coopération avec l'Exécutif et les limitations qui en découlent. En traitant cette question. je me demande s'il serait désirable de faire des concessions au détriment de la primauté du droit international dans les cas des actes de gouvernement. Je dois avouer que je ne comprends pas bien pourquoi on devrait être prudent et tâcher de préserver le principe de la division (ou de l'équilibre) des pouvoirs. Il va de soi, il me semble, que les règles impératives (*jus cogens*) par leur existence, jettent une autre lumière sur cette question. Je me demande également si l'idée d'après laquelle le juge devrait renoncer à examiner l'action de l'Exécutif qui vise la modification d'une règle coutumière peut être acceptée. Il me paraît, en effet, que l'opinion du juge devrait être précisée dans ces cas, en partant de l'interprétation adoptée par la communauté internationale dans son ensemble, ce qui ne signifie pas que l'organe de l'Etat ne pourrait pas agir d'après son intérêt particulier. Une telle limitation du pouvoir du juge serait, d'après mon opinion, très dangereuse. Enfin, je suis un peu perplexe à l'idée de voir examiner des résolutions d'organes internationaux par les juges internes. S'il était question de décisions, on pourrait dans une certaine mesure en comprendre les raisons. Ce problème demande une nouvelle réflexion. Enfin, ne faudrait-il pas dire quelque chose du rapport entre juges internes et décisions de la Cour internationale de justice et juridictions internationales en général ?

Deux questions encore ont été soulevées dans le Rapport. L'une concerne les buts des résolutions de l'Institut. Je ne pense pas que notre tâche consiste dans la création de modèles. Il me paraît que, tout simplement, l'Institut peut et doit constater l'état du droit et faire des recommandations en vue de son perfectionnement. La deuxième question porte sur la rédaction et demande s'il faut formuler les textes de la résolution au conditionnel ou non. En réponse, je dirais que je préfère toujours des formules flexibles. Dans le cas du sujet que nous étudions, c'est d'autant plus préférable qu'il s'agit de problèmes qui concernent la vie interne des Etats.

En ce qui concerne le texte du projet de résolution, mes observations concrètes relatives à sa rédaction découlent de ce que j'ai indiqué ci-dessus. Lors du travail de la Commission sur le texte, j'aurai l'occasion de les exprimer.

En vous exprimant mes meilleurs vœux pour le succès de votre travail, je vous prie de croire, Monsieur le Rapporteur et cher Confrère, à mes sentiments les meilleurs.

7. *Observations of Mr R. Bernhardt*

4 December, 1992

Cher Confrère,

Please accept my sincere apologies for my belated comment to your most important second report on the topic "The activities of National Judges and the International Relations of their State" for the *Institut de Droit International*. Several reasons are responsible for the considerable delay of my answer, in the first line my other commitments, but I had and still have also some problems which are probably inherent in our subject.

While I am still convinced that your approach in general as well as many details of your report and your draft resolution are acceptable and excellent, I have difficulties with some of the proposals.

Your task and the task of our Commission are in my view insofar exceptional and difficult as one tries to formulate rules which are neither part of present international law nor are they uniform in the internal legal systems of different States. If I understand the situation correctly, you (and the Commission) are trying to indicate directions in which States and their courts should go. We try to formulate rules for an area in which the States enjoy and must enjoy a considerable measure of discretion. This general remark has a certain relevance for my basic approach to the matter. We should in the first line underline and postulate a broad competence of national courts in dealing and

deciding questions of international law, but leave aside details in view of the diversity of national legal systems. At the same time, I am reluctant to underline discretionary powers of the executive in legal matters; it seems to me to be of some relevance that for instance the political question doctrine is now debated even in the United States, as the recent book of Thomas Franck shows.

Having said this, I come to your draft resolution; I will comment only on a few points.

Article 1: I fully accept the first paragraph, but I have doubts whether paragraph 2 is necessary, and I am opposed to paragraph 3, since this should entirely be left to the national legal system. I do not think that our resolution should in this respect formulate wishes for the relations between the courts and the executive.

I have some doubts in respect of certain statements in paragraph 1 of article 2, especially the reference to the "margin of discretionality" is in my view in this context doutbful. Paragraph 2 of the same article appears to me to be superfluous and it might be counter-productive. I accept article 3, but I have difficulties with paragraphs 2 and 3 of article 4. Such provisions expressly open the door for political considerations of the courts (and for political pressure from the executive).

Article 5 paragraph 3 restricts again the powers of the courts in a questionable manner; this provision would require a restriction of the competence of the courts even in States which at present do not know such restrictions.

Article 7: One should at least add that national courts can also decide on the binding force of a resolution.

In article 8, I have again doubts in respect of paragraph 2. Whether facts ascertained by the executive should constitute *prima facie* evidence is doubtful, and we should postulate a rule which is not generally recognized and which weakens again the power of the national courts.

These and certain other points make it difficult for me to support wholeheartedly a draft resolution which in my view needs further discussion. I had hoped that we had more time for an intensive debate in our Commission. But I admire your efforts and I will not make difficulties if you and the other members of the Commission think that the draft should be submitted to the *Institut* at the Milan Session.

I apologize once more for my late answer and for raising some difficult problems.

With kind regards,

Yours sincerely.

8. *Observations de M. K. Mbaye*

7 décembre 1992

Cher Confrère,

Veuillez excuser le retard que j'ai mis à vous faire parvenir mes remarques.

En vous en souhaitant bonne réception, je vous prie de croire à ma considération distinguée.

Préambule :

— *Paragraphe 3*

Premier " attendu " :

Ne faudrait-il pas parler d'" organes chargés des relations internationales " à la place de " *organs responsible for foreign policy*"?

La première expression me semble plus technique et en tout état de cause plus proche du sujet que traite la Neuvième Commission.

Deuxième et troisième " attendus " :

Je ne suis pas sûr que ces attendus devraient être maintenus dans leur forme actuelle.

Il serait possible d'en faire un seul attendu qui serait ainsi conçu :

> " Considérant toutefois que les juridictions nationales doivent être compétentes pour assurer le contrôle de l'application du droit international par les organes chargés des relations internationales. "

L'attendu suivant pourrait se lire comme suit :

> " Considérant qu'il est opportun d'indiquer les règles devant gouverner le rôle des juridictions nationales dans la conduite des relations internationales au sein de l'Etat et notamment en ce qui concerne leurs rapports avec les organes législatifs, gouvernementaux ou administratifs concernés. "

Article 1 :

Je me demande, en ayant en vue la pratique en vigueur dans certains pays où les tribunaux nationaux n'ont pas le pouvoir d'interpréter les traités, s'il ne serait pas utile de parler de " compétence " avant de parler d'" indépendance ".

En ce qui concerne la formule à utiliser dans le texte, je préfère : " *should...* ".

Article 2 :

Le deuxième alinéa de l'article 2 est en soi une règle dont je ne discute pas la légitimité dans l'absolu. Elle est partout admise. Mais venant s'inscrire juste après le premier alinéa qui rejette la règle relative à l'existence de " questions politiques " ou d' " actes de gouvernement ", elle en affaiblit considérablement la portée, au point d'apparaître comme une contradiction de ce qui est exprimé avant. En effet, le principe de la séparation des pouvoirs peut s'interpréter comme conduisant à réserver à l'Exécutif l'interprétation de certaines règles en raison de leur caractère et notamment du fait qu'elles sont indétachables de l'exercice du " pouvoir gouvernemental ".

Certes, on pourrait tenter de rédiger cet alinéa autrement pour éviter la fâcheuse apparente contradiction relevée ci-dessus. Mais je crois plus judicieux de le supprimer purement et simplement.

Article 3 :

Je me demande si les termes " *in the light of international law* " sont ceux qu'il faut employer. En français, il conviendrait de dire : " au regard du droit international ".

Article 4 :

Je suggère que seul le premier alinéa soit maintenu.

En effet, dans cetrains pays, ce que prescrivent les alinéas 2 et 3 dépasse le pouvoir du juge.

Article 7 :

Je me demande si cet article est utile.

Article 8 :

Ne conviendrait-il pas, à la fin de cet alinéa, de mentionner une réserve relative à l'obligation pour les tribunaux nationaux de respecter l'interprétation qui aurait pu être donnée déjà par des organes judiciaires internationaux compétents en la matière considérée ?

On pourrait alors écrire :

> " Sous réserve du respect des décisions déjà intervenues et rendues en la matière par des organes juridictionnels compétents. "

9. *Observations de M. V. Marotta Rangel*

30 décembre 1992

Monsieur le Rapporteur et cher Confrère,

Je vous remercie d'avance pour votre compréhension à propos du retard à vous faire parvenir mes observations sur votre dernier rapport (provisoire).

Permettez-moi tout d'abord de vous féliciter pour l'excellence de ce rapport, très bien documenté et touchant à des questions importantes, épineuses, brûlantes d'actualité. Exemple du caractère contemporain, de ces questions, l'affaire United States *v.* Alvarez-Machain, postérieure (il me semble) à votre rapport, jugée par la Cour suprême des Etats-Unis, ayant trait au traité d'extradition conclu le 4 mai 1978 par cet Etat et le Mexique.

Je voudrais vous dire avant tout combien je suis d'accord avec le projet de résolution. Les articles proposés découlent d'une analyse équilibrée des principales questions y afférant. Pour vous en donner un exemple précis ayant égard à l'article 4 du projet, il me semle aussi qu'il n'est pas nécessaire, ni même convenable, d'ajouter une référence à la contribution de la Cour internationale de Justice dans le domaine de la délimitation de zones maritimes. Je n'aurais pas, d'ailleurs, de suggestions additionnelles à vous faire. Le projet, à mon avis, reste en harmonie avec la pratique brésilienne ; je dirais même qu'il contribue (selon le propos de votre rapport) à la perfectionner.

Veuillez agréer, mon cher Rapporteur, mes salutations distinguées.

Final Report

General Considerations

The comments we received after sending our Provisional Report [1] have indicated widespread agreement in the Commision as to the general approach taken in the two previous reports. In particular, there is agreement on the advisability that the proposed resolution of the *Institut* should have as its subject the position of national courts, when they are called upon to apply international norms either directly or indirectly, with respect to the organs of the forum State responsible for foreign policy. There is also, in principle, agreement on the necessity that the role of national courts in the application of international law — in so far as such courts are the organs that are institutionally responsible for applying the law and seeing that it is complied with — must be strengthened if international law is to have a greater efficacy. We say "in principle" because, within the framework of this general approach, some differences of opinion exist between those who hold that in the draft resolution annexed to the Provisional Report the power of the courts and their position with regard to the Executive are not fully emphasized and those who hold, instead, that the draft goes "too far" in this direction [2]. In fact, these two opposing points of view reflect some of the divergencies inherent in the world's two great legal systems — that of common law, more inclined to respect some Executive prerogations (for example, regarding the political question or internatoinal facts), and that of civil law, which tends to oppose

[1] Letters were received from our *confrères* Bernhardt, Collins, van Hecke, Marotta Rangel, Mbaye, Paolillo, Sahovic, Seidl-Hohenveldern and De Visscher.

[2] *Cf.*, in the first sense, Mr Bernhardt's comment and, in the second, those of Mr Collins.

restraining judicial independence. These divergencies, however, are narrowing, as we have shown in our previous Reports, in several common law Countries (we refer in particular to the United States) where the Executive's prerogatives are being eroded [3]. On the other hand, even though it has never been and it is not now our intention to mediate between the two systems but rather to indicate preferable solutions *for the purposes of a correct and complete application of international law within the State,* this does not mean that some limits ot the court's power, limits drawn from the common law system, may not be appropriate in view of guaranteeing a balance of powers [4].

The above may serve to introduce some comments on the following question which arose in the replies we received. In our previous Reports we insisted on the view that in the draft resolution to be proposed to the *Institut* it would be necessary, making use of the material from the different national legal systems, to indicate a *model.* It would be necessary, that is, to indicate what role should be ensured to the courts in order to attain the objective of a complete and correct application of international law. This view has not been criticized by most of those members of the Commission who submitted remarks and, indeed, has been expressed very precisely with more convincing arguments that ours [5]. However, some reservations on the matter have arisen; they contend that our task should not be that of indicating models but rather of verifying the existing law and submitting recommendations for

[3] With regard to the political question, *cf.* also the study by T. FRANCK, *Richter und Ausserpolitik: The Political Question Doctrine,* Bonn, 1990, partic. pp. 22-23; by the same author: *Political Questions, Judicial Answers,* Princeton, 1992. It is obvious that we are interested only in cases where recourse to the political questions involves the non-application of international law. In most of the cases usually discussed with regard to the political question (and examined also in the two books cited), recourse to this notions is made in order to avoid applying to foreign policy domestic constitutional norms, particularly norms delimiting the respective spheres of the Legislative and Executive branches.

[4] *Cf.* what will be said later with regard to art. 2 of the draft resolution on the subject of the political question.

[5] We are referring to Mr De Visscher's comments.

its betterment [6]. It has also been noted — more or less, we think, along the same lines — that our draft should support a broad competence of national courts in dealing with and deciding questions of international law, but should leave aside the details, considering the diversity of the national legal systems [7]. Such doubts can be dissipated if it is emphasized in the draft (a) that the decision as to the most appropriate method for applying international law in the forum State and for regulating relationships between the Judiciary, on the one hand and the Legislative and Executive powers, on the other, is to be made by the individual State, and (b) that the resolution is intended to have only a hortatory nature and seeks to influence this decision with several recommendations whose sole purpose is to ensure a more correct and complete application of international law. With regard to point (a), we believe that the third "whereas" clause of the draft resolution annexed to the Provisional Report can be sufficient; with regard to point (b), we think it will be covered as well if all the rules indicated in the resolution are expressed in the conditional tense, that is, in the English text, with "should". The use of this verb form was, moreover, favored by the majority of Commission members who commented on this point.

Another general question raised was whether the draft resolution should not also be concerned with the relationship between national courts and international tribunals [8]. Unquestionably, the opinions of international courts and, particularly, the judgments and opinions of the International Court of Justice, provide very important material for ascertaining customary norms and for the interpretation of treaties and other norms deriving from treaties. They, however, in a certain sense, are part and parcel of international law; thus, reference to them is implicit in any reference to the aforesaid international sources. We would propose, therefore, not to make them the subject of an *ad hoc* provision, also because the resolution should not go into details on the application and interpretation of international law at the international level.

[6] *Cf.* Mr. Sahovic's comments.

[7] *Cf.* Mr Bernhardt's comments, which will be also discussed with regard to art. 1.

[8] *Cf.* Mr Sahovic's comments.

In our previous Report (para. 5) and in dealing with the precedence of international law over domestic law (a precedence recognized) in various Countries with regard to ordinary laws) we held that in no Country is this precedence recognized also with regard to constitutional norms. It has been pointed out that our assertion was expressed in too unqualifed terms, since there exist some cases, for example, in Belgium concerning the European Economic Community treaty, in which the treaty has been considered as having precedence even as regard the Constitution [9]. We take note of this and also note that the wording in the last "whereas" clause of the draft resolution of the precedence of international law is general enough to cover constitutional law as well.

With this premise, we shall now examine the proposals we have received for modifying the draft resolution. The text of the parts of the draft where there were no proposed changes contain some purely stylistic changes [10].

We have also decided to number the paragraphs of each article [11].

Preamble to the Draft Resolution

The observations concerning this part of the resolution were few and the proposals for substantive changes were only two.

First, a different formulation of the first "whereas" clause was suggested in order to stress the necessity that the independence of the Judiciary be ensured to keep at bay the disturbing growth of nationalism and of contempt for the law. The new formulation would be (in its original version):

> " Considérant que la multiplication des rapports internationaux et le démantèlement de nombreux Etats sous la poussée de forces nationalistes, au même titre que les violations graves et répétées des règles élémentaires du droit international et des droit fondamentaux de la

9. *Cf.* Mr Van Hecke's comments. *Cf.* also the *mercuriale* of the first advocate-general to the Belgian Court of Cassation on " contrôle de constitutionnalité et contrôle de compatibilité avec les traités, " in *Journaux des Tribunaux*, 1992, nn. 5649-5650, pp. 729ff. and 749ff.

10 We are grateful to Mr Collins for these suggestions.

11 As suggested by Mr Paolillo.

> personne humaine, commandent la présence, au sein de tout Etat, d'un pouvoir judiciaire pleinement indépendant, intègre et mieux informé des règles et principes du droit international public et privé " [12].

Indeed, the text we proposed ("whereas in an increasingly internationalized world, relations within the various national communities tend to be governed more and more by international law") may have given the impression that we wanted to refer to an internationalization, to a *political* opening outward of national communities, an opening that is contrary, at least in certain areas of the world, to the present reality [13]. What we however more simply wanted to say was that contemporary international law and especially treaties tend more and more to govern aspects of the *economic and social* life within national communities. And, frankly, in spite of the dismemberment of various European States and the wave of nationalism in Europe, we do not see this diminishing. We propose therefore to retain a text that is closer (but more specific and concise) to our wording. We suggested the following:

"whereas international law increasingly affects economic and social relations within the various national communities" [14].

It was then proposed that some of the "whereas" clauses (more or less the second to the sixth) could be summed together and reduced to two, as follows (in the original version):

> " Considérant toutefois que les juridictions nationales doivent être compétentes pour assurer le contrôle de l'application du droit international par les organes chargés des relations internationales ;

[12] The proposal is Mr De Visscher's

[13] *Ibid.*

[14] Mr Collins suggests, as a purely linguistic modification, that the words "relations within the various national communities" be changed to " private parties and private rights". This change, however, would make the text too restrictive, in that also the public administration of the forum State or a foreign State may be parties in a legal action.

We should also note that the expression "within the national communities", and the expression "within the State", which are used here and there in the draft resolution, are meant to indicate what occurs within State communities regardless of the form and structure (federal, partially federal, etc.) of each State.

> " Considérant qu'il est opportun d'indiquer les règles devant gouverner le rôle des juridictions nationales dans la conduite des relations internationales au sein de l'Etat et notamment en ce qui concerne leurs rapports avec les organes législatifs, gouvernementaux ou administratifs concernés " [15].

We would have many reservations about adopting a solution of this kind. It would affect a series of assertions in the preamble to the resolution that we believe are necessary to express in a complete way the general approach adopted by the Commission on the topic and also to confirm the limits within which the treatment of the topic by the *Institut* must be confined. In particular, the sequence of clauses is necessary in order to make it clear, on the one hand, that the problems dealt with basically concern decisions that pertain to individual national legal systems and not to international law, and that it is, however, on the other hand, in the interest of international law, or, rather, in the interest of a precise application of international law, that the independence and the competence of the Courts be ensured. Moreover, with regard to the first of the two proposed "whereas" clauses, it must be pointed out that this clause is too restrictive as it refers only to the power of the Courts to review the application of international law by the organs responsible for international relations, while the power of the Courts regarding the application of international law acquires relevance, perhaps greater relevance, and produces the same problems with regard to relations between private parties.

Although we propose that our text be left, we agree that the second of the two proposed "whereas" clauses very appropriately speaks of "*organes législatifs gouvernementaux, ou administratifs*", as being opposed to the judicial organs, rather than, as we proposed in the third "whereas" clause of the draft annexed to our Provisional Report, of "organs responsible for foreign policy". The first wording is more precise than ours, and we would have no difficulty in adopting it, as it does not change the meaning of what we wanted to say.

[15] The proposal is Mr Mbaye's. Altough our distinguished *confrère* refers to the "second and third 'whereas' clauses" and to "the following 'whereas' clause", we think this change must involve the fifth and sixth "whereas" clauses as well.

Art. 1

The most important proposal concerning art. 1 — a proposal made by two members of the Commission — was to take out para. 3, which concerns the possibility for the Executive to express an opinion in cases pending before the Courts. It was suggested that para. 3 be eliminated either because it was thought that the resolution should not go into details with regard to relationships between the Judiciary and the Executive (such details should be left to each national legal system) [16] or because it was thought that the Executive should not be given the prerogative of expressing its opinion when the Court has not asked for such opinion [17]. As far as we are concerned, in principle we have no objection to taking out this paragraph, which we felt was appropriate in that it reflects the idea of the Executive as *amicus curiae*. Its removal could indeed be justified as one way of strengthening the role of the Courts vis-à-vis the Executive, which is one of the basic purposes of our reports. We, instead, do not share the view that the resolution should not go in to details as far as relationships between the Courts and the Executive are concerned: brought to its extreme consequences, this view would risk reducing the resolution to the mere restatement of the independence of the Courts!

Even if personally we do not oppose eliminating para. 3, we think it is better to keep it in the text of the resolution annexed to the present Report, perhaps in brackets. This would be out of consideration for the great majority of Commission members who expressed their view without making any objection to this provision. The Commission can then decide definitively whether or no to retain para. 3.

Some non-substantive changes, many of which we agree with, were proposed for all three paragraphs of art. 1. It was suggested that it would be better to say in the first two paragraphs that problems arise when the Courts are called upon to "interpret and apply" international law rather than to " settle questions of inter-

[16] This is the opinion of Mr Bernhardt. He not only suggests the elimination of para. 3 but has also consequentially expressed doubts about para. 2.

[17]. Mr Paolillo's view.

national law" [18]; and regarding the third paragraph it was proposed to relate the Executive's opinions to the "interpretation" of international norms [19].

Lastly, the question was raised, although not without some doubt, as to whether it would be appropriate to propose a revision of art. 65 of the Statute of the International Court of Justice in order to give the Supreme Courts of the member States of the U.N. the possibility to request advisory opinions of the Court on questions concerning the interpretation of international law; this would ensure, as does art. 177 of the EEC Treaty on the relations between the European Community Court and the courts of the member States, uniformity in the interpretation of international law. This is most certainly an interesting proposal, and there is no doubt that uniformity in the interpretation of treaties cannot be fully assured if there is no "central" organ to assure it; we are, however, in spite of this, reluctant to include such a provision in the resolution for the same reasons we gave in discussing, from a general point of view, the proposal to include an *ad hoc* provision concerning the relations between domestic courts and international tribunals.

To conclude, art. 1 could be formulated as follows:

> 1. National courts enjoy full independence in interpreting and applying international law to cases submitted to them where questions of international law arise, either as principal questions or as preliminary or incidental ones, without prejudice to the limitations provided by the present resolution.
>
> 2. In order to ensure the correct interpretation and application of international law, national courts may request the non-binding opinion of the Executive, in particular of the organs responsible for the State's foreign policy, on the content and meaning of the rule to be interpreted and applied.
>
> [3. Unless it is expressely provided otherwise, the Executive should be able to express spontaneously its own opinion in cases pending before national courts when the decision of the court involves the interpretation and application of international law.]

[18] *Ibid.*

[19] *Cf.* Mr de Visscher's comments. The formulation of the present paragraph corresponds, with slight differences, to what was proposed by our distinguished *confrère*.

Art. 2

There was agreement in the Commission on the general rule concerning the "political question" in para. 1. However, some uncertainty was expressed over the use of the term "margin of discretionality", which might lead to doubt and ambiguity [20]. A new formulation was suggested which would eliminate such doubt, without changing the substance, and we have accepted it [21]. The paragraph has therefore been reformulated as follows:

> 1. Without prejudice to articles 4, paragraph 3, and 5, paragraph 3, of the present resolution, national courts called upon to adjudicate a question related to the conduct of the Executive, should not refuse to exercise their competence on the basis of the political nature of the question if the conduct of the Executive is subject to a rule of international law.

Paragraph 2 was subject to much more discussion. It was asked whether it should be removed as being superfluous, counter-productive and likely to weaken the importance of the principle contained in para. 1 [22], or whether, again to safeguard the principle of para. 1, to change it [23]. There were also proposals concerning para. 2 suggesting, on the contrary, that recourse to the political question doctrine be given fuller treatment, particularly regarding purely international disputes [24].

We should note that para. 2 arose from the concern that the courts not be given the power to prevent decisions at the highest policy level, in particular, decisions to declare war or to use force in international relations, taken by the competent legislative or executive organs of the State. We already discussed this subject

[20] *Cf.* the comments by Mr Bernhardt and Mr Collins.

[21] This proposal is Mr Paolillo's.

[22] *Cf.* comments by Mr Bernhardt and Mr Mbaye.

[23] *Cf.* Mr Seidl-Hohenveldern's comments. *Cf.* also those by Mr Sahovic.

[24] *Cf.* Mr Collin's comments which make reference to the *Buttes Gas and Oil Co. v. Hammar* case which we discussed in the Preliminary Report with regard to the Act of State doctrine. Mr Collins was also concerned that the possibility would not be allowed of adjudicating "purely political claims, such as attempts by various interest groups to declare a war invalid, etc., as in the Vietnam cases". This concern was, as we shall soon see, at the basis of our para. 2.

in our Provisional Report (para. 7). It goes without saying that, owing to the philosophy behind our study, we would feel attracted by the proposal to eliminate the paragraph. However, we cannot avoid wondering whether complete rejection of the political question doctrine — a rejection which was not requested by the majority of the Commission members who expressed their views and who were not contrary to para. 2 — is realistic. We wonder whether rejection would be accepted within and outside the *Institut*. We think that it would be difficult to accept the view that the courts can have the power to stop a war or the use of force in international relations when the war or the use of force is indeed contrary to international law but has been decided upon the *constitutionally competent* legislative and executive organs. If this is the case, perhaps one should not mention the principle of division of powers, which, indeed, may be ambiguous and convey much more than is intended, and refer para. 2 directly to the aforesaid possibility of war and of the use of force and thus foresee that the courts do not have, in any case, the power to prevent them.

Also with regard to war and to the use of force, however, the possibility exists for reducing the unavoidable restraint on the courts' power in the application of international law. It was held in the Commission that if it is "absurd" for a court to stop a war, this does not mean that a court cannot grant compensation, for example, for the nationalization of foreign property during the war [25]. Widening this point of view, we think one can reasonably propose that the courts have the power to decide on compensation for damage caused to private persons as a consequence of a war or of a use of force contrary to international law [26].

In light of the above, we propose that the second paragraph of art. 2 be changed into the two following paragraphs:

> 2. Paragraph 1 of the present article does not imply that national courts have competence to declare war or other use of force in inter-

[25] *Cf.* Mr Seidl-Hohenveldern's comments.

[26] This is exactly opposite to what was decided in the *Saltany v. Reagan* case (1988-1989), commented on by D'Amato, "The Imposition of Attorney Sanctions for Claims Arising from the U.S. Raid on Libya, « *Am. Journal of Int. Law*, 1990, p. 705 ff. However, this is a bad example of a decision from the point of view of the affirmation of the rule of law.

national relations invalid, even when the war of the use of force is unlawful under international law and provided that it has been deliberated by constitutionally competent organs.

3. Notwithstanding paragraph 2 of the present article, national courts should be able to decide upon the compensation for damage caused to private persons by a war or by the use of force in international relations when the war or the use of force is unlawful under international law.

Art. 3

For this article, only a few non-substantive changes were proposed, along with the express mention of the Act of State.

Art. 4

Several criticisms were directed towards paragraphs 2 and 3 of art. 4. These paragraphs concern the courts' powers and their relationships with the Executive with regard to changes in customary law. Among the critics, there were those who suggested that these paragraphs be taken out [27], those who had difficulty in accepting them in that they open the door for political considerations of the courts and for political pressure from the Executive [28], those who do not criticize para. 3 but hold that it is unlikely that para. 2 will be accepted in that it widens the courts' powers excessively [29], and those who, on the contrary, fearing abuse of power by the Executive, instead are for the elimination of para. 3 [30]. The fear that such abuse may occur seems to be shared by those who propose a formulation of para. 3 which would place on Executive acts the same limits that para. 2 places on activity of the courts [31].

[27] This is the opinion of Mr Mbaye, who believes that the two paragraphs contain rules that go beyond the powers of the courts in the practice of some States.

[28] Mr Bernhardt's view.

[29] Mr Collins's view.

[30] *Cf.* the comments of Messrs Paolillo and Sahovic.

[31] *Cf.* Mr Seidl-Hohenveldern's comments.

We think that the elimination *sic et simpliciter* of paragraphs 2 and 3 would mutilate our draft excessively and make art. 4 almost useless. To say that the courts may ascertain the existence of customary norms and apply them is to say something that is so well known as to not require an article in an *Institut* resolution. We have attempted to probe the subject, taking as a starting point obviously (as can be evinced from our Preliminary Report) the case law practice of several Countries and the subsequent doctrinal debates. On the other hand, the problem of the *modification* of customary law — of a law which derives from the behavior of *all* State organs, including Judiciary and Executive organs — is not a problem that can be left out. As for the concern that the courts may go beyond the scope of their competence, we may recall that, according to our proposal, they do not act in a legal vacuum but in relation to a modifying practice which has already been initiated although not concluded.

We therefore propose, first of all, that the basic idea underlying para. 2 be maintained, that is, the idea that the courts may contribute, although within certain limits, to the modification of customary law. As far as para. 3 is concerned, we propose modifying it by emphasizing the necessity for cooperation between the Judiciary and the Executive both in order to give consideration to the above-mentioned criticisms and to focus the paragraph on the activity of the courts rather than on that of the Executive.

To conclude, paragraphs 2 and 3 of art. 4 could be formulated as follows, taking into account the welcome proposal to invert the two conditions in para. 2 and thereby stress more clearly that the courts never act in a legal vacuum.

> 2. National courts should refuse to apply a customary norm, or should consider a customary norm partially or wholly modified, if such a practice exists, even at a formative stage, to support such finding and if such norm no longer corresponds to the requirements of equity and justice.
>
> 3. In applying the rules under paragraph 2, the courts should take into due account the participation of the Executive of the forum State in the process of modifying customary law.

Two confrères expressed doubts, from opposite points of view, over para. 2, which would go too far in recognizing the broad powers of national courts in deciding, although with limited effect in the specific case, questions of invalidity and termination of treaties [32], and over para. 3, which, *vice versa*, would reduce these powers in a questionable manner in the presence of a denunciation of the treaty by the forum State [33]. On the first point, we refer to our survey of the case law in various Countries [34], which we have extensively drawn upon in our Preliminary Report and which we believe largely (if not totally) supports the content of para 2. On the second point, we tend to agree, for the reasons given in this Report and in the previous ones, with any criticism regarding limitation of the courts' powers. We think, however, with regard to para. 3, that when the State organs that are competent to denounce a treaty — and we want to emphazise the word *competent* — has shown at an international level that they intend to withdraw, there is not much the courts of that State can do. The situation is not legally different from what occurs when the State intends to conclude a treaty, in the sense that if a treaty is concluded by the *competent* organs, it must be applied.

This explanation may perhaps serve also to exclude the appropriateness of reducing, as has been suggested [35], all of article 5 to the first paragraph.

Art. 6

One member of the Commission has suggested eliminating para. 2 which recommends that national courts apply principles of law generally recognized by the States also when such principles are not expressly contemplated in their national legal systems [36]. We tend to disagree with this proposal, again owing to the principle of judicial independence in the ascertainment of international norms.

[32] Mr Collins's view.

[33] *Cf.* Mr Bernhardt's comments.

[34] CONFORTI and LABELLA, "Invalidity and Termination of Treaties: The Role of National Courts", *European Journal of International Law*, 1990, p. 44ff.

[35] By Mr Paolillo.

[36] *Ibid.*

It is perhaps worthwhile noting that the paragraph aims at avoiding the occurrence, with regard to general principles of law common to the States, of what happened at the time of the Weimar Constitution concerning customary law. We refer to the interpretation which was given to art. 4 of this Constitution ("die allgemein anerkannten Regeln des Volkerrechts..."), an interpretation under which the application of general norms of international law ought to be contingent upon their recognition by the German State.

Art. 7

Several proposals for modifying this article which still leave the central idea unchanged seem appropriate [37].

It has been held that the article should be concerned only with *binding* resolutions of international organs [38], or that at least it would be necessary to add that the courts can decide on the binding force of a resolution [39]. We agree that this second suggestion, which in a certain sense includes the first one, should be followed.

We also agree with the proposal to take out the phrase "without being influenced by national interests" from the article [40]. This phrase is justified in the part of the resolution regarding the interpretation of treaties by the courts to disapprove of what in our preliminary Report we explained were "unilateral" interpretations, but it does not make much sense with regard to the application of resolutions of international organs.

We therefore think that art. 7 could be changed as follows:

> National courts should decide with full independence upon the existence, the validity and the binding force of a resolution of an international organ [41].

[37] Instead we do not think that the article is useless (as does Mr Mbaye), as it completes the overview of the Court's position with respect to international sources.

[38] Mr Sahovic's view.

[39] Mr Bernhardt's view.

[40] The proposal was made by Mr De Visscher.

[41] This formulation seems preferable to the more restrictive one proposed by Mr Paolillo ("National courts shall independently determine whether a decision of an international organization is applicable to cases submitted to them").

Art. 8

Also paragraph 2 of art. 8 — which provides that the ascertainment of international facts made by the Executive constitutes *prima facie* evidence of the existence of such facts — was criticized in that it would weaken the power of the courts and would not be relevant for all Countries [42]. This latter criticism is certainly correct. We note, in fact, that in the survey of case law in our provisional Report (para. 16), we stressed that the doctrine of *prima facie* evidence is applied in several Anglo-American Countries, especially in the United States. In a certain sense, although this doctrine leaves the courts the possibility of accepting evidence to the contrary, it is situated halfway between the strict common law practice, which is more faithful to the rule that the Executive's statement is conclusive, and the continental practice which emphasizes the independence of the court. Instead, we do not share the first criticism, the idea that acceptance of the doctrine of *prima facie* evidence weakens the power of the courts. It would seem, in fact, that precisely because the courts remain free to accept different evidence, their independence is not undermined. This is why, in conclusion, we would be inclined to keep the text of para. 2 as it stands. This solution constitutes a reasonable compromise, or perhaps we could say the right synthesis, of the solutions offered by the case law.

It was also proposed that mention should be made in this article of the possible relations with international jurisdiction in the sense of recommending that the courts respect the ascertainment of international facts made by international tribunals [43]. We are in doubt about this proposal for the same reasons put forth with regard to the proposal for including an *ad hoc* general provision of the relationships between domestic and international courts. We remain doubtful if we realize that, on the subject of the ascertainment of international facts more than on the other subjects considered in the draft resolution, it could be appropriate to further investigate these relationships. An in-depth study should tend toward establishing whether respect is owed only to the decisions

[42] *Cf.* Mr Bernhardt's comments.
[43] *Cf.* Mr Mbaye's comments.

of international tribunals that are binding for the forum State or to any judicial decision of international tribunals. We frankly believe that all this would carry us a bit beyond our main topic.

Lastly, we think that it is appropriate to maintain the reservation in the last paragraph of art. 8 relating to the recognition of States and Governments, instead of moving it to the preamble, as suggested [44]. It is a reservation which specifically concerns the ascertainment of international facts.

We propose therefore to keep art. 8 as it is, except for a non-substantive change in para. 3, which is necessary to harmonize this paragraph with common law methods of proof [45].

[44] By Mr van Hecke.

[45] *Cf.* in this regard Mr Collins's comment.

Revised Draft Resolution

The Institute of International Law,

— whereas international law increasingly affects economic and social relations within the various national communities;

— whereas this necessarily leads national courts to have to decide, either as a principal or an incidental question, issues whose solution depends on the application of international norms;

— whereas in principle it is the concern of the legal system of each State to provide the most appropriate methods for ensuring that international law is applied within the State, and particularly to regulate the relationships between the Judiciary, on the one hand, and the Legislative and Executive branches on the other;

— whereas, however, in order to attain a correct and complete application of international law within each State, it is to be hoped that the role of national courts will be strengthened since they are the organs institutionally responsible for ensuring compliance with the law;

— whereas the strengthening of the role of national courts may more easily be achieved by removing certain limits on their independence that are imposed, with regard to the application of international law, by the laws and the practice of certain States;

— whereas it is appropriate to indicate rules which should be followed in the national legal systems to attain the strengthening of the role of national courts and to guarantee them independence in deciding questions of international law comparable to the independence they enjoy in deciding domestic issues;

— whereas the aforesaid rules postulate that international law is valid within the State;

— whereas this resolution does not intend to take a position on the methods with which such validity has been achieved and does not put into question the principle according to which international law should be given precedence over domestic law;

adopts the following resolution:

Art. 1

1. National courts enjoy full independence in interpreting and applying international law to cases submitted to them where questions of international law arise, either as principal questions or as preliminary or incidental ones, without prejudice to the limitations provided by the present resolution.

2. In order to ensure the correct interpretation and application of international law, national courts may request the non-binding opinion of the Executive, in particular of the organs responsible for the State's foreign policy, on the content and meaning of the rule to be interpreted and applied.

[3. Unless it is expressly provided otherwise, the Executive should be able to express spontaneously its own opinion in cases pending before national courts when the decision of the court involves the interpretation and application of international law.]

Art. 2

1. Without prejudice to articles 4, paragraph 3 and 5, paragraph 3 of the present resolution, national courts called upon to adjudicate a question related to the conduct of the Executive, should not refuse to exercise their competence on the basis of the political nature of the question if the conduct of the Executive is subject to a rule of international law.

2. Paragraph 1 of the present article does not imply that national courts have competence to declare war or other use of force in international relations invalid, even when the war or the use of force is unlawful under international law and provided that it has been deliberated by constitutionally competent organs.

3. Notwithstanding paragraph 2 of the present article, national courts should be able to decide upon compensation for damage caused to private persons by a war or by the use of force in international relations when the war or the use of force is unlawful under international law.

Art. 3

National courts should not invoke reasons of public order of the forum State or the Act of State doctrine or any other reason in order to refuse to review the international lawfulness of a foreign legislative, judicial or administrative act; nor should they apply or implement such acts if such review leads to the conclusion that they constitute internationally wrongful acts.

Art. 4

1. National courts should have the power to independently find whether a norm of customary international law has come into existence or has been modified or terminated.

2. National courts should refuse to apply a customary norm, or should consider a customary norm partially or wholly modified, if such a practice exists, even at a formative stage, to support such finding and if such norm no longer correspond to the requirements of equity and justice.

3. In applying the rules under paragraph 2, the courts should take into due account the participation of the Executive of the forum State in the process of modifying customary law.

Art. 5

1. National courts should have the power to independently find whether a treaty binding on the forum State has come into existence or has been modified or terminated.

2. In a case brought before them, national courts should refuse to apply, in whole or in part, a treaty if they believe that such

treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even when the forum State has not denounced the treaty at the international level.

3. National courts should be bound to refuse to apply a treaty when such treaty has been denounced by the competent organs of the forum State, even if they believe that the cause of invalidity or termination which has been alleged for purposes of the denunciation has not actually been verified.

4. National courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international court and avoiding interpretations influenced by national interests.

Art. 6

1. National courts should determine with complete independence the existence of a general principle of law common to the national legal systems, within the limits in which such principles are applicable pursuant to art. 38, para. 1, of the Statute of the International Court of Justice.

2. National courts should apply one of such principles even when it is not expressly recognized by other organs of the forum State.

Art. 7

National courts should decide with full independence upon the existence, the validity and the binding force of a resolution of an international organ.

Art. 8

1. National courts may defer to the Executive, and in particular to the organs responsible for foreign policy, the ascertainment of facts pertaining to the international relations of the forum State and of other States.

2. The ascertainment of international facts made by the Executive should constitute *prima facie* evidence of the existence of the facts themselves.

3. When the ascertainment of international facts involves the application and interpretation of international norms — as, for example, in the case in which it is necessary to ascertain whether a state of war or of neutrality exists between the forum State or other States, whether a territory or a given marine or air space is under the sovereignty of one or another State, whether a given person has diplomatic or consular status, whether a vessel is a warship or a government vessel — the courts should be able to depart from the application and interpretation of the international norms made by the Executive.

4. The present article does not apply to the effects of the recognition, or the non-recognition, of States and Governments in domestic cases.

Imp. Bosc Frères - Oullins - Dépôt légal n° 9010 - Avril 1993